

**(1992) 11 AHC CK 0106**  
**In the Allahabad High Court**

**Case No :** IT Reference No. 299 of 1980 and IT Application No. 149 of 1983

Commissioner of Income Tax

APPELLANT

Vs

V.P. Agarwal

RESPONDENT

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**Date of Decision :** 27-11-1992

**Acts Referred:**

Income Tax Act, 1961 — Section 143(3), 147, 256, 256(1), 256(2)

**Citation :** (1993) 68 TAXMAN 236

**Hon'ble Judges :** M.C. Agarwal, J; A.P. Misra, J

**Bench :** Division Bench

**Final Decision :** Disposed Of

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**Judgement**

Agarwal, J.—Both these cases relate to the income tax assessment of an assessee for the same year, i.e., the assessment year 1972-73. They were heard together and are disposed of by this common order.

The assessee-respondent is doing business under the name of Agarwal Scientific Glass Industries, Agra, dealing in manufacture and sale of scientific laboratory equipment. He filed return of income tax for the assessment year 1972-73, the accounting for which had ended on 31-3-1972. An income of Rs. 29,407 was returned. The balance sheet filed in support of the return of income tax showed three creditors as follows:

Rs.

1. K.K. Trading Corporation, Bombay

1,09,463

2. Reliable Trading Co., Bombay

44,949

3. Amritlal Bros., Bombay

36,151

In the books of account the assessee had shown purchases of Rs. 85,773, Rs. 44,949 and Rs. 36,151 from the aforesaid parties, respectively. The assessee had also filed copies of accounts of these parties as appearing in the books of account for different years showing purchases alleged to have been made during the accounting periods of assessment years 1970-71 and 1971-72. The Assessing Officer initiated enquiries into the transactions with the abovenamed parties. Enquiries made from the State Bank of India revealed that cheques issued by the assessee purporting to be for payments in respect of purchases made from the said parties were bearer cheques and the payments thereof were received either by the assessee himself or by his employees. Enquiries revealed that firms styled as Reliable Trading Co. and K.K. Trading Corporation were not in existence at the addresses given by the assessee, while the third party Amritlal Bros, denied any dealings with the assessee. Thereafter the assessee moved a petition u/s 271(4A) of the income tax Act, 1961 ("the Act"). In that petition, he admitted that he had made an investment of about Rs. 90,000 outside the books of account and that money was utilised in making purchases from Bombay. He offered a sum of Rs. 80,000 to be assessed as his income. This disclosure petition was rejected by the Commissioner. In the meantime the Voluntary Disclosure of income and Wealth Ordinance, 1975 was promulgated and the assessee made another disclosure petition stating that Rs. 80,412 that was the credit balance in the accounts of Reliable Trading Co. and K.K. Trading Corporation, Bombay as on 3-12-1973 represented his own money which was utilised to make purchases from Bombay in respect of which he was unable to get any vouchers. It was also asserted that he had taken several other amounts as loans from his wife, mother and other members of the family. The wife and other members of the family also filed voluntary disclosure petitions under the aforesaid Ordinance declaring the respective amounts that were claimed to have been advanced as loan to the assessee during the period relevant to the assessment years 1970-71 to 1974-75.

2. The assessment for the assessment year 1972-73 in respect of the present assessee was completed by the ITO on 29-3-1976 u/s 143(3) of the Act. On a total income of Rs. 42,680 determining the said income the Assessing Officer did not make any addition to the income of the assessee in respect of the aforesaid transactions of purchases.

3. The Commissioner initiated action u/s 263 as in his view by not making addition in respect of the fictitious transactions, in the names of three parties referred to above, the Assessing Officer had made an assessment order that was erroneous and prejudicial to the interests of the revenue. The Commissioner, therefore, issued a show-cause notice to the assessee and after examining the matter he set aside the assessment observing that there was no evidence to show that the close relatives of the assessee had actually lent any money to him and the Assessing Officer had erred in accepting the assessee's contention

without analysing the facts of the case in the light of the relevant provisions of law. The Commissioner observed that since the matter has not been properly examined by the ITO, it would be in the interest of justice to restore the matter to him for further examination and for making an assessment de novo after allowing the assessee an opportunity of being heard.

4. The assessee then appealed to the Tribunal, which, after taking note of the observation made by the Commissioner, quashed the Commissioner's order by observing as below:

"We have heard the parties and have gone through the order of the Commissioner carefully. We find that the main objections of the Commissioner are that apart from the evidence in the shape of declaration by the assessee's various relations, there was no evidence that the amounts disclosed by the declarants were really made available to the assessee for investment in making purchases and that assuming the amounts were made so available to the assessee, there was no evidence that the assessee did utilise those amounts for making alleged purchases from Bombay parties. From these two circumstances the Commissioner has drawn an inference that the assessee made an attempt to hoodwink the department by making fictitious entries in the name of some bogus parties and when his dishonesty was detected an attempt was made to take refuge under the voluntary disclosure scheme. Since according to him the assessee did not come up with clean hands under that scheme also, he made another attempt to cheat the department by not making the entire disclosure in his own hands but by making it in the name of a number of his relations, he held the assessment order passed by the income tax Officer to be erroneous and prejudicial to the interests of the revenue.

As noted by us earlier, a number of cases have been cited by the parties. However, it is not really necessary for us to refer to each of them as there is possibly no dispute about the ratio laid down in those cases. In order to assume jurisdiction u/s 263, the Commissioner has to find that the order passed by the income tax Officer is erroneous and prejudicial to the interests of the revenue. To our mind this requires the Commissioner to be prima facie satisfied and it is not necessary that he should come to the final conclusion that a particular disallowance or an addition must necessarily be made. If that was so, there would have been no necessity for the Commissioner to set aside the assessment order and direct the income tax Officer to make a fresh assessment as contemplated in section 263. This, however, does not mean that the Commissioner u/s 263 can direct a fishing enquiry which might or might not result in some addition or disallowance. Therefore, according to us, particularly where Allahabad High Court has jurisdiction, the Commissioner must be found to be prima facie satisfied that the order passed by the income tax Officer is erroneous and prejudicial to the interest of the revenue. From the two objections taken by him to the order of the income tax Officer, we do not think it can be reasonably held that the Commissioner was prima facie satisfied about the error

and prejudice in the order. Accordingly, we cancel the order of the Commissioner and restore that of the income tax Officer."

5. The Commissioner then moved an application u/s 256(1) and at his instance the Tribunal vide reference dated 6-8-1980 has referred the following question of law for the opinion of this Court:

"Whether, on the facts and in the circumstances of the case, the income tax Appellate Tribunal was correct in law in cancelling the order u/s 263 of the income tax Act, 1961 passed by the Commissioner of income tax in restoring the order of the income tax Officer ?"

6. Pursuant to the Commissioner's order and in compliance therewith the ITO made a fresh assessment vide order dated 29-5-1980 wherein, in addition to the income originally assessed, he treated a sum of Rs. 2,66,878 as income of the assessee in respect of various transactions which had been the subject-matter of investigation. The assessee appealed to the Commissioner (Appeals), who vide order dated 19-2-1981 annulled fresh assessment, on the ground that the Commissioner's order u/s 263 which gave jurisdictions to the Assessing Officer to make fresh assessment had been set aside by the Tribunal. Against the order of the Commissioner (Appeals) the revenue came in appeal before the Tribunal which vide order dated 7-6-1982 upheld the view taken by the Commissioner (Appeals). The Commissioner, thereafter moved an application u/s 256(1) for referring a question of law arising out of the Tribunal's order dated 7-6-1982 and the Tribunal rejected the same.

7. Feeling aggrieved the Commissioner has moved the present application [IT A No. 149 of 1983 u/s 256(2) of the Act] praying that the Tribunal be directed to state a case and to refer the following question for the opinion of this Court:

"Whether the income tax Appellate Tribunal New Delhi was justified in law in holding that there was no infirmity in the order of the Commissioner of income tax (Appeals), Agra, when reference Application u/s 256(2) of the income tax Act, 1961 in respect of order u/s 263 of income tax Act for assessment year 1972-73 is pending for disposal ?"

8. We will first take the reference being IT Reference No. 299 of 1980. The facts as narrated above have been stated in the order of the Commissioner to which the Tribunal has also made a brief reference in its order. The Tribunal did not controvert the same nor were those facts controverted before us. The assessment order in question does not deal with these issues at all and it is totally silent on the subject giving an impression as if nothing worth enquiry and investigation was noticed and no enquiry whatsoever was made while, in fact, the ITO had found some transactions which required investigation and about which an investigation produced result adverse to the assessee. Yet while framing the assessment the Assessing Officer completely shut his eyes and did not make any reference whatsoever to the relevant facts in the assessment order, what to say of recording a specific finding in favour or against the

assessee. That is why the Commissioner in his order says that by doing so the ITO "virtually" accepted the assessee's case.

9. The learned standing counsel contended that the assessment order in question was totally silent on the issue about which the Assessing Officer had made enquiries and had found material which was prima facie adverse to the assessee and his failure to discuss the effects in the assessment order and record a specific finding makes the assessment order erroneous and prejudicial to the interests of the revenue. Criticising the approach of the Tribunal he urged that even the Tribunal has not observed that the material on record was sufficient to establish that undisclosed investment in purchase of goods had been financed from loans, raised from various close relatives who had made voluntary disclosures under the aforesaid Ordinance. He pointed out that the Tribunal's approach that the Commissioner should have himself recorded a finding about the genuineness of the transactions in question and should not have set aside the same and remitted the matter to the Assessing Officer was also erroneous. He placed reliance in *Swarup Vegetable Products Industries Ltd. (No. 1) Vs. Commissioner of Income Tax*, in which this Court observed that it is beyond dispute that u/s 263 the Commissioner has power to set aside the assessment order and send the matter for fresh assessment if he is satisfied that further enquiries are needed and that the order of the ITO is prejudicial to the interests of the revenue. He also placed reliance on a judgment of the Hon'ble Calcutta High Court in *Commissioner of Income Tax Vs. Panna Devi Saraogi*, in which also the view taken was that the Commissioner has the power to cancel the assessment and direct fresh assessment to be made that will give the assessee the fullest opportunity of making out its case at that stage. The same view was taken by the Hon'ble Gujarat High Court in *Additional Commissioner of Income Tax, Gujarat Vs. Mukur Corporation*, .

10. The learned counsel for the assessee, on the other hand, contended that in order to enable the Commissioner to acquire jurisdiction u/s 263 to interfere with the assessment order, it is to be made out that the assessment order is erroneous as well as prejudicial to the interests of the revenue. According to him, it is not enough that the Commissioner brands the assessment order as erroneous. It has to be demonstrated to be so. According to him, there may be some loss to the revenue but that would not amount to prejudice to the revenue and if income has escaped assessment, action can be taken u/s 147. In that situation section 263 could not be invoked by the Commissioner. He further contended that where two views are possible on the same issue the Commissioner would not be justified in taking action u/s 263 simply because he does not agree with the view taken by the Assessing Officer. Reliance was placed on *Venkatakrishna Rice Company Vs. Commissioner of Income Tax*, . The Hon'ble Madras High Court has exhaustively dealt with the nature of the Commissioner's power u/s 263 and the learned counsel for the assessee took us through the following observations appearing:

In our judgment, the expression "prejudicial to the interest of the revenue" is not to be construed in a petty fogging manner, but must be given a dignified construction. It may be noted that the use of the expression "Revenue" in our opinion, is significant. It denotes some kind of abstraction or symbol in the same sense in which the expression "crown" is used to distinguish it from any person enthroned. The interest of the revenue is not to be equated to rupees and paise, merely. There is a biblical saying that we do not live by bread alone. Varying this saying, it may be said that the revenue does not live by tax alone. In this sense, therefore, the interests of the revenue are not tied up merely with realising as much revenue as possible, willy-nilly, merely looking to the productivity aspect of taxation. The jurisdiction of the Commissioner u/s 263 is undoubtedly a supervisory jurisdiction. It is intended for interference in special cases to counteract orders which are erroneous as well as prejudicial to the interests of the revenue. In this context, therefore, the expression "prejudicial to the interests of the revenue" must be regarded as involving a conception of Acts or orders which are subversive of the administration of revenue. There must be some grievous error in the order passed by the income tax Officer, which might set a bad trend or pattern for similar assessments, which on a broad reckoning, the Commissioner might think to be prejudicial to the interests of revenue administration. There might be cases where the Commissioner might wish to interfere with an order of the income tax Officer in order to safeguard the fair name and reputation of the income tax Department without any thought of going into the particular aspects of the assessment. Assessments which are mala fide, politically and communally motivated, maybe, however, set aside as being prejudicial to the interests of the revenue. It is unnecessary, for us to illustrate the point any further. All that we wish to observe is that the scope of the interference under this section is not to set aside merely unfavourable orders and bring to tax some more money to the treasury. Nor is the section meant to get at sheer escapement of revenue which, as is well known, is taken care of by provisions elsewhere in the Act such as, for instance, section 147 of the Act. The prejudice must be prejudice to the revenue administration.

[Emphasis supplied] (p. 137)

Reliance was also placed on H. KENCHE GOWDA Vs. STATE OF KARNATAKA. (JOINT COMMISSIONER OF AGRL. Income Tax)., in which it was held that the revisional power u/s 35 of the Karnataka Agricultural Act, 1957 could not be invoked in respect of the income of a different assessee that had escaped assessment and for which action can be taken u/s 36 of the said Act.

11. The learned counsel for the assessee contended that in this case the alleged creditors being the wife and other relatives of the assessee had made voluntary disclosures claiming therein that the disclosed amounts had been advanced as loan to the present assessee and those disclosures have been accepted. There was sufficient proof that the assessee's contention was correct and in view of the instructions of the CBDT that such disclosure would not be questioned, the order

of the Assessing Officer in accepting the assessee's case cannot be said to be erroneous. For this view reliance was placed on CIT v. Mukund Family Trust [1987] UPTC 2038 and Rajan Ramkrishna Vs. Commissioner of Wealth-tax, Gujarat-I, . The learned counsel contended that the Tribunal had enough material before it on which the assessee's contention could be sustained though for some reasons it did not refer to the same in its order.

12. We have given our anxious consideration to the respective arguments. It cannot be in dispute that while exercising powers u/s 263 to interfere with the assessment order in question it was necessary for the Commissioner to show that the assessment order was erroneous and prejudicial to the interests of revenue and from a perusal of the assessment order, which has completely omitted the issue from consideration, and the various details referred to above and discussed by the Commissioner, we are of the opinion that the Commissioner had successfully demonstrated that the assessment order was erroneous and prejudicial to the interests of the revenue. The Commissioner has indirectly referred to the ITO's omission when he says that the Assessing Officer has virtually accepted the assessee's contention. If the Assessing Officer had actually recorded any -finding on the issue and then accepted the assessee's claim the things could be different. The omission of the Assessing Officer to discuss the issue and record a categorical finding has deprived the Commissioner of knowing the reasons why the Assessing Officer did not make addition on account of the discrepancies noticed by him. That is the reason why the Commissioner instead of recording a finding himself has, to be fair to the assessee, set aside the assessment order and restored the issue for determination by the Assessing Officer so that either side has a proper opportunity of establishing its case.

13. While making an assessment, the ITO has a varied role to play. He is the investigator, prosecutor as well as adjudicator. As an adjudicator he is an arbitrator between the revenue and the taxpayer and he has to be fair to both. His duty to act fairly requires that when he enquires into a substantial matter like the present one, he must record a finding on the relevant issue giving, howsoever briefly, his reasons therefor. In S.N. Mukherjee v. Union of India AIR 1990 SC 1984, it has been observed by the Hon"ble Supreme Court as follows:

"35. Reasons, when recorded by an administrative authority in an order passed by it while exercising quasi-Judicial functions, would no doubt facilitate the exercise of its jurisdiction by the appellate or supervisory authority. But the other considerations, referred to above, which have also weighed with this court in holding that an administrative authority must record reasons for its decision are of no less significance. These considerations show that the recording of reasons by an administrative authority serves a salutary purpose, namely, it excludes chances or arbitrariness and ensures a degree of fairness in the process of decision-making. The said purpose would apply equally to all decisions and its application cannot be confined to decisions which are subject to appeal, revision or judicial review. In our opinion, therefore, the requirement that reasons be

recorded should govern the decisions of an administrative authority exercising quasi-judicial functions irrespective of the fact whether the decision is subject to appeal, revision or judicial review. It may, however, be added that it is not required that the reasons should be as elaborate as in the decision of a court of law. The extent and nature of the reasons would depend on particular facts and circumstances. What is necessary is that the reasons are clear and explicit so as to indicate that the authority has given due consideration to the points in controversy. The need for recording of reasons is greater in a case where the order is passed at the original stage. The appellate or revisional authority, if it affirms such an order, need not give separate reasons if the appellate or revisional authority agrees with the reasons contained in the order under challenge." (p. 1995)

Similar view was earlier taken by the Hon<sup>ble</sup> Supreme Court in *Siemens Engg. & Mfg. Co. Ltd. v. Union of India* AIR 1976 SC 1785. It is settled law that while making assessment on assessee, the ITO acts in a quasi-judicial capacity. An assessment order is amenable to appeal by the assessee and to revision by the Commissioner under sections 263 and 264. Therefore, a reasoned order on a substantial issue is legally necessary. The judgment of the Hon<sup>ble</sup> Madras High Court on which reliance was placed by the learned counsel for the assessee also points to the same direction. We have reproduced above the relevant portion of the observations made by the learned Judges. They have held that orders which are subversive of the administration of revenue, must be regarded as erroneous and prejudicial to the interests of the revenue. If the Assessing Officers are allowed to make assessments in an arbitrary manner, as has been done in the case before us, the administration of revenue is bound to suffer. If without discussing the nature of the transaction and materials on record, the Assessing Officer had made certain addition to the income of the assessee, the same would have been considered erroneous by any appellate authority as being violative of the principles of natural justice which require that the authority must indicate the reasons for an adverse order. We find no reason why the same view should not be taken when an order is against the interests of the revenue. As a matter of fact such orders are prejudicial to the interests of both the parties, because even the assessee is deprived of the benefit of a positive finding in his favour, though he may have sufficiently established his case.

14. As is evident from the Tribunal's order, the Tribunal has not discussed the material on record and has not recorded any finding that the assessee's case stood established from the material on record. The Tribunal's view that the Commissioner should have himself recorded a finding is not in accordance with the view taken by this Court in the case of *Swaroop Vegetable Products Industries Ltd.* (supra).

15. The contention of the learned counsel for the assessee that where action u/s 147 to bring to tax the escaped income is permissible u/s 147, no action u/s 263 can be taken, maybe correct. But on the facts and circumstances of this case, we

are of the view that no action u/s 147 could be justified after the assessment had been made. The reason is that the matter was wide open before the Assessing Officer. He inquired into the transactions, procured some evidence, apprised the assessee of his view and the assessee also made his submissions and led evidence before him. In respect of such a matter, no action u/s 147 can be initiated and there is no doubt about the legal position in this regard.

16. As regards the legal effect of the disclosures made by the alleged creditors, we are of the view that we should not express any opinion and it would be for the respective authorities to take them into account in arriving at their finding.

17. In view of the above discussion, we are of the opinion that the Commissioner was right in holding that the impugned assessment order was erroneous and prejudicial to the interests of the revenue and setting aside the same and directing the Assessing Officer to make a fresh assessment, and the Tribunal was not right in cancelling the Commissioner's order passed u/s 263. Accordingly, we answer the question referred to this Court in the negative and in favour of revenue. No order as to costs.

18. Now we come to the IT Appeal No. 149 of 1983. As stated above, following the Tribunal's order, the consequential assessment order was annulled by the Commissioner (Appeals) and his order was upheld by the Tribunal. The Tribunal also refused to make a reference. The learned counsel for the assessee contended that the Commissioner (Appeals) was bound to follow the Tribunal's order and the Tribunal was also bound to follow its earlier order and, therefore, the order passed by the Tribunal is in accordance with law and no question of law can be said to arise out of the Tribunal's order. Reliance was placed on CIT v. Dhampur Sugar Mills Ltd. [1988] 170 ITR 449 in which this Court held that where the Commissioner's order u/s 263 had been set aside, the Assessing Officer had no jurisdiction to pass a fresh assessment order. That was a case in which the Tribunal's order quashing the Commissioner's order u/s 263 had become final as no reference u/s 256 had been sought. Reliance was also placed on a similar decision of the Madhya Pradesh High Court in GOVINDRAM SEKSARIA CHARITY TRUST Vs. Income Tax OFFICER, "C" WARD, CIRCLE-I, AND OTHERS., . In this case also the Tribunal's order was not challenged by way of reference and the Hon'ble Madhya Pradesh High Court, therefore, held that till the order passed by the Tribunal was set aside, the revenue was bound by the order passed by the Tribunal. Reference was also made to a recent decision of the Hon'ble Supreme Court in Union of India v. Kamlakshi Finance Corporation Ltd. AIR 1992 SC 711 in which as Assistant Collector, Central Excise had passed an order disobeying the order passed by the appellate authority. The High Court condemned the conduct of the Assistant Collector and on appeal the Hon'ble Supreme Court upheld the High Courts' view. The Hon'ble Supreme Court stressed upon the need to follow judicial discipline and to give effect to orders of higher appellate authorities.

19. There can be no dispute with the principles of law and propriety laid down in

the aforesaid rulings but the facts of the present case are different. As already stated, when the Tribunal passed the impugned order dated 7-6-1982, it had already referred a question of law arising out of its order which it had followed while passing the impugned order and we have recorded above an opinion on that question disapproving the view taken by the Tribunal. As a consequence, the Tribunal has to pass an order u/s 260 in accordance with the opinion of this Court. That would be an order dismissing the assessee's appeal and upholding the order of the Commissioner, as a result of which the reassessment made by the Assessing Officer cannot be said to be without Jurisdiction or against the directions of the Tribunal as the Tribunal's order passed earlier would be deemed to have never been passed. However, the fresh assessment order passed by the Assessing Officer has been set aside by the Commissioner (Appeals) and that order has been upheld by the Tribunal by an order from which the proposed question of law is said to arise. Therefore, a queer situation has arisen and it has to be examined how to retrieve the situation. We may mention that the Hon'ble Supreme Court in Commissioner of Income Tax Vs. Bansi Dhar and Sons, had the occasion to deal with the effect of a reference u/s 256 vis-a-vis the powers of the Tribunal relating to the appeal which it had disposed of. The Hon'ble Supreme Court took the view that till the question of law is answered by the High Court or the Supreme Court and the Tribunal passes an order u/s 260 in accordance with the opinion of the High Court or the Supreme Court, the appeal is kept pending before the Tribunal. The following observations are important:

"After the High Courts and, in cases of appeals to the Supreme Court, the Courts answer the question in any manner or give certain opinion, the Appellate Tribunal would dispose of the appeals in accordance with the opinions expressed or answers given by the High Courts or the Supreme Court. Therefore, under the scheme, the appeal is kept pending before the Tribunal and the appellate jurisdiction is retained by the Tribunal, but the High Court exercises an advisory or consultative jurisdiction.

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... When a question of law arises, the Tribunal can and in certain circumstances must seek, at the instance of the assessee or in its own motion or at the instance of the revenue, the opinion of the High Court on such question. The Jurisdiction exercised by the High Courts is purely advisory, it is not that of a civil court exercising original, or any appellate or revisional, jurisdiction. Therefore, the powers and jurisdiction of the High Courts, and in certain cases of the Supreme Court, are those which are expressed and conferred upon them and also those which inhere in the exercise of that jurisdiction or are ancillary or those which subserve the exercise of that function and jurisdiction of giving advice. The appeal is kept pending before the Appellate Tribunal." (pp. 672-673)

20. In our view, therefore, a question of law does arise out of the order of the Tribunal and we direct the Tribunal to state a case and refer the following question for the opinion for this Court:

"Whether, on the facts and in the circumstances of the case, the Tribunal was right in upholding the order of the Commissioner (Appeals), Agra whereby he annulled the assessment order dated 29th May. 1980 by following the Tribunal's order dated 31-12-1979?"

No order as to costs.