

APPEALS ,STAY PROCEEDINGS & REVISIONS

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What do you mean by Appeal?

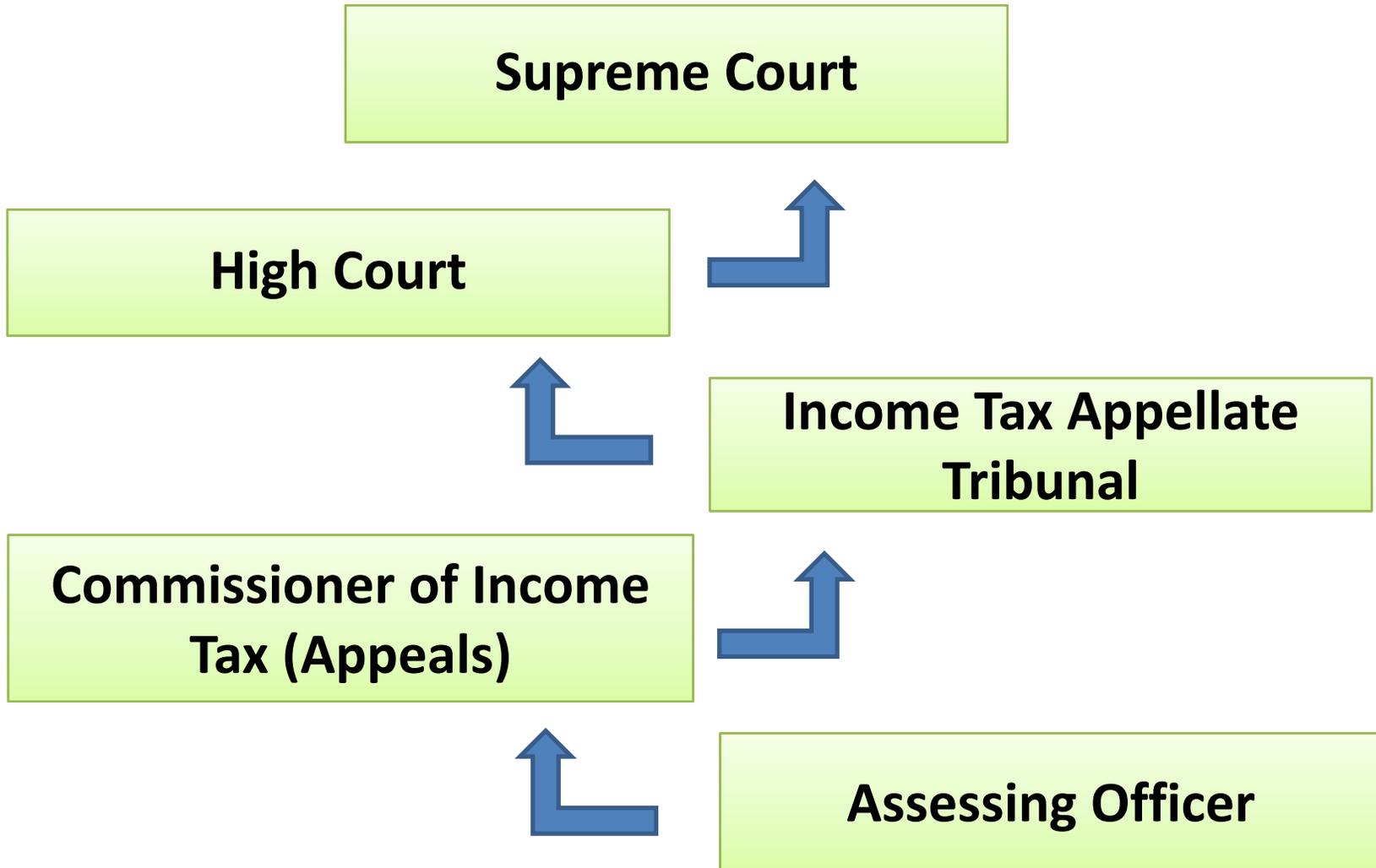
Appeal is a **mechanism** provided by the law **to challenge order of lower authorities** before higher authority.

Though drafting is more akin to art than science, certain basic provisions of law relating to appeals do act as rules that guide drafting of appeals.

Right of Appeal

- The **right of appeal** is **not an inherent** but a Statutory right.
- Once the law provides for an appeal, a person who complies with the prescribed conditions gets the vested right to have the appeal dealt with under law.

Income Tax Appellate hierarchy



Filing of Appeals Before CIT(A) - Sec 246A

Who can file an appeal?

A person who is aggrieved by the Assessment order passed by Assessing Officer can file an appeal.

With whom appeal can be filed?

Aggrieved Assessee can file appeal before the CIT(A), having jurisdiction over the assessee.

What do u mean by aggrieved?

In section 246A right of appeal is carved out only in favour of assessee who is aggrieved by the order of AO.

The word " Aggrieved" is placed in section 246A with a definite purpose to roll out appeals, in cases, where the assessee is not really aggrieved.

Filing of Appeals Before CIT(A) - Sec 246A

- **Basic Criteria required to file an appeal:**

- 1. No inherent right of appeal**

- Appeal is a mechanism provided by the law to challenge order of lower authorities before higher authority. There is no inherent right of appeal. Assessee is entitled to file appeal against those orders where right of appeal is specifically granted under the I.T Act, 1961.
- **Mahant Harihar Gir [1941] 9 ITR 246 (PAT)**

- 2. Provisions relating to right of appeal to be liberally construed**

- Once right of appeal under the statute is granted, it has to be liberally construed and the same can not be restricted
- **Ashoka Engg Co [1992] 192 ITR 645/63 Taxman 510**

Filing of Appeals Before CIT(A) - Sec 246A

WHEN CAN APPEAL BE FILED BEFORE CIT(A)?

Appeal can be filed when a tax payer is adversely affected by Orders passed by various Income tax authorities, which are enlisted below :

1. Order against tax payer where the tax payer denies liability to be assessed under Income Tax Act; (eg: The assessee has a right of appeal against the order of the ITO assessing AOP instead of Members.)
2. Intimation issued under Section 143(1) making adjustments to the returned income;
3. Scrutiny assessment order u/s 143(3) or an ex-parte assessment order u/s 144, to object to income determined or loss assessed or tax determined or to the status under which he is assessed;

Filing of Appeals Before CIT(A) - Sec 246A

4. Re-assessment order passed after reopening the assessment u/s 147 or re computation order U/s 150;
5. Search assessment order u/s 153A or 153C erstwhile 158BC;
6. Rectification Order u/s 154/155;
7. Order of assessment or reassessment u/s 92CD(3) Advance pricing agreement;
8. Order u/s 163 treating the taxpayer as agent of a non-resident;

Filing of Appeals Before CIT(A) - Sec 246A

9. Order passed u/s 170(2)/(3) assessing the successor to the business in respect of income earned by the predecessor;
10. Order u/s 171 recording finding about partition of Hindu Undivided Family (HUF);
11. Order u/s 115VP(3) refusing approval to opt for tonnage-tax scheme by qualifying shipping companies;
12. Order determining refund u/s 237;

Filing of Appeals Before CIT(A) - Sec 246A

13. Order u/s 201(1)/206C(6A) deeming person responsible for deduction of tax at source as assessee in default on failure to deduct/ collect tax at source or to pay the same to the Government;
14. Order imposing penalty u/s 221/271/271A/271AAA/271AAB/271F/271FB/272A/272AA/272BB/275(1A)/158BFA (2)/ 271B/271BB/271C/271CA/ 271D/271E;
15. Appeal by a person responsible to bear tax after paying tax U/s 195, for a declaration that no tax was deductible. (Sec 248)

Procedure for Filing CIT Appeals – Sec 249(1)

Fees to be paid before filing appeal to the Commissioner (Appeals) depends upon total income determined by the Assessing Officer. Fees are to be paid as stated under and proof of payment of fee is to be attached with Form No. 35:

| Total Income determined by AO | Fees Payable (in Rs) |
|---|-----------------------------|
| Less than Rs. 1,00,000 | 250/- |
| More than Rs.1,00,000/- but less than Rs.2,00,000 | 500/- |
| More than Rs. 2,00,000/ | 1,000/- |
| Subject matter of appeal relates to other matter | 250/- |

Procedure for Filing CIT Appeals – Sec 249(1)

Time limit for filing the Appeal:

- 30 days from the date of service of notice of demand; or
- 30 days from date of service of order; or
- 30 days from date of payment of tax in case of Appeal filed u/s 248.

Condonation of delay

The appeal may be admitted on satisfaction that the appellant had **sufficient cause for delay**. [Sec 249 (3)]

What constitutes sufficient cause has been considered in Collector, **Mst. Katiji And Others (1987) 167 ITR 471 (SC)** and it has been held that "The Legislature has conferred the power to condone delay by enacting section 5 of the Limitation Act of 1963 in order to enable the court to do substantial justice to parties by disposing of matter on "merits".

Condonation of delay

In **Vedabai Alias Vaijayanatabai Baburao Patil (2002) 253 ITR 798 (SC)** it was held that:

*“The court has to exercise the discretion on the facts of each case keeping in mind that in construing the expression “sufficient cause”, the principle of advancing substantial **justice is of prime importance.**”*

It is common knowledge that this court has been making a justifiably liberal approach in matter instituted in this court. But the message does not appear to have percolated down to all the other courts in the hierarchy.

Condonation of delay

And such a liberal approach is adopted on principle as it is realized that:

1. Ordinarily, a litigant does not stand to benefit by lodging an appeal late.
2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated.
3. When substantial justice and technical considerations are pitted against each other, the cause of substantial justice deserves to be preferred, for the other side cannot claim to have vested right in injustice being done because of non-deliberate delay.

Condonation of delay

4. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of malafide. A litigant does not stand to benefit by resorting to delay. In fact, he runs a serious risk.
5. It must be grasped that the judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so.

Tax payment for admission of CIT Appeal

PAYMENT OF ACCEPTED TAX LIABILITY MUST BE PAID BEFORE FILING APPEAL –SEC 249(4)

An appeal will be admitted by CIT(A) only if tax as per the returned income, where return of income is filed, or advance tax payable, where no return of income is filed has been paid prior to filing of appeal. In the latter situation i.e. where return of income is not filed, tax payer can apply to the CIT(A) for exemption from such condition for good and sufficient reasons.

Tax payment for admission of CIT Appeal

FILING OF APPEAL WITHOUT PAYMENT OF TAX

Proviso to Section 249(4) it transpires that the CIT(A) has been empowered to grant exemption from the payment of tax equal to the amount of advance tax which was payable by the assessee in a situation where no return is filed by the assessee.

The assessee can first file appeal even without the payment of tax provided he satisfies the CIT(A) for the reasons of non-payment of tax.

Bhumiraj Constructions 11 taxmann 333 (Mum).

Tax payment for admission of CIT Appeal

- There is no Time limit for payment of SAT u/s 249 (4), the appeal can be restored if the taxes have been paid.

K Satish Kumar Singh, 19 taxmann.com 154

- Provisions of Section 249 (4) cannot be read into provisions of Section 253(1)(b), i.e. Appeal to ITAT.

Therefore appeal even if not admissible before CIT(A) for non payment of returned tax , still the same can be admitted before ITAT since there is no restriction u/s 253(1)(B).

Pawan Kumar Laddha , 324 ITR 324 (SC)

Basic Layout For Conducting CIT Appeal

Filing of Appeal along with the prescribed fees
in Form No.35



On receipt of Form 35, CIT(A) fixes the date and place
for hearing the appeal



Additional grounds can be accepted if the omission
was not willful and unreasonable



CIT(A) may carry out further inquiry either himself or
through AO

Form 35

As per Rule 45, an appeal to CIT shall be in Form No. 35 and shall be filed electronically w.e.f 01.03.2016.

In Ashraf Aziz Kasamani v/s Ito 24(1)(2) (2018) 92 taxmann.com 283 it was held that E-Filing of appeals to CIT (A) is not applicable to order passed prior to 1.03.2016.

PROCEDURE FOR FILING FORM 35

- Login to e-Filing Portal.
- Click “e-File” – Select “Income Tax Forms” – Choose “Form 35”.
- Select the **CIT(A)** with whom you wish to appeal to.

Form 35

- Fill the contents of Form 35.
- Once the form is filled, click **'Submit'** and attach the relevant documents.
- Electronically verify the above form.

Form 35

SELECTION OF CIT (A)

- The portal will prompt for the CIT(A) over the Appellant's jurisdiction.

- However, the Appellant has a choice to appeal to any other CIT(A). In such a case, the following have to be selected from the dropdown :
 - State of the relevant CIT (A)
 - City of the relevant CIT(A)
 - Jurisdiction of the relevant CIT(A)

Form 35

CONTENTS OF FORM 35

- Basic Contact details
- Details of the order appealed against
- Details of Appeal pending with the CIT (A) selected
- Details of total addition/disallowances made in the order and out of the same, the amount in appeal
- Details of Income tax return filed along with the amount of tax paid.

Form 35

CONTENTS OF FORM 35

➤ Statement of Facts

(up to 1000 words - fill in the form itself, exceeding 1000 words – attach separate document)

➤ Grounds of appeal – Section wise.

(each ground should not exceed 100 words)

➤ List of documentary evidences relied upon

➤ Additional Evidence, if any

➤ Delay if any , to be reported , in which case of grounds of delay and affidavit should be filed.

➤ Details of appeal filing fees

➤ Digital verification – **The Digital verification is only required if the ITR was filed digitally by the assessee. Other options to file the Form 35 are through EVC and Aadhar OTP.**

Form 35

DOCUMENTS TO BE ATTACHED

- Assessment Order
- Notice of Demand
- Statement of Facts
- Grounds of Appeal
- Payment challan of Appeal filing fees
- Affidavit in case of delay.
- be sent on the mobile no. registered with the Bank account, whose details are given.

Form 35

DIGITAL VERIFICATION

The form shall be verified by the person in accordance with the provision of Rule 45 (2) .i.e. by the person who is authorized to sign the ROI u/s 140 of the I.T. Act :

- Individual – Himself, Authorized Representative.
- HUF – Karta or any adult member.
- Firm – Managing partner/any other partner
- Company – Managing director
- LLP – Designated partner
- Local authority – Principal officer
- Political party – Executive officer of such party
- AOP/BOI – Any member

Form 35

DIGITAL VERIFICATION

Form 35 can be digitally verified in either of the following ways :

- DSC registered on the portal – Through DSC (Digital Signature Certificate).

- DSC not registered on the portal –
 - i. Through Aadhaar OTP i.e. Verification code will be sent on the mobile no. registered with UIDAI.

 - ii. Though EVC (Electronic verification code) i.e. Verification code will be sent on the mobile no. registered with the Bank account, whose details are given.

Additional Evidence - Rule 46A – IT Rules

CIT (A) would admit additional evidence filed only in following situations:

1. Where the AO has refused to admit evidence which ought to have been admitted; or
2. Where the appellant was prevented by sufficient cause from producing the evidence which he was called upon to be produced by the AO ; or
3. Where the appellant was prevented by sufficient cause from producing before the AO any evidence which is relevant to any ground of appeal; or
4. Where the AO has made the order appealed against without giving sufficient opportunity to adduce evidence relevant to any ground of appeal.

Procedure in appeal - Sec. 250

- Notice to AO and assessee fixing a day and place for hearing
- Following shall have right to be heard:
 - The appellant in person or through his AR
 - The AO or his AR
- CIT(A) has power to adjourn the hearing.
- No power to set aside after June 01,2001. At the most is case of admission of additional evidence , remand report may be called for.

Additional Grounds Of Appeal

Section 250(5) specifically provides that the Commissioner of Income Tax (Appeals) may allow appellant to go into any ground of appeal not raised in the appeal memo if omission of that ground in appeal memo was “not willful or unreasonable”.

Provisions relating to limitation apply only to filing of appeal in the first instance and once appeal has been filed within time, **additional ground can be raised at any time before appeal is finally heard and disposed off.**

Powers of CIT(A) - Sec 251

1. After the hearing is concluded, CIT(A) passes order in writing.
2. Disposing of the appeal and stating the decision on each ground of appeal with reasons.
3. In case of assessment and penalty, CIT(A) may
 - **confirm,**
 - **reduce or**
 - **enhance it.**
4. CIT(A) may consider and decide “any matter arising out of the proceedings”, notwithstanding that such matter was not raised before CIT(A)

Powers of CIT(A) - Sec 251

5. The scope of power of CIT(A) is **conterminous** with that of AO .i.e. he can do what AO can do and can also direct him to do what he failed to do

Kanpur Coal Syndicate 53 ITR 225(SC)

6. Before enhancing any assessment or penalty, CIT(A) **has to provide reasonable opportunity** to the tax payer.

7. In any other , he may pass such orders in the appeal as he thinks fit.

8. CIT(A) can make addition in respect of new source of income if it is not considered by the AO

Nirbheram Daluram 224 ITR 610 (SC)

No withdrawal of Appeal- Sec 251

Assessee, after filing appeal, could not at his option or at his discretion withdraw it;

However if it is done, in view of pendency of application before Settlement Commission, on rejection of settlement application, appeal proceeding would continue.

- **Rai Bahadur Hardutroy Motilal Chamaria, 66 ITR 443 (SC)**
- **M Loganathan ,25 Taxmann 174 (Mad)**
- **Bhupendra Mirji Shah, 2018, 98 Taxmann.com Bom HC.**

Powers of Stay

- As per Sec. 220, the Assessee has to make the payment raised through Notice of Demand u/s 156, within 30 days.
- Earlier 15% of the demand raised was required to be paid by the Assessee, in case of filing of CIT Appeal. However vide Office Memorandum [F. No. 404/72/93-ITCC] dated 31.07.2017, the limit has been revised to **20% of the disputed demand.**
- In practice, it is advisable to make application to the Assessing Officer & CIT(A) simultaneously to stay the recovery proceedings. Option to reject or stay the proceedings depending upon circumstances.

Powers of Stay

- Commissioner had no jurisdiction to pass an order on application seeking stay of order impugned in appeal pending before Commissioner (Appeals).
 - **Devaraj Pande, 39 taxmann.com 1 , (kar)**
 - **Uttar Gujarat Vij Co Ltd, 34 taxmann 242 (Guj)**
 - **Jalaram Enterprises Co.(P.) Ltd. 44 taxmann 486**

- Order passed by CIT (A), in stay of demand is not appealable before ITAT.
 - **Rajya Krishi Utpadan, 57 taxmann 3 (Lucknow ITAT)**

Instruction No 20/2003, Dt. 23-12-2003

Order to be passed within 15 Days from the date of last hearing.

The Board desires that appellate orders by Commissioner of Income Tax (Appeals) should be issued within 15 days of the last hearing. Any lapse on this account shall be viewed adversely.

Independence of CIT Appeals

- Independence of appellate authorities is the foundation for free and fair judicial process. An unbiased mind is a prerequisite for impartial adjudication by any judicial / quasi judicial authority.
- The adjudication of appeals under Income Tax Act, 1961 ('Act') are no different.
- The appellate authorities under the Act comprise of Commissioner Appeals at the first step of the appellate ladder, followed by Income Tax Appellate Tribunal, the High Court and finally the Supreme Court.

Independence of CIT Appeals

- **Attempts by CBDT to stifle CIT(A) from acting impartially**
- In last 6 months, the CBDT in the veil of administering the appellate process and managing litigation under the Act, has issued the following two instruction / policy which wholly compromise the impartiality of CIT(A) while adjudicating an appeal before him / her namely :
 - a) **Litigation Management under Central Action Plan 2018-19.**
 - b) **Instruction by CBDT dated 8th March 2018**

Independence of CIT Appeals

- “Litigation Management” under [Central Action Plan 2018-19](#)
- The Central Action Plan 2018-19 issued by CBDT and accessible on the website of ‘Income Tax Gazetted Officers’ Association (ITGOA) Delhi” and has a special chapter titled Litigation Management.
- While on one hand this Chapter discusses speedy disposal of appeals pending before CIT(A)s, on the other hand this Chapter incentivizes passing of ***‘quality orders’ by CIT(A)s.***
- However, what is shocking and defies conscience is the definition granted by CBDT to a *‘quality orders’*, which non-only prejudices the appellate process, but also penalizes an unbiased officer in adjudication of a case on its merit

Independence of CIT Appeals

- With a view to encourage quality work by CITs(A), **additional credit of 2 units shall be allowed for each quality appellate order passed.** The CIT (A) may claim such credit by reporting such orders in their monthly DO letter to the CCIT concerned.
- **Quality cases would include cases where enhancement has been made, order has been strengthened,** in the opinion of the CCIT, or **penalty u/s 271(1)I has been levied by the CIT(A).**

Independence of CIT Appeals

- **Instruction No. F. No. DGIT(Vig.)/HQ/SI /Appeals/2017-18/9959, dated March 8, 2018.**
- In the Instruction No. F. No. DGIT(Vig.) /HQ/SI/Appeals/2017-18/9959, dated March 8, 2018, the CBDT, in the garb of issuing administrative instructions for proper dispatch of appeal orders, criticized and castigated the CIT(A)s for giving relief to assessees on legal grounds.
- One wonders if the CBDT does not want CIT(A)s to grant relief on 'legal grounds', whether they wish that relief to be granted on 'illegal grounds'?
- By dictating the CIT(A)s to carry out appellate proceedings with a preconceived notion and in a prejudiced process, CBDT has crossed the 'lakshmanrekha' by compromising on a fair and unbiased trial promised by our Constitution.

Independence of CIT Appeals

- Orders of CIT(A)s are heavily relied upon by Income Tax Appellate Tribunal ('ITAT'), which is the final fact finding authority under the Income-tax Act, 1961. The Hon'ble Supreme Court and the Hon'ble High Courts give due respect to the opinion of the CIT(A)s while adjudicating appeals before them. **Where the fairness of first appellate authority is compromised, the entire chain of justice administration would be gravely hurt.**
- Orders of the CIT(A)s are not final. Remedy of filing appeal before ITAT lies with both the tax payers and the Income Tax Department. Where the Income Tax Department is aggrieved by an order of CIT(A), they should consider approaching the ITAT rather than issuing instructions and policies which prejudice the independence of the office of CIT(A).

Independence of CIT Appeals

- In a democratic set-up like India where there is a balanced distribution of powers between executive, legislature and judiciary, policies that vitiate the independence of quasi-judicial authorities have been frowned upon by the Constitutional courts.
- The Income Tax Department must suo motu take appropriate action and forthwith withdraw the aforementioned instructions / policies.

Filing Appeal Before ITAT – Sec 252

Appeal against an order of Commissioner (Appeals) lies with the Income Tax Appellate Tribunal (ITAT).

Who can file an Appeal?

Both tax payer and the Assessing Officer can file appeal before the Appellate Tribunal.

Filing of Appeals Before ITAT – Sec 253

WHEN CAN APPEAL BE FILED BEFORE ITAT?

1. Order by Commissioner(Appeals) u/s 250/154/271/271A/272A;
2. Order by Assessing Officer u/s 158BC(c) in respect of search action initiated during 30.6.1995 to 1.1.1997;
3. Order by Assessing Officer u/ s 115 VZC excluding the tax payer from tonnage tax scheme;
4. Order by Commissioner u/s 12AA on registration application by a charitable or religious trust;
5. Order by the Commissioner u/s 80G(5)

Filing of Appeals before ITAT – Sec 253

6. Regarding approval of a charitable trust for donations made after 31.3.92;
7. Order by Commissioner u/s 154 to rectify an order u/s 263;
8. Penalty order passed by Commissioners u/s 271 or section 272A;
9. Penalty order passed by Chief Commissioner/ Director General/Director u/s 272A;
10. Order passed by Assessing Officer u/s 143(3)/147 in pursuance of direction of Dispute;

Procedure For Filing Appeals before ITAT

TIME LIMIT FOR FILING APPEAL BEFORE ITAT:

Appeal is to be filed before the Appellate Tribunal **within 60 days** of the date on which order appealed against is communicated to the taxpayer or the Commissioner, as the case may be.

Procedure For Filing Appeals before ITAT

Fees to be paid before filing appeal to ITAT depends upon total income determined by the Assessing Officer. Fees as under are to be paid and proof of payment of fee is to be attached with Form No 36

| Total Income determined by AO | Fees Payable |
|--|---|
| Less than Rs. 1,00,000 | 500/- |
| More than Rs.1,00,000/- but less than Rs.2,00,000 | 1,500/- |
| More than Rs. 2,00,000/ | 1% of assessed income, subject to maximum Rs 10,000/- |
| Subject matter of Appeal relates to any other matter | 500/- |

CBDT INSTRUCTION NO. 3/2018 Dt. 11.07.18

Department Appeals shall not be filed in cases where the **tax effect** does not exceed the monetary limits given as under:

| Appeals in Income-tax matters | Monetary Limit (in Rs.) |
|--------------------------------------|--------------------------------|
| Before Appellate Tribunal | 20,00,000/- |
| U/s 260A before High Court | 50,00,000/- |
| Before Supreme Court | 1,00,00,000/- |

The same shall also apply to pending Appeals. However, filing of appeal has to be decided strictly on merits.

Procedure For Filing Appeals Before ITAT

MEMORANDUM OF CROSS OBJECTIONS:

- The tax payer or the AO on receipt of notice that an appeal has been filed before the Appellate Tribunal against order of CIT(A) by the other party can, **within 30 days** of receipt of notice u/s 253(4), file a memorandum of cross objections in Form No. 36A as in Annexure-3.
- No Fees for the same is payable.
- The memorandum of cross objections is to be filed in Form 36A and to be signed and verified by the person who was competent to sign Form 36.

Procedure For Filing Appeals Before ITAT

CONDONATION OF DELAY IN FILING APPEAL/ MEMORANDUM OF OBJECTIONS:

The Appellate Tribunal may admit an appeal or permit filing of memorandum of cross objections after the period of 30 days, if it is satisfied that there was sufficient cause for not presenting it within the prescribed time.

WITH WHOM THE APPEAL IS TO BE FILED:

Appeal is to be filed with the Assistant Registrar or the Superintendent/ Assistant Superintendent/Clerk in the ITAT.

Procedure For Filing Appeals Before ITAT

Filing of Appeal along with the prescribed fees
in Form No.36



Filing of paper Book
(numbered on each page along with Index)



On receipt of Form 36, CIT(A) fixes the date and place
for hearing the appeal



Additional grounds can be accepted if the omission
was not willful and unreasonable

Revised Form 36 and Form 36A

- The CBDT has now vide Notification No. 72 dated 23.10.2018 issued the Income-tax (10th Amendment) Rules, 2018, prescribing new format of Form 36 and 36A, to take effect from the date of publication of said notification in the Official Gazette.

Salient Amendments of the New Forms

- Detailed information about the Appellant's and Respondent's personal information including **mobile no. and email-id are to be furnished**
- Details of total amount of **addition or disallowance made, penalty** and other amount in the order, and amount / penalty disputed in appeal is to be given in Form 36 and Form 36A

Salient Amendments vide Notification dated 23.10.2018

- Major change in Form 36 and Form 36A is to give 'Tax effect relating to each ground of appeal'. The information should help all stake holders to focus on the ground of appeal where the tax effect is maximum, and pay attention to the ground of appeals based on the tax effect.
- To have uniformity in computing 'Tax effect' for each ground, detailed guidelines is given for different scenario, which are summarized below:

Salient Amendments vide Notification dated 23.10.2018

1. In case of loss, notional tax, as stated above, on change of loss amount.
2. Tax effect will be tax including surcharge and Cess but excluding interest and penalty on disputed amount.
3. If dispute relates to interest and/or penalty amount, difference in interest and/or penalty amount.
4. In case of tax on book profit under section 115B or section 115JC of the Act, tax effect will be sum of tax effect under normal provisions and tax effect under section 115JB or section 115JC of the Act, as computed under sub-clause (a) above.

It now also needs to be separately mentioned as to whether there is any delay in filing of the forms

New ground can be raised before ITAT

- Assessee can raise a new ground before the ITAT even if the same is not raised before CIT(A).
 - **National Thermal Power Co. Ltd. , 157 CTR 249(SC)**

- An assessee is entitled to raise before appellate authorities additional grounds in terms of additional claims not made in return filed by it.
 - **Pruthvi Brokers & Shareholders 23 taxmann 23 (Bom.)**
 - **Indian Bank 55 taxmann 372 (Mad)**

THE APPELLATE TRIBUNAL RULES, 1963

➤ **Language of tribunal - Rule 5**

Language of tribunal shall be in English

➤ **Filing of documents in Hindi – Rule 5A**

Notwithstanding anything contained in these rules, the parties may file documents drawn in Hindi in Gujarat, Maharashtra, Uttar Pradesh, Punjab, Chandigarh, Delhi, MP, Rajasthan , Bihar.

➤ **Use of Hindi in proceedings and orders – Rule 5B**

In the above states ITAT in its discretion may permit the use of Hindi in its proceedings or may pass orders in Hindi and it shall be accompanied by the authorized English translation.

THE APPELLATE TRIBUNAL RULES, 1963

➤ **Procedure for filing appeals - Rule 6**

A memorandum of appeal to the Tribunal shall be presented by the appellant in person or by an agent to the Registrar to an officer authorized in this behalf by the Registrar.

➤ **Filing of affidavits - Rule 10**

Where a fact which cannot be borne out by, or is contrary to, the record is alleged, it shall be stated clearly and concisely and supported by a duly sworn affidavit.

THE APPELLATE TRIBUNAL RULES, 1963

Authorizing a representative to appear - Rule 16

In any appeal by any assessee, where the memorandum of appeal is signed by his authorized representative, the assessee shall append to the memorandum a document authorizing the representative to appear for him.

The document shall state what his relationship is with the assessee, or if he is a person regularly employed by the assessee, the document shall state the capacity in which he is at the time employed.

THE APPELLATE TRIBUNAL RULES, 1963

Authorization to be filed – Rule 17

An authorized representative appearing for the assessee at the hearing of an appeal shall, unless the document referred to in rule 16 has been appended, file such a document before the commencement of the hearing.

THE APPELLATE TRIBUNAL RULES, 1963

Dress regulations - Rule 17A

For Members

In summer - White shirt, white pant with black coat, a black tie or a buttoned up black coat (In case of Female members – white saree).

In winter - Striped or black trousers may be worn in place of white trousers.

For authorized representative.

Males - A suit with a tie or a buttoned up coat over a pant.

Females - Black coat over white or any other sober coloured saree.

THE APPELLATE TRIBUNAL RULES, 1963

➤ Preparation of paper books, etc.- Rule 18

If the appellant or the respondent, proposes to refer or rely upon any document, he may submit the same in the following manner:

- **paper book in duplicate containing such papers,**
- **duly indexed and paged,**
- **duly attested as to whether this evidences were before both the lower authorities,**

at least a day before the date of hearing of the appeal along with proof of service of a copy of the same on the other side at least a week before. However, the Bench may in an appropriate case condone the delay and admit the paper book.

THE APPELLATE TRIBUNAL RULES, 1963

- The tribunal may suo moto direct the preparation of paper book in triplicate by and at the cost of the appellant or respondent.
- The papers and documents must always be legibly written or printed.
- The additional evidence, if any, shall not form part of the same paper book. May be filed as separate paper book with affidavit for the same
- The parties shall not be entitled to submit any supplementary paper book, except with the leave of the Bench.

THE APPELLATE TRIBUNAL RULES, 1963

- Documents that are referred to and relied upon by the parties during the course of arguments shall alone be treated as part of the record of the Tribunal.
- Paper/paper books not conforming to the above rules are liable to be ignored.

XYZ

PAPER BOOK: 2010-11

Before the Honorable Appellate Tribunal “ A ” Bench

| | | |
|----------|--|--------------|
| 1 | Income Tax Return and Computation of Total Income | 1-4 |
| 2 | Assessment Order dated 28.03.2013 | 5-7 |
| 3 | Notice u/s 148 dated 30.03.2017 | 8 |
| 4 | Letter dated 5.09.2017 | 9 |
| 5 | Development rights agreement dated 6.12.2007 | 10-33 |
| 6 | Show cause notice dated 17.11.2017 | 34 |
| 7 | Letter dated 30.11.2017 in response to the show cause notice dated 17.11.2017 | 35-36 |

We hereby state that all the above documents were presented before both the lower authorities either in first round or second round.

CHARTERED ACCOUNTANTS

THE APPELLATE TRIBUNAL RULES, 1963

Production of additional evidence before ITAT - Rule 29

The parties to the appeal shall not be entitled to produce additional evidence either oral or documentary before the Tribunal .

However the additional evidence can be accepted if :

- Tribunal requires any document or any witness to be produced.
- Where the tax authorities have decided the case without giving sufficient opportunity to the assessee.

THE APPELLATE TRIBUNAL RULES, 1963

Proceedings before the Tribunal- Rule 33

The proceedings before the Tribunal **shall be open to the public.**

However, the Tribunal may, in its discretion, direct that proceeding before it in a particular case will not be open to the public.

THE APPELLATE TRIBUNAL RULES, 1963

Order to be pronounced signed and dated – **Rule 34**

The order of the bench must be,

- In writing
- Signed and,
- Dated by the members consisting it.

Where a case is referred under sub-section (4) of section 255, the order of the member or members to whom it is referred shall be signed and dated by him or them, as the case may be.

THE APPELLATE TRIBUNAL RULES, 1963

- The pronouncement of the order may be in any of the following manners:-
 - The bench may pronounce the order immediately upon the conclusion of the hearing.
 - In case where order is not pronounced immediately the Bench shall give a date for pronouncement.
 - In case where no date of pronouncement is given by the Bench. The Bench must pronounce the order **within 60 days** from the date of which the hearing of the case was concluded. However **a further period of 30 days** can be taken in case of exceptional and extraordinary circumstances.

Tribunal - Power of stay

- Assessee can approach to stay the recovery only when a valid appeal is pending before the Tribunal.
- Power of the Tribunal to grant stay of recovery is towards tax, interest and even penalty. It can grant stay only to extent of 180 days which can be further extended, in any case not exceeding 365 days Sec 254(2A). It has no power to grant stay for more than 365 days.
Ecom Gill Coffee Trading (P.) Ltd, 209 taxman 190 (Kar)
- If an order of stay is passed, the AO cannot pass an order of adjustment under sec 245 to recover tax .
Maruti Suzuki India Ltd , 347 ITR 43 (Delhi)

Tribunal - Power of stay

In case of Pepsi foods Pvt Ltd , Delhi HC

S. 254(2A): The Third Proviso which restricts the power of the ITAT to grant stay beyond 365 days “even if the delay in disposing of the appeal is not attributable to the assessee” is arbitrary, unreasonable and discriminatory. It is struck down as violative of Article 14. The ITAT has the power to extend stay even beyond 365 days.

Tata Communication, Bom High court confirmed order of special bench on above stand in case delay is not attributable to assessee.

- **Idea Cellular Ltd. (2012) 75 DTR 105 (MP) (High Court)**
- **Sushil Bhatia HUF ,(2018) 94 taxmann.com 30 Bombay HC.**
- **Vodafone india Limited ,(2018) 89 taxmann.com 54 Bombay HC**

Orders of the Appellate Tribunal -Sec 254

The Appellate Tribunal may after,

- Giving opportunity to both the parties,
- Pass such order thereon as it thinks fit,
- Final or ultimate fact finding authority should consider all facts and records. Decide the matter on cogent reason.

DK enterprises,99 taxmann.com 151 Bombay HC

Procedure of the Tribunal –Sec 255

- Appeals are heard by a Bench comprising one judicial member and one accountant member.
- Appeals where total income computed by the Assessing Officer does not exceed Rs. 50 lakh may be disposed of by single member Bench.
- The President of ITAT is empowered to constitute Special Bench consisting of three or more than three members for disposal of any particular case, one of whom would necessarily be a judicial member and one an accountant member.

Miscellaneous Applications- Sec 254 (2)

The ITAT, at any time **within six months from end of month in which order is passed by it**, can rectify any **mistake apparent from record**, if the same is brought to its notice by the tax payer or the Assessing Officer. A fee of Rs 50/- is to be paid for filing miscellaneous application.

Petitioner seeking Stay

On application by the tax payer, ITAT can pass an order of stay in any proceedings relating to an appeal filed before the ITAT. ITAT is expected to dispose of the appeal within the period of stay i.e 180 days. However ITAT may grant further stay; however, the total stay period cannot exceed 365 days.

MISCELLANEOUS

- In case of conflict of opinion between members – case may be referred to third member by the president.
- Power of third member – limited to resolve the issue referred to him.
- Sanctity of 3rd member and Sp. Bench is the same.
- Contradiction between Sp. Bench and Third Member, Sp. Bench would prevail.
- Tribunal bound to follow order of High Court even if it is not jurisdictional – unless contrary decision of other High Court.
- Judgments to be pronounced publicly .

Appeal Before High Court

- Appeal against Appellate Tribunal's order lies with the High Court,
- The case must involve a substantial question of law,
- Appeal to the High Court against Appellate Tribunal's order can be filed by the tax payer or the Chief Commissioner/Commissioner,
- To be filed within 120 days,
- To be filed in the form of memorandum of appeal.

Appeal Before Supreme Court

- Appeal against High Court's order in respect of Appellate Tribunal's order lies with the Supreme Court in those cases, which are certified to be fit for appeal to the Supreme court.
- Special leave can also be granted by the Supreme Court under Art. 136 of the constitution of India against the order of the High court.

Doctrine of Judicial precedence

- Judicial precedent or decisions is a process which is followed by the judges to take the decision. In Judicial precedent, the decision is taken by following the similar cases happened in the past. So judicial decision is based on the principle of stare decisis i.e. “stand by the decision already made”.

Doctrine of Judicial precedence

Supreme court

(All courts are legally bound to the supreme court judicial decisions. It is the Apex Authority.)



High Court

(Decisions are binding on all subordinate courts. In case of conflict between 2 benches, the decision taken by the Jurisdictional bench is binding, in case of no jurisdictional bench the one which is in favour of assessee to be followed)



(ITAT)

(In case of conflict between 2 ITAT benches, the matter is referred to a Special Bench or whichever decision is favorable to assessee has to be followed)

**REVISION U/S 263 OF
INCOME TAX ACT, 1961**

PRE-CONDITIONS FOR INVOKING SECTION 263

- Order is erroneous
- Prejudicial to the interest of the revenue

*Malabar Industrial Co. Limited , 243 ITR 83 (SC),
Vikash Polymers ,194 Taxman 57 (Delhi) (HC)*

*S. Murugan [2012]135 ITD 527 (Chennai) (Trib.),
J. K. Construction Co. 162 Taxman 46 (Jodhpur) (Trib)*

PRE-CONDITIONS FOR INVOKING SECTION 263

Meaning of the term “erroneous”

- Non application of mind to relevant material or an incorrect assumption of facts or an incorrect application of law will satisfy the requirement of order being erroneous.

Jawahar Bhattacharjee [2012] 341 ITR 434 (Guwahati) (HC) (FB)

PRE-CONDITIONS FOR INVOKING SECTION 263

- **If income is assessed in wrong hands order is erroneous**
- Whether even where an income has not been earned and is not assessable, merely because assessee wants it be assessed in his or her hand in order to assist some one else who would have been assessed to a larger amount, an assessment so made can certainly be erroneous and prejudicial to interest of revenue. The Commissioner has ample jurisdiction u/s 263 to cancel the assessment.

Smt. Tara Devi Aggarwal [1973] 88 ITR 323 (SC)

PRE-CONDITIONS FOR INVOKING SECTION 263

- **Order assessing income which is not earned is an erroneous order**
- The pre-requisite to exercise of jurisdiction by the Commissioner u/s 263 is that the order of the ITO 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 of the ITO is erroneous but is not prejudicial to the revenue or if it is not erroneous but is prejudicial to the revenue - recourse cannot be had to section 263(1).

PRE-CONDITIONS FOR INVOKING SECTION 263

- 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.
- ***Malabar Industrial Co. Ltd. [2000] 243 ITR 83 (SC)***

PRE-CONDITIONS FOR INVOKING SECTION 263

Meaning of the term “prejudicial to the interest of the revenue”

- The term “prejudice” contemplated is prejudice to the income-tax administration as a whole.
- ***Pratap Footwear [2003] SOT 638 (Jabalpur) (Trib.)***.
- In the case of ***Bhagwan Das [2005] 272 ITR 367 (All.)(HC)***, the High Court held that non-application of mind by the Assessing Officer was prejudicial to the interest of the revenue.

PRE-CONDITIONS FOR INVOKING SECTION 263

- Every loss of revenue as a consequence of the order of the Assessing Officer cannot be treated as prejudicial to the interest of revenue.
- ***Hero Briggs & Stratton Auto Ltd. [2007] 161 Taxman 127 (Delhi) (Trib.)***

PRE-CONDITIONS FOR INVOKING SECTION 263

- **‘Prejudice’ must be prejudice to the administration**
- The word prejudice must be judicially examined. What constitutes prejudice to the revenue has been the subject matter of a judicial debate. One view was that ‘prejudice to the interest of the revenue’ does not necessarily mean loss of revenue. The expression is not to be construed in a pettifogging manner, must be given a dignified construction. The interests of the Revenue are not to be equated to rupees and paise merely. There must be grievous error in the order passed by reckoning, the commissioner might think to be prejudicial to the revenue administration. The prejudice must be prejudice to the revenue administration

Bismillah trading Co [2001] 248 ITR 292 (Ker.)

PRE-CONDITIONS FOR INVOKING SECTION 263

Tax effect

- In absence of any finding that there is loss of revenue, interference is not justified.

G. R. Thangamaligai [2003] 259 ITR 129 (Mad.) (HC)

- Where the tax effect of an order is NIL, such order is not open to revision even if erroneous being prejudicial to the interest of the revenue.
- *Punjab Wool Syndicate [2012] 17 ITR 439 (Chandigarh) (Trib.)*

SCOPE OF REVISION UNDER SECTION 263

- The Assessing Officer held entitled to consider only those grounds which were considered by the Commissioner

D. N. Dosani [2006] 280 ITR 275 (Guj.)(HC)

- The error envisaged by Section 263 should actually be an error either of fact or of law.

Technip Italy Spa [2006] 150 Taxman 13 (Delhi) (Trib.)

Pratap Footwear [2003] SOT 638 (Jabalpur) (Trib.)

SCOPE OF REVISION UNDER SECTION 263

- Section 263 does not require any specific show cause notice detailing specific grounds on which revision of assessment order is tentatively being proposed affecting initiation of exercise in absence thereof or to require commissioner to confine himself to terms of notice and foreclosing consideration of any other issue or question of fact.
- Commissioner is free to exercise his jurisdiction on consideration of all relevant facts, provided an opportunity of hearing is afforded to assessee to contest facts on basis of which he had exercised revisional jurisdiction.
- ***Amitabh Bachchan [2016] 69 taxmann.com 170 (SC)***

SCOPE OF REVISION UNDER SECTION 263

Orders that can be revised

- It is not limited to exercising revisional powers qua order of assessment only; it would take within its sweep even orders wherein either the proceedings are dropped or proceedings are filed.

New Jagat Textile Mills (P.) Ltd. [2006] 282 ITR 399 (Guj)(HC)

SCOPE OF REVISION UNDER SECTION 263

- Any issue, which Assessing Officer has not considered in the assessment u/s 143(3) r.w.s. 147, can be brought to life by Commissioner in exercise of his powers u/s 263.

Spencer & Co. Ltd. [2012] 137 ITD 141 (Chennai) (Trib) (TM)

SCOPE OF REVISION UNDER SECTION 263

- Any communication by the Assessing Officer under Section 195(2) that disposes of application made under section 195(1) and determines liability towards tax to be deducted at source in accordance with provisions of section 195(2), is an order for purposes of section 263.
- *Board of Control for Cricket in India [2005] 96 ITD 263 (Mum.)(Trib.)*

SCOPE OF REVISION UNDER SECTION 263

- Invoking of power of revision u/s 263 by the Commissioner is within the permissible limits of the law if the order passed by the authority, to give effect to the orders of the Tribunal is covered under the phrase “any order”.

***Pentamedia Graphics Ltd. [2012] 17 ITR 302 (Chennai)
(Trib.)***

SCOPE OF REVISION UNDER SECTION 263

Can intimation under Section 143(1) be revised

- The Commissioner can exercise jurisdiction under section 263 in respect of assessment under section 143(1) as applicable after 1-4-1989.

Anderson Marine & Sons (P.)Ltd [2004] 266 ITR 694 (Bom)(HC)

SCOPE OF REVISION UNDER SECTION 263

Substitution of judgement of the Commissioner

- If the decision is held to be erroneous.

Antala Sanjaykumar Ravjibhai [2012] 135 ITD 506 (Rajkot) (Trib.)

Manish Kumar [2012] 134 ITD 27 (Indore) (Trib.)

- Order passed cannot be branded as erroneous, merely because Commissioner is of other view or in his opinion order passed is weak and not a detailed order.

Allied Engineers [2009] 180 Taxman 70 (Mag.) (Delhi) (Trib.)

SCOPE OF REVISION UNDER SECTION 263

Can the assessee make a new claim

- Assessee is not eligible to claim any new benefit

ITW India (P) Ltd. [2010] 40 SOT 348 (Hyd.) (Trib.)

- Where assessee did not prefer any appeal against a revision order of the Commissioner, no ground relating to revision order could be taken in appeal against fresh assessment order passed giving effect to revision order.

Crew B.O.S. Products Ltd v. [2012] 135 ITD 542 (Delhi) (Trib.)

PRINCIPLES OF NATURAL JUSTICE

- The notice must mention how the impugned order is prejudicial to the interests of the Revenue.

Brahma Builders [2012] 77 DTR 249 (Pune) (Trib.)

- The show-cause issued must indicate the material and the reasons; and the order under Section 263 should not be contrary to the existing material and reasons for revision.

Shyam Biri Works (P) Ltd. [2003] 84 ITD 124 (All.)(Trib.)

PRINCIPLES OF NATURAL JUSTICE

- Before exercising revisional powers, the assessee must be called, his explanation sought for and examined by Commissioner, and thereafter, if Commissioner is of the view that order is erroneous and prejudicial to interest of revenue, Commissioner may pass revisional orders.

Vikash Polymers [2010] 194 Taxman 57 (Delhi) (HC)

- The Commissioner must pass a speaking order.

Jewel of India [2003] 87 ITD 527 (Mum.)(Trib.)

PRINCIPLES OF NATURAL JUSTICE

- Granting an opportunity to comply with a query raised in a proceeding under Section 263 within less than a day, could not be held to be a reasonable opportunity of hearing.

***Peerless General Finance & Investment Co. Ltd. [2005] 5 SOT 17
(Kol.)(Trib.)***

PRINCIPLES OF NATURAL JUSTICE

- Revision order passed on a ground in addition to the grounds mentioned in his show cause notice issued cannot be sustained.

Ashish Rajpal [2009] 320 ITR 674 (Delhi) (HC),

Contimeters Electricals (P) Ltd. [2009] 317 ITR 249 (Delhi) (HC)

D. N. Dosani [2006] 280 ITR 275 (Guj.) (HC)

PRINCIPLES OF NATURAL JUSTICE

- As the Commissioner did not consider the merits of the objections raised by the assessee to the show cause notice, the matter was remanded to CIT for adjudication and to record his findings on the objections of the assessee.
- *Religare Finvest Ltd. [2013] 152 TTJ 647 (Delhi) (Trib.)*

PRINCIPLES OF NATURAL JUSTICE

- When the Assessing Officer has specifically mentioned in the order that books of accounts along with purchase / sales, invoices, ledgers, bank accounts were examined, verified and test checked, setting aside by Commissioner, in absence of any finding that Assessing Officer's order is factually incorrect, and not justified.
- ***Vijay Kumar Megotia [2010] 3 ITR (T) 760 (Pat.)(Trib.)***

PRINCIPLES OF NATURAL JUSTICE

Issue of Notice is not mandatory

- Section 263 does not require for a notice to be served as in the case of section 147. Section 263 merely requires that an opportunity of being heard should be given to the assessee and the stringent requirement of the service of notice u/s 147 cannot be therefore be applied to a proceeding u/s 263.

Gita Devi Aggarwal [1970] 76 ITR 496 (SC)

Hukamchand Mohanlal [1971] 82 ITR 624 (SC)

CHANGE OF OPINION

Two views are possible- Revision is not valid

- When the Assessing Officer takes one of the two views permissible in law and which the Commissioner does not agree with and which results in a loss of revenue, it cannot be treated as erroneous order prejudicial to the interest of revenue, unless the view taken by the Assessing Officer is completely unsustainable in law.

Max India Limited [2007] 295 ITR 282 (SC)

Malbar Industries Co Ltd [2000] 243 ITR 83 (SC)

- This decision of the SC has been followed by the Bombay, Delhi, Madras, Punjab & Haryana, Gujarat High Courts and a number of Tribunals in the country.

CHANGE OF OPINION

- In one case, where the view of the Assessing Officer had also been expressed by the Special Bench of the Tribunal, revision under Section 263 was held to be invalid.

Anik Development Corporation [2011] 44 SOT 100 (UO) (Mum.)(Trib.)

- Even an audit objection and a possibility of a second view was held to be reason good enough for not invoking Section 263.

Sohana Woollen Mills [2007] 296 ITR 238 (P&H) (HC)

CHANGE OF OPINION

Can the Revenue change its earlier view

- The department is not entitled to reopen an assessment based on a fresh inference of transactions accepted by the revenue for several preceding years on the pretext of dubbing them as erroneous.

Escorts Ltd. [2011] 338 ITR 435 (Delhi) (HC)

- An order which became erroneous due to retrospective amendment in the law would be amenable to revision under section 263.

Vincast Engineering [2006] 280 ITR 385(All)(HC)

REVISION ON THE BASIS OF HIGH COURT JUDGEMENT

- The Commissioner has no jurisdiction to revise an order on the ground that the order which was based on a decision of the jurisdictional High Court, was prejudicial to revenue, even if the High Court decision relied upon is set aside by the Supreme Court, subsequently.

G. M. Mittal Stainless Steel (P.) Ltd. [2003] 263 ITR 255 (SC)

REVISION ON THE BASIS OF HIGH COURT JUDGEMENT

Contrary view

- Even though the view of the Assessing Officer is in conformity with decision of jurisdictional High Court or any other High Court, the Commissioner is entitled to invoke jurisdiction under section 263 subject to condition that view of jurisdictional High Court is subject matter of an appeal before the Supreme Court.

Hindustan Tin Works Ltd. [2005] 92 ITD 101 (Del.) (Trib)

APPLICATION OF MIND BY THE ASSESSING OFFICER

- In these cases, since the Assessing Officer made proper enquiry and examined accounts, it could not be said that there was non-application of mind by him. Hence, the action under Section 263 was held invalid.

Antala Sanjaykumar Ravjibhai [2012] 135 ITD 506 (Rajkot) (Trib.)

Roshan Lal Vegetable Products (P) Ltd. [2012] 51 SOT 1 (URO) (Asr.)(Trib.)

Fine Jewellery (India) Ltd. [2012] 19 ITR 746 (Mum.)(Trib.)

APPLICATION OF MIND BY THE ASSESSING OFFICER

- When the order of the Assessing Officer was silent on the claim made by assessee, and allowed such claim, without any discussion, it was held that such an order was erroneous and prejudicial to the interest of revenue.

Bharat Overseas Bank Ltd. [2013] 152 TTJ 546 (Chennai) (Trib.)

- Areas where Assessing Officer had applied mind – Section 263 proceedings not valid, areas where he didn't apply mind – Section 263 proceedings valid.

Hindustan Lever Ltd [2012] 343 ITR 161 (Bom.) (HC)

APPLICATION OF MIND BY THE ASSESSING OFFICER

Requirement to pass a detailed order

- In one case, where the High Court found that the Assessing Officer examined all the details with respect to assessee's claim of deduction, the order could not be said to be erroneous or was passed without application of mind merely because the same was not elaborate order.

Design & Automation Engineers (Bombay) (P) Ltd. [2008] 323 ITR 632 (Bom.)(HC),

Manish Kumar [2012] 134 ITD 27 (Indore) (Trib.)

ENQUIRY BY THE ASSESSING OFFICER

- The Tribunal held that the order may be brief or cryptic but that by itself is not sufficient to brand assessment order as erroneous or prejudicial to interest of revenue.

Maithan International [2012] 134 ITD 393 (Kol.)(Trib.)

- If it could not be said that it was “lack of enquiry” and therefore, the assessment order passed by the Assessing Officer cannot be revised under section 263.

Sunbeam Auto Ltd. [2009] 289 Taxman 436 (Delhi) (HC),

Vodafone Essar South Ltd. [2011] 141 TTJ 84 (Delhi) (Trib.)

ENQUIRY BY THE ASSESSING OFFICER

- Mere lack of inquiry by Assessing Officer is not sufficient for revision under section 263.

Vikas Polymers [2010] 194 Taxman 57 (Delhi) (HC)

- Non-Examination of issue by Assessing Officer does not, per se, make the assessment order prejudicial to interest of revenue for revision under section 263.

Institute of Chartered Accountants of India [2011] 136 TTJ 548 (Delhi) (Trib.)

ENQUIRY BY THE ASSESSING OFFICER

- Whether just collecting voluminous details and not perusing same and completing assessment in hurry by accepting submission of assessee at face value and without application of mind, is valid reason for invoking powers under section 263
- Whether where Assessing Officer passed assessment order without examining vital issues which had phenomenal effect of determination of correct total income, commissioner was justified, in exercising jurisdiction under section 263

Pancard Clubs Ltd. [2011] 12 taxmann.com 16 (Mum.)

ENQUIRY BY THE ASSESSING OFFICER

- Where original assessment order had been revised under section 264 and, thus, no longer existed, order passed by Commissioner under section 263 revising original assessment was void ab initio.
- No cross objections are maintainable in an appeal against order of revision in terms of section 253(4)

***New Mangalore Port Trust* (HC)(Karnataka) [2016] 67 taxmann.com
229***

ENQUIRY BY THE ASSESSING OFFICER

Contrary view

- The onus lay on the assessee to establish the identity of the person making gift and his capacity to make a gift and that it has been actually received as a gift from donor was not satisfactorily discharged by assessee, the Assessing Officer was not justified in accepting said gifts without making further enquiry about creditworthiness of donors as well as source of funds. In this case the revision under Section 263 was held to be valid.

Anil Kumar [2005] 147 Taxman 5 (Mag.) (Delhi) (Trib.),

- When the assessee claimed the advances to be trading advances but no material was available on record to suggest that persons to whom advances were made had any trading activity with assessee, the Assessing Officer ought to have conducted further enquiry before accepting assessee's claim. In these circumstances, revision under Section 263 was held to be valid.

Super Cloth [2006] 99 ITD 300 (Chennai) (Trib.)

ENQUIRY BY THE ASSESSING OFFICER

1. Possibility of further enquiry

- Merely because from a perfectionist point of view, it is felt that some more enquiries and verifications could have been made by Assessing Officer while making assessment/assessment order cannot be declared to be erroneous and prejudicial to interest of revenue.

Salora International Ltd. [2005] 2 SOT 705 Delhi (Trib.)

ENQUIRY BY THE ASSESSING OFFICER

- In the following cases, it was held that assessment framed under section 143(3) cannot be revised on ground that desired inquiry was not made.

Amrik Singh [2003] 127 Taxman 87 (Mag.) (Chd.) (Trib.),

Baljees [2003] 127 Taxman 150 (Mag.) (Chd.) (Trib.)

ENQUIRY BY THE ASSESSING OFFICER

Where the Assessing Officer makes enquiry but does not mention the same in the assessment order

- Where the assessing officer during the scrutiny assessment proceeding raised a query which was answered by the assessee to the satisfaction of the assessing officer but the same was not reflected in the assessment order by him, a conclusion cannot be drawn by the Commissioner that no proper enquiry with respect to the issue was made by the assessing officer, and enable him to assume jurisdiction under section 263 of the Act.

Ashish Rajpal [2009] 320 ITR 674 (Delhi) (HC),

Vikash Polymers [2010] 194 Taxman 57 (Delhi) (HC)

ENQUIRY BY THE ASSESSING OFFICER

- If the Assessing Officer allows the claim, on being satisfied with the explanation of assessee, on an enquiry made during the course of Assessment Proceedings, the decision of Assessing Officer cannot be held to be erroneous, on ground that there is no elaborate discussion in that regard in the order. It is the practice that whenever any claim of the assessee is accepted, Assessing Officer may not discuss the same in his order.

Anil Shah [2007] 162 Taxman 39 (Mum.)(Trib.)

DOCTRINE OF MERGER – ORDERS SUBJECT MATTER OF APPEAL

- Once the issue was considered and decided by the COMMISSIONER (APPEALS), revision under section 263 cannot be done.

Ranka Jewellers [2010] 328 ITR 148 (Bom.)(HC)

- Matter not considered and decided in appeal can be subjected to revision.

Ram Kishore Raj Kishore [2004] 135 Taxman 511 (All.) (HC)

DOCTRINE OF MERGER – ORDERS SUBJECT MATTER OF APPEAL

- The doctrine of merger applies only in respect of such items which were the subject matter of appeal and not in respect of those which were not.

Alagendian Finance Ltd [2012] 293 ITR 1 (SC),

Ram Kishore Raj Kishore [2004] 135 Taxman 511 (All.)(HC)

- The proceedings under section 263 were held to be invalid during the pendency of an appeal, even though the issues in revision are different from those in appeal.

Aerens Infrastructure & Technology Ltd. [2004] 271 ITR 15 (Delhi) (HC)

DOCTRINE OF MERGER – ORDERS SUBJECT MATTER OF APPEAL

- Despite fact that Commissioner under section 263 has set aside the whole assessment, it cannot be considered that Commissioner has also set aside that part of order which is not erroneous and prejudicial to interest of revenue or has also set aside those additions which have attained finality.
- *Uma Kant Newatia [2005] 97 ITD 414 (Kol.)(Trib.)*

DOCTRINE OF MERGER – ORDERS SUBJECT MATTER OF APPEAL

- The consequence of the amendment made in section 263 with retrospective effect from 1-6-1988 is that the power u/s 263 of the commissioner shall extend and shall be deemed to have extended to such matter as had not been considered and decided in an appeal.

Shri Arbuda Mills Ltd. [1998] 231 ITR 50 (SC)

Jaykumar B. Patil [1999] 263 ITR 469 (SC)

DOCTRINE OF MERGER – ORDERS SUBJECT MATTER OF APPEAL

- **In case of appeal dismissed on ground of limitation**
- If for any reason an appeal is dismissed on the ground of limitation and not on the merits, that order would not merge with the orders passed by the first appellate authority

Raja Mechanical Co. P Ltd. [2012] 345 ITR 350 (SC)

DOCTRINE OF MERGER – ORDERS SUBJECT MATTER OF APPEAL

1. Partial or complete merger of order of the Assessing Officer with that of the Commissioner (Appeals)

- In this case, the ITO allowed deduction under section 35B on an amount lower than that claimed by the assessee. Thereafter, the CIT invoked section 263 and set aside the assessment order on the ground that the deduction was allowed without going into the details.
- The assessee argued that section 263 could not have been invoked as the impugned assessment order was subject matter of appeal before the COMMISSIONER (APPEALS) and had merged with the order of the COMMISSIONER (APPEALS).
- The HC held that deduction under section 35B, in so far as it pertained to the amount allowed by the Assessing Officer, was not the subject matter of appeal before the COMMISSIONER (APPEALS) and hence the doctrine of merger did not apply in this case. Hence, the revision under section 263 was held to be valid.

Ratilal Bacharilal & Sons [2006] 282 ITR 457 (Bom.) (HC)

DOCTRINE OF MERGER – ORDERS SUBJECT MATTER OF APPEAL

- Only that part of the order of the Assessing Officer merges with that of the Commissioner (Appeals) which has been considered and decided upon by the latter.
- If the Commissioner (Appeals) does not apply his mind on a particular aspect, the jurisdiction of the Commissioner under section 263 cannot be ousted.
- In this case, the Commissioner (Appeals) considered only the question of eligibility of deduction under section 80-IB(10) and not the computation part. It was held that the aspect of computation of deduction was open to revision by the Commissioner under section 263.

Heritage Housing Development – ITA No 6484/M/2009 decided by Third Member on 1st June, 2012, ITAT Mumbai – “H” Bench

DOCTRINE OF MERGER – ORDERS SUBJECT MATTER OF APPEAL

Contrary view

- In this case, the assessee claimed investment allowance under section 32A of Rs. 5,35,424/- on certain fixed assets. However, the Assessing Officer allowed the claim only in respect of certain fixed assets. On appeal before the COMMISSIONER (APPEALS), the issue was decided in favour of the assessee. Thereafter, the Commissioner invoked the provisions of section 263 on the ground that the action of the Assessing Officer in granting deduction under section 32A on certain fixed assets was erroneous. The HC held that once the COMMISSIONER (APPEALS) allowed the assessee's claim on certain fixed assets, the order of the Assessing Officer stood merged with that of the COMMISSIONER (APPEALS) and hence, no part of the order of the Assessing Officer could have been revised by the Commissioner under section 263.

Shashi Theatre Pvt Ltd [2001] 248 ITR 126 (Guj.) (HC)

OTHER ISSUES

Void orders – Whether revision possible

- As the order passed u/s 147 /143(3) was itself void, the order of CIT passed u/s 263 for quashing this order was without jurisdiction.

Inder Kumar Bachani (HUF) [2006] 101 TTJ 450 (Lucknow) (Trib.)

- Order of Commissioner u/s 263 cancelling original assessment was cancelled by the Tribunal and department's reference application was pending before High Court, Assessing Officer had no jurisdiction to make second assessment in pursuance of a non-existing order u/s 263.

Garg Enterprises [2005] 142 Taxman 42 (Mag.) (Chd.) (Trib.)

OTHER ISSUES

- It was held that the Commissioner cannot exercise his power of revision under section 263 in respect of original assessment order which already stood rectified under section 154.

Kalyan Solvent Extraction Ltd. [2005] 276 ITR 154 (MP) (HC)

OTHER ISSUES

Incorrect finding by the Commissioner

- Where the finding of the CIT that the Assessing Officer had arrived at his findings without conducting an enquiry, was itself erroneous, the CIT wrongly exercised the powers by recourse to section 263.

Development Credit Bank Ltd. [2010] 323 ITR 206 (Bom.) (HC)

- The Commissioner exercising jurisdiction under section 263 of the Act on the ground that the order of the Assessing Officer was prejudicial to the interest of revenue on the ground that the assessee failed to produce the shareholders and the creditors before the Assessing Officer was held to be not justified.

OTHER ISSUES

Can the Commissioner simply remand the matter back to the Assessing Officer

- The CIT cannot remand the matter to the Assessing Officer for further enquiries or to decide whether the findings recorded are erroneous without a finding that the order is erroneous and how that is so.
- A mere remand to the Assessing Officer implies that the CIT has not decided whether the order is erroneous but has directed the Assessing Officer to decide the aspect which is not permissible.

DG Housing Projects [2012] 343 ITR 329 (Delhi) (HC)

OTHER ISSUES

Meaning of the term “record”

- “Record” does not mean only the record available with ITO at time of passing of assessment order. It would include the records available with the Commissioner at the time of passing of the order by the Commissioner.

K. Ramachandran (Dr.) [2004] 139 Taxman 320 (Mad.) (HC)

OTHER ISSUES

- Record, connotation of Word record used in section 263(1) would mean record as it stands at the time of examination by commissioner and not as it stands at the time of order passed by AO and, as such, Commissioner would be justified in invoking section 263 on the basis of valuation report submitted by DVO subsequent to assessment order
- **Shree Manjunathesware packing products & Camphor Works [1998] 96 Taxmann 1 (SC)**

OTHER ISSUES

- There is nothing in the provision of the act, particularly in section 263, which would require the court to accept the narrow view that the record must be of the assessee concerned and that the commissioner has no power, jurisdiction and authority to take action u/s 263 in the case of an assessee on the basis of records in the cases of other persons.

Arunaben Sumankumar [2002] 124 Taxmann 57 (Guj.)

OTHER ISSUES

Remedy against section 263 order

- The appropriate remedy against the order passed by the CIT in exercise of its revision jurisdiction under section 263 is to file appeal before the Tribunal

John George Vettath [2007] 162 Taxman 134 (Ker.) (HC)

OTHER ISSUES

Writ against section 263 proceedings

- If prima-facie opinion is recorded by commissioner that order sought to be revised is erroneous and prejudicial to revenue, Court in its writ jurisdiction cannot pre-empt proceedings under section 263.

Pankaj Goyal [2004] 270 ITR 201 (HP) (HC)

OTHER ISSUES

- In view of an alternate remedy, writ against an order under Section 263 was held to be invalid.

B&A Plantation and Industries Ltd [2013] 212 Taxman 137(Mag.) (Gau.)(HC)

- The proper course of action against an order passed under section 263 is to approach the Tribunal and not the High Court in writ.

John George Vettath [2007] 162 Taxman 134 (Ker.) (HC)

OTHER ISSUES

Revision and Transfer pricing

- CIT has no administrative jurisdiction over the TPO, he could not have revised the order passed by the TPO under section 92CA(3).

Essar Steel Limited 55 SOT 1 (Mum.) (Trib.)

- The Assessing Officer's omission to follow the binding Circular, which makes it mandatory for the Assessing Officer to make a reference to the TPO if the aggregate value of the international transaction exceeds Rs. 5 crores, amounted to making assessment without conducting proper inquiry and investigation and resulted in the order becoming "erroneous and prejudicial to the interest of the Revenue".

OTHER ISSUES

Change in law when the Commissioner invokes section 263

- It was held that legal decisions available at the point of time when Commissioner is examining the matter for exercise of powers under section 263 cannot be ignored. What is to be seen is the legal position prevailing as on the point of time when revision order is passed and not when the Assessing Officer passed the impugned order.

Star India Ltd. [2012] 49 SOT 422 (Mum.)(Trib.)

Saluja Exim Ltd [2011] 199 Taxmann 69 (Mag) (Punjab and Haryana)

OTHER ISSUES

Impact of subsequent events

- If, at that particular time, when the power under section 263 is exercised, a decision of the jurisdictional High Court was there, it would not be open to Commissioner to have proceeded on the basis that the Assessing Officer who had acted in terms of High Court's decision had acted erroneously, when the decision had not been set aside by the SC or at least had not been appealed from.

G. M. Stainless Steel (P) Limited [2003] 263 ITR 255 (SC)

OTHER ISSUES

- Once the law on the subject has been declared by the High Court, the pronounced judgment dates back to the date of the enactment. Therefore, the order of Assessing Officer, though passed prior to such judgment, but contrary to law pronounced subsequently by High Court would be erroneous and prejudicial to interests of revenue.

Intellinet Technologies India P. Ltd. [2010] 134 TTJ 744 (Bang.)(Trib.)

OTHER ISSUES

- **Subsequent amendment in law**
- Position of law as on date when assessing officer passes an order has to be taken into consideration; no subsequent change, in law, can constitute basis for exercise of power u/s 263

Saluja Exim Ltd. [2011] 199 taxmann 69 (Mag.) (Punj. & Har.)

OTHER ISSUES

- **Principle of consistency must be followed**
- Commissioner can take recourse to revisional powers under section 263 on fundamental aspects of a transaction on which a view had been taken and accepted by revenue for several preceding years; such an approach is against the principle of consistency. The department had not shown any special circumstances warranting deviation from the said principle.

Escorts Ltd. [2011] 198 Taxmann 324

OTHER ISSUES

Time limit to pass the revised order

- The period of limitation is to be reckoned from the date of the original assessment order under section 143(3) when the issues in respect of which the order was revised were decided in the original assessment order.

ICICI Bank Ltd. [2012] 343 ITR 74(Bom.)(HC).

Ashoka Buildcon Limited [2010] 325 ITR 574 (Bom.) (HC)

OTHER ISSUES

- **Time bar applies to Suo moto orders only**
- The time bar u/s 263(2) should be taken to apply Suo moto orders of revision by the commissioner and not to orders made by him pursuant to a direction or order passed by the tribunal or by any other higher authority.

National Taj Traders [1980] 121 ITR 535 (SC)

OTHER ISSUES

- Where through a reassessment had been made, commissioner, in exercising its revisional jurisdiction, reopened order of assessment in relation to an item, which was not subject of reassessment proceedings, period of limitation provided for in section 263(3) would begin to run from date of order of original assessment and not from order of reassessment.

Alagendran Finance Ltd. [2007] 162 Taxmann 465 (SC)

OTHER ISSUES

Can a revision order be partially valid?

- In this case, the Commissioner revised the order under section 263 on more than one ground. It was held that that the revision on certain grounds was valid while in case of certain other grounds, it was invalid.

*Colorcraft Kashmirira Ceramic Compound [2007] 105 ITD 599 (Mum.)
(Trib)*

OTHER ISSUES

Non-initiation of penalty proceeding is an 'error'

- Failure of assessing officer to initiate penalty proceedings at the time of passing of the assessment order will render the order erroneous and prejudicial to the interest of the revenue

Sri Surendra Prasad Agarwal [2005] 275 ITR 113 (All.)

Ashok Construction Co. [2006] 280 ITR 368 (All.)

OTHER ISSUES

Order not levying cannot be revised

- If the commissioner finds, while examining the records of an assessment order u/s 263, that the assessing officer has not initiated penalty proceedings, he cannot direct the initiation of penalty proceedings because penalty proceedings are not part of assessment proceedings. The Commissioner cannot pass an order u/s 263 pertaining to penalty

J.K. D'Costa [1982] 133 ITR 7 (Delhi)

Nihal Chand Rekyan [2000] 242 ITR 45 (Delhi)

INSTANCES WHEN REVISION WAS HELD VALID

- The assessee had claimed deduction under Section 80 HHC and 80-IA and the same was allowed.
- The Commissioner, while exercising his revisional powers, held that assessment is erroneous and prejudicial to the interest of the revenue, as the assessee while computing the deduction under section 80HHC, had not reduced the claim of deduction allowed under section 80-IA from the profits and gains from the business.
- In this case, the revision under section 263 was held to be valid –

Abhishek Industries Ltd. [2013] 255 CTR 504 (P&H) (HC)

INSTANCES WHEN REVISION WAS HELD VALID

- As the Assessing Officer had not clearly indicated the computation with the relevant Articles of the DTAA and the basis, it could be construed as an order both erroneous and prejudicial to the interest of revenue, hence the revision order was justified –

Infosys Technologies Ltd. (No 2)[2012] 341 ITR 293 (Karn.)(HC)

- Failure by the Assessing Officer to make enquiry in respect of payments liable to tax deduction at source was good enough to invoke revision under section 263 –

Bharti Hexacom Ltd. [2013] 21 ITR (T) 648 (Delhi) (Trib.)

INSTANCES WHEN REVISION WAS HELD INVALID

- When neither section 80HH, nor section 80I statutorily obliged to maintain the accounts unit wise, the consolidated accounts held to be valid and revision was held to be not valid –

Bongaigaon Refinery & Petrochemical Ltd [2012] 349 ITR 352 (SC)

- There cannot be revision of a non-existing order and where there is no order either for levy or waiver of interest under section 158BFA(I) or section 234A, 234B or 234C of Act in existence, Commissioner can have no jurisdiction to invoke provisions of section 263 for directing Assessing Officer to charge interest under section 158BFA(1) –

Anand Kumar Agarwal (HUF) [2005] 92 TTJ 81 (Agra)(Trib.)

INSTANCES WHEN REVISION WAS HELD INVALID

- Revision of order on the basis of a non-jurisdictional High Court which was not approved by the jurisdictional High Court is not valid –

Hindustan Lever Ltd [2012] 70 DTR 182 (Cal.)(HC)

- Assessment order following binding precedent is not amenable to revision under Section 263. It was held that the AAR ruling was binding despite contrary rulings on the subject –

Prudential Assurance Co. Limited [2010] 324 ITR 381 (Bom.)(HC)

INSTANCES WHEN REVISION WAS HELD INVALID

- When the assessment for AY 1987-88 was completed under section 143(1)(a) and notice under section 143(2) had not been issued and time for completing asst. under section 143(3) had expired, the Commissioner could not direct assessment under section 143(3) by his revision order under section 263. On these facts, the order was held to be contrary to provisions of section 143(2), 143(3) and 153(1)(a) –

V. Narayanan [2011] 127 ITD 133 (Chennai)(Trib.) (TM).

INSTANCES WHEN REVISION WAS HELD INVALID

- During the year under consideration, the assessee company had invested sums in its subsidiaries outside India. The Commissioner observed that the Assessing Officer had completed the assessment without examining/referring these transactions to the Transfer Pricing Officer to determine whether these investments were made at arm's length and invoked section 263. The Tribunal held that investment in share capital of the subsidiaries outside India is not in the nature of transactions referred to section 92B and hence, the order of the Commissioner under section 263 was set aside –
- ***Vijay Electricals Limited – ITAT Hyderabad “A” Bench dated 31st May, 2013***

INSTANCES WHEN REVISION WAS HELD INVALID

- If an existing circular is in conflict with the law of the land laid down by the High Courts or the Supreme Court, the Revenue authorities while acting quasi-judicially, should ignore such circulars in discharge of their quasi-judicial functions. The sole reason for invocation of section 263 was a Board circular. Since the outcome of the original order of assessment was in tune with the Division Bench decisions of the jurisdictional court, the order of revision was held invalid –

Bhartia Industries Limited [2013] 353 ITR 486 (Cal.) (HC)

CONCLUSION

- Thus, we can see that the abovementioned judicial precedents have greatly helped in shaping the law on the powers of the Commissioner under section 263 of the Act. We can see that not only orders of assessment can be revised under this section but also such orders where proceedings have been filed or dropped. Jurisdiction under section 263 can be assumed upon the fulfillment of the twin conditions viz. erroneous order and prejudice to the revenue. However, the judge laid law has ensured that in cases where two views are possible or where the issue is debatable, revision under section 263 cannot be done. Furthermore, the observance of the principles of natural justice in section 263 proceedings has gone a long way in ensuring that the taxpayers are not subject to avoidable harassment, without compromising the remedy available to the Income-tax authorities in genuine circumstances.

THANK YOU

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