

# Revisions & Miscellaneous Petitions

Revisions under sections 263, 264  
and miscellaneous petitions under section 254  
of the Income-tax Act, 1961



Amar Gahlot  
Advocate & Consultant  
Lakshmikumaran & Sridharan Attorneys

## Outline

- Revision proceedings before the CIT u/s 263 and 264 of the Act
- Miscellaneous petitions before the ITAT u/s 254 of the Act
  - Rectification under section 154

## Revision under section 263

## Legislative Background

- Section 33B of Income-Tax Act, 1922
  - The 1922 Act as enacted originally did not have provisions relating to revision
  - Introduced from the year 1948

## Revision of orders prejudicial to revenue

- **Section 263** of the Income Tax Act, 1961 confers the power upon the Commissioner to cancel the assessment and directing the assessing officer to make fresh assessment. Such powers includes power to call for and examine the records of a proceedings under the Act and revise any order if the Commissioner considers the same to be erroneous and prejudicial to the interest of the revenue.
- **Intent:**
  - To give powers to the Principal Commissioner or Commissioner to call for and examine the assessment records and verify the records to see whether the records reveal that the order passed by the Assessing Officer is *erroneous in so far as prejudicial to the interest of revenue*.
- **Malabar Industrial Co. Ltd. v. CIT [2000] 243 ITR 83**
  - Twin Conditions
  - interpreted the phrase *erroneous in so far as prejudicial to the interest of revenue*

## Explanation 2 to Section 263

- Deeming fiction
- The order passed by the AO shall be deemed to be erroneous in so far as it is prejudicial to the interest of the revenue by virtue of the below mentioned appendages:
  - a) When the order is passed without making inquiries or verification
  - b) When the order is passed allowing any relief without inquiring into claim
  - c) When the order has not been made in accordance with any order, direction or instruction issued by the CBDT
  - d) When 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

## Retrospective or Prospective Application of Explanation 2

- **Crompton Greaves Limited v. CIT [2016] 46 ITR(T) 465 (Mumbai - Trib.)**
  - It is the Commissioner's responsibility to demonstrate that the enquiries or verification conducted by the TOs were not in accordance with the enquiries or verification that would have been carried out by a prudent officer.
  - Hence, the question as to whether the amendment brought in by way of Explanation 2(a) would have retrospective or prospective application, was not relevant.

## *“erroneous in so far as prejudicial to the interest of revenue”*

- **Hindustan Construction Co. Ltd. v. Dy. CIT [2008] 25 SOT 359 (Mum.)**
  - As per dictionary meaning, the word 'erroneous' means 'involving error; deviating from the law'. 'Erroneous assessment' refers to an assessment that deviates from the law and is, therefore, invalid, and the defect is jurisdictional in its nature; 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.
- **Addl. CIT v. Saraya Distillery [1978] 115 ITR 34 (All.)**
  - An order can be said to be erroneous when either it does not decide a point and record a finding on an issue which ought to have been done or decided it wrongly. Even in such a case an order would be as much prejudicial to the interest of the complaining party as one deciding against him. The grievance in both the events is the same, viz., that the order has injuriously affected the right of the party as a result of which he did not have the relief which ought to have been granted.

## Revision on the basis of High Court judgment

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

-CIT v. GM Stainless Steel (P) Ltd [2003] 263 ITR 255 (SC)

- **Conflict with the CBDT Instruction**

- Instructions or circulars which are contrary to the law cannot override judicial declaration of law.

-Hindustan Aeronautics Ltd. v. CIT [2000] 243 ITR 808

- Discomfort to the statutory provision

## Order

- Section 2(14) of the Civil Procedure Code, 1908: Order means the formal expression of any decision of the Civil Court which is not a decree.
- Section 2(2) of the Civil Procedure Code, 1908: Decree means the formal expression of an adjudication which conclusively determines the rights of the parties with regard to all or any of the matter in controversy in the suit.

### **Smt. Bhartiben M. Kelawala v. CIT [2011] 128 ITD 4**

- The word 'order' mentioned in section 263 which can be the subject-matter of revision by the Commissioner would mean an order determining the rights and liabilities of the assessee under the Act.

## Words 'any order' under section 154 vs. 'the order' under section 263

- **Rastriya Ispat Nigam Ltd. v. ACIT [2015] 377 ITR 420 (Andhra Pradesh)**
  - The words 'any order' in section 154(1)(a) would mean even the reassessment order under section 147.
  - It cannot be stated that both the expressions, 'any order' and 'the order', as occur in sections 154 and 263 respectively, would have the same meaning.
  - The word 'the' clearly denotes the specific order, while the word 'any' would mean any order passed by the Income-tax Authority.

## What all Orders are covered under section 263

- Order passed in any proceedings by the Assessing Officer
  - Regular Assessment Order under section 143(3)
  - Reassessment Order under section 143(3) read with section 147
  - Rectification order under section 154
  - Order for Communication under section 195(2)
  - Certificate under section 197(1)
  - Advance Tax Order under section 210
  - Transfer Pricing Order under section 92CA?
  - Assessment/ Refund from ITNS
    - CIT v. Allahabad Agricultural Institute [2017] 397 ITR 655 (Allahabad)
  - Intimation under section 143(1)

## Revision against Intimation under section 143(1)

- Is Intimation an order?
  - Yes-Anderson Marine & Sons Pvt. Ltd (2004) 266 ITR 694 (Bom)
- Specifically covered under section 246
- No opinion is formed by AO for intimation under section 143(1)
  - Rajesh Jhaveri Stock Brokers 291 ITR 500
- Alternative approach
  - Since no opportunity of being heard is afforded to the Assessee
  - Thus, Revision under section 263 cannot be invoked

## Lack of Inquiry vs. Inadequate Inquiry

- If no inquiry at all was made by the AO at the time of assessment- only then section 263 invokable
- Effect of Explanation 2(a)
  - CIT v. Sunbeam Auto Ltd. [2009] 289 Taxman 436 (Delhi) (HC)
  - Commissioner of Income-tax v. Vikas Polymers [341 ITR 537 (Del)
  - ITO v. DG Housing Projects [2012] 343 ITR 329 (Delhi) (HC)
  - Narayan Rane v. ITO [2016] 70 taxmann.com 227 (Mumbai - Trib.)
- Objective satisfaction of the Commissioner

## Power of superintendence under section 263

- Conferred upon a superior court
- Under other laws- power given to protect public interest
- Different from Revisionary power conferred under CPC
  - To correct the error of jurisdiction vs. to protect the interests of the Revenue

## Rule of construction - Casus omissus

- Commissioner of Income-tax v. National Taj Traders, [1980] 121 ITR 535 (SC)
 

*“It is well settled that the principle that the fiscal statute should be construed strictly is applicable only to taxing provisions such as a charging provision or a provision imposing penalty and not to those parts of the statute which contain machinery provisions. By no stretch, could section 33B be regarded as a charging provision.”*
- error vs. mistake - question of degree only
- interests of revenue vs. detrimental vs. protect revenue



## Reference vs Review vs Revision

- Reference
  - Section 113 of the Civil Procedure Code empowers a subordinate court to state a case and refer the same for the opinion of the High Court. Such an opinion can be sought when the code itself feels some doubt about a question of Law.
- Review
  - Dealt under Section 114 of the Code of Civil Procedure. Review means to reconsider, to look again or to re examine. It is a judicial re-examination of the case by the same court and by the same Judge.
- Revision
  - Section 115 of the Code of Civil Procedure empowers the High Court to entertain a revision in any case decided by a subordinate Court in certain circumstances.

## Doctrine of Merger

- When an appeal or revision or any other remedy is provided in a statute against an order passed by any authority, the decision of the higher authority is the operative decision and it alone is effective and enforceable, whether that authority confirms, modifies or reverses the order of the lower authority. The decisions of all lower authorities thus merge with those of the higher authorities, who dealt with them.
- Clause (c) of Explanation 1 to Section 263 (1): Partial Merger Doctrine
- Merger only to an extent the issues which were subject matter of appeal and considered by Commissioner (Appeals)

*-CIT v. Shree Arbuda Mills Ltd. (1998) 231 ITR 50 (SC)*

## Notice and Time Limit

- Time limit- 2 years from the order sought to be revised
- Notice must mention
  - Areas of revision
  - Reasons as to why the order is treated erroneous  
*-Commissioner of Income-tax v. Vikas Polymers [341 ITR 537 (Del)*
- Any point but for the ones mentioned in the notice are beyond the ambit of revision under section 263  
*-CIT v. Ashish Rajpal (2009) 320 ITR 674 (Del)*
- **CIT v. Amitabh Bachhan [2016] 384 ITR 200 (SC)**
  - SCN detailing the specific grounds of proposed revision-no longer a sine qua non for a valid service.
  - Commissioner need not confine himself to terms of notice and foreclosing consideration of any other issue.
  - Commissioner is free to exercise his jurisdiction on consideration of all relevant facts, provided an opportunity of being heard is given to the assessee to contest facts on the basis of which revisional jurisdiction was exercised.

## Revision vs. Reassessment

- Under Revision, Commissioner must be certain that the order is erroneous. Mere doubt that order may be erroneous is not sufficient for invoking section 263. It is necessary to point out the exact error in the order which he proposes to revise. For Reassessment, there shall be reason to believe that the income has escaped assessment. The reasons must be based on some tangible material. However level of certainty is not necessary at the time of initiation of the proceedings.  
*- CIT v. GK Kabra 211 ITR 336 (AP)*
- The revision can be only with respect to the items listed in the Notice issued by CIT. No other item can be the subject matter of revision CIT. In Reassessment, the AO is having power to make addition for any other income which has escaped assessment other than the one mentioned in the reason and the same is noticed by him latter on during the course of the assessment. (Diluted by Amitabh Bachchan case ?)

## Revision vs. Reassessment

- Failure to make necessary inquiries by the AO can result in an erroneous order and accordingly it can result in Revision u/s. 263. On the other hand, Reassessment does not permit a review of the order passed by the AO unless there is some fresh tangible material. Failure on the part of the AO can not result in Reassessment.
- Notice of Revision shall itself mention the reasons for the same. On the other hand, reasons recorded for reassessment are made available to the assessee post filing the Return in response to the notice u/s. 148

## Other issues

- **Non-initiation of Penalty proceedings**
  - *Erroneous + Prejudicial to the revenue*
  - *Master Vijay R Oswal v. ITO [2003] 87 ITD 98 (Rajkot)(Trib.)*
    - Non-initiation of penalty proceedings by the AO was held to be not good ground for invoking section 263
  - *CIT v. BrajBhushan Cold Storage [2005] 275 ITR 360 (All)(HC)*
    - Commissioner can revise the order of the AO dropping penalty proceedings.
- **Revision vis a vis Transfer Pricing**
  - *Essar Steel Limited v. ACIT 55 SOT 1 (Mum.) (Trib.)*
    - CIT has no administrative jurisdiction over the TPO, he could not have revised the order passed by the TPO under section 92CA(3).

## Other issues

- **Can the assessee make a new claim:**

- Assessee is not eligible to claim any new benefit
  - CIT v. Sun Engineering Works (P.) Ltd [1992] 198 ITR 297 (SC)
- CIT v. Caixa Economica De Goa [1994] 210 ITR 719 (Bombay)
- Conversion of section 263 to section 264 proceedings?

- **Requirement to pass a detailed order**

- CIT v. Gabriel India Ltd., 203 ITR 108 (1993)
- The order cannot be branded as erroneous by the Commissioner because according to him the order should have been written more elaborately

## Other issues

- **Revision on the basis of retrospective amendment**

An order which became erroneous due to retrospective amendment in the law would be amenable to revision

- *CIT v. Vincast Engineering [2006] 280 ITR 385 (All)(HC)*

- **Principles of Natural Justice**

- Before exercising revisional powers, the assessee must be called, his explanation sought for and examined by Commissioner
  - *CIT v. Vikash Polymers [2012] 341 ITR 537 (Delhi)*
- Revision order passed on a ground in addition to the grounds mentioned in the SCN issued cannot be sustained
  - *CIT v. Ashish Rajpal [2009] 320 ITR 674 (Delhi)(HC)*
- Approach after Amitabh Bachchan case?

- **Writ against section 263 proceedings?**

## Other issues

- **Remanding the matter back to the Assessing Officer**

- 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.

*-ITO v. DG Housing Projects [2012] 343 ITR 329 (Delhi) (HC)*

- **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.

*-CIT v. Development Credit Bank Ltd. [2010] 323 ITR 206 (Bom.) (HC)*

## Section 264

- Applicable to any order other than an order to which section 263 applies
- Commissioner may act suo moto or on application made by the assessee
- Commissioner may call for the record of any proceedings under the Act in which such order has been passed
- Order may be passed not being prejudicial to the assessee
  - However an order declining to interfere is not an order prejudicial to the assessee

## Miscellaneous Applications under the Income-tax law

## Rectification

- “Rectification” connotes something what ought to have been done but by error not done and what ought not to have been done was done, requiring correction
- Tribunal’s power to rectify its orders is derived only from the provisions contained in Section 254(2) of the Act.
  - Except for marginal exceptions, there is no inherent power to rectify mistakes
- Power is to rectify, not perpetuate the mistake

## Law as contained in the IT Act

- Section 254 of the IT Act deals with the orders of the Appellate Tribunal
- Sub-section (1) empowers the Tribunal to pass an order in a case, after giving the due opportunity of hearing to the parties
- Sub-section (2) provides for the rectification power of the Tribunal vis-à-vis the order passed by it under sub-section (1)
  - Such power is to be exercised as against the mistake apparent from the record
  - The mistake has to be pointed out either by the assessee or by the Assessing Officer ... suo moto?
  - Application for the rectification has to be filed within six months from the end of the month in which the impugned order has been passed

## Law as contained in the Tribunal Rules

### Income-tax (Appellate Tribunal) Rules, 1963 [“Tribunal Rules”]

- **Rule 24** provides that the Tribunal may proceed to dispose off the appeal *on merits* after hearing the respondent, in case of *appellant’s non-appearance*
- **Rule 25**, whereas, provides for such disposal in the case of *respondent’s non-appearance*
- Further, both the Rules state that if the non-appearing party appears thereafter and shows sufficient cause for non-appearance, the *Tribunal shall* set aside the impugned order and restore the appeal.

## Procedure for Miscellaneous Application

- Rule 34A of the Tribunal Rules provides that a Miscellaneous Application must clearly and concisely state the mistake apparent from the record of which the rectification is sought under the section
- Applicant is also to disclose any other Miscellaneous Application filed against the same order and the decision thereon, if any
- Stay Petition to be filed in accordance with Rule 35A
- Affidavit along with the application is preferred in practice

## Dismissal for want of prosecution

- Appellate Tribunal Rules vide notification dated February 1, 1941  
Rule 36: Determination of the appeal on merits notwithstanding the non-appearance of the appellant
- 1941 Rules substituted by the Appellate Tribunal Rules, 1946  
Rule 24: In case of non-appearance of the appellant, the Tribunal may, in its discretion, either dismiss the appeal for default or may hear it ex parte
- Rule 24 as amended vide notification dated January 26, 1948  
Rule 24: In case of non-appearance of the appellant, the Tribunal may dismiss the appeal for default  
\* Rule contained no provision for restoring an appeal dismissed for default



### Dismissal for want of prosecution ... *contd.*

- Rule 24 of the Appellate Tribunal Rules, 1946 in so far as it enables the tribunal to dismiss an appeal for default of appearance, is ultra vires
  - Commissioner of Income Tax, Madras v. S. Chenniappa Mudaliar, AIR 1969 SC 1068
- Rajendra Prasad Borah v. ITAT [2008] 302 ITR 243, following *S. Chenniappa Mudaliar*, held that:
  - Section 254 obligates the Tribunal to dispose off the appeal on merits
  - Rule 24 of the Tribunal Rules, per se does not empower dismissal for default without going into merits
  - CIT v. Multi-plan India (P.) Ltd., [1991] 38 ITD 320 is not good law

### Dismissal for want of prosecution ... *contd.*

- If the order of dismissal is merely on account of the default in appearance and not on merits, it is truly an order in favour of the assessee
- Tribunal dismissing the appeal on merits
  - If sufficient cause for non-appearance is shown to the Tribunal's satisfaction, then the Tribunal has inherent jurisdiction to recall the matter
    - Rule 24 and 25 of the Tribunal Rules

## “Mistake apparent from the record”

- ‘Mistake’ is not only an arithmetical or clerical error. It is subjective and is something which a duly and judiciously instructed mind can find out from the record
  - Karan & Co. v. ITAT, [2001] 118 Taxman 473 (Delhi)
- ‘Apparent’ must be something which appears to be so ex facie and is incapable of argument or debate
  - Smt. Baljeet Jolly v. CIT, [2000] 113 Taxman 38 (Delhi)
- Mistake apparent from the record v. Mistake apparent on the face of record
  - T.S. Balaram v. Volkart Brothers, Bombay, (1971) 2 SCC 526  
 “any mistake apparent from the record” is undoubtedly not more than that of the High Court to entertain a writ petition on the basis of an “error apparent on the face of the record”
  - IT Act v. Civil Procedure Code, 1908

## “Mistake apparent from the record” ... *contd.*

- Simple mistake cannot be a test
  - what is simple to one mind may not be simple for another mind
- Whether subsequent decision of the Apex Court, jurisdictional High Court or any other High Court amounts to a mistake?
  - Judgments only clarify the law
- Mistake is not confined to the mistake of facts, but includes mistake of law as well
- Arguable points are not mistakes

## Rectification of rectification: Possible?

- Power of rectification under sub-section (2) is only as regards the order passed under sub-section (1), therefore, an order of rectification passed under sub-section (2) cannot be further rectified
  - Basisth Kumar Jaiswal v. ACIT, M.A. No.18/LKW/2012
- Successive applications for rectification of original order cannot be maintained, as it will defeat the object of section 254(2)
  - Panneerselvam v. ACIT, 319 ITR 135
- However, once the rectification order has been passed under sub-section (2), it merges with the order passed under sub-section (1) for subsequent actions
  - Possibility of rectification of the rectified order

## Other Issues

- Simultaneous filing of an appeal against the order passed by the Tribunal under sub-section (1), as a matter of precaution
- Expression 'the date of the order' has to be construed as meaning the date of communication or knowledge of the order to the applicant
  - D. Saibaba v. Bar Council of India (2003) 6 SCC 186
  - Oral Pronouncement?
- Delay in rectifying the order on account of Tribunal's default
  - Applicant not to be penalised for the default of the Court

## Other Issues

- Whether dismissal of rectification application is an order?
  - IT Act vis-à-vis Civil Procedure Code, 1908
- Rectification application and the appeal
  - Heard simultaneously in the CESTAT
  - ITAT re-posts the appeal, if the rectification appeal is allowed
- Rectification may be allowed on a point not urged
  - Power to rectify the error is to be exercised by correcting the error in the order and the correction must, therefore, extend to the elimination of the error
    - Blue Star Engineering Co. v. CIT, 1969 73 ITR 283 Bom
- Ground of appeal not adjudicated upon, but argued by the party

Questions? Thank you.