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Date of Publishing: July 25, 2024

Time to pull back revisionary power arrayed u/s 263**RAJI NATHANI**

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Finality of Assessments

On the finality of assessments as a general rule when once the Income-tax Officer has made an assessment that assessment is settled and on the general principles of law governing estoppels neither the subject nor the Crown ought to be at liberty to go behind the amount of profits and gains when once determined by any competent authority. *Mahaliram Ramjeedas, In re* [\[1938\] 6 ITR 265 \(Cal\)](#). Also with reference to the doctrine of res judicata the Madras High Court in *Trichinopoly Tennore Hindu Permanent Fund Ltd. v. CIT* [\[1937\] 5 ITR 703 \(Mad\)](#) held that the Income-tax Officer does not constitute a Court, and, therefore, the doctrine can have no application. But his assessments are final, unless they can be reopened under some provision of the Act. There is therefore a scheme for reopening of assessment under the Act in the form of section [263](#).

Section 263 - Revision of orders prejudicial to revenue.

263. (1) The Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the Assessing Officer or the Transfer Pricing Officer, as the case may be, is erroneous in so far as it is prejudicial to the interests of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including, —

Explanation 2.—For the purposes of this section, it is hereby declared that an order passed by the Assessing Officer or the Transfer Pricing Officer, as the case may be, shall be deemed to be erroneous in so far as it is prejudicial to the interests of the revenue, if, in the opinion of the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner,—

- (a) the order is passed without making inquiries or verification which should have been made;
- (b) the order is passed allowing any relief without inquiring into the claim;
- (c) the order has not been made in accordance with any order, direction or instruction issued by the Board under section [119](#); or
- (d) the order has not been passed in accordance with any decision which is prejudicial to the assessee, rendered by the jurisdictional High Court or Supreme Court in the case of the assessee or any other person.

A bare reading of Section [263](#) also makes it clear that 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 interest of the revenue. If one of them is absent i.e. if the order of the AO is erroneous but is not prejudicial to the revenue or if it is not erroneous but it is prejudicial to the revenue - recourse cannot be had to provisions of the 263(1) of the Act as held in *Malabar Industrial Co. Ltd. v. CIT* [[2000](#)] [109 Taxman](#) 66/243 ITR 83 (SC).

Chaturvedi and Pithisaria

Chaturvedi and Pithisaria in their treatise on Income Tax law reveals that prior to the Act of 1922, there was no provision enabling the revenue to file appeals against assessment orders prejudicial to its interests. The omission was repaired by the enactment of section [33](#) more or less in the same terms as present section [263\(1\)](#) of the 1961 Act which empowers the Commissioner to revise orders passed by subordinate authorities and pass such orders as he deems fit, "not being an order prejudicial to the assessee." Section 263 thus provides a remedial power to the Commissioner to revise an assessment in the various situations referred to clause (a) to (d) in Explanation 2.

The Rationale

Section 263 is meant to give powers to the territorial administrative Commissioner to identify cases where an order has been passed by jurisdictional assessing officer without making proper inquiries or verification which should have been made in his opinion.

Shift in the Backdrop

Assessment scheme has undergone a major change in 2020 when the Faceless Assessment Scheme was launched which abolished the earlier system of tax administration and assessment based on territorial jurisdiction. In the earlier system all assessment related inquiries and verifications are undertaken by the territorial/jurisdictional assessing officer (JAO) at his whims and fancies. All the discretion vested in him to plan the course of assessment proceedings.

Relevant extracts of assessment

S. 144B- Faceless Assessment.

144B. (1) Notwithstanding anything to the contrary contained in any other provision of this Act, the assessment, reassessment or recomputation under sub-section (3) of section [143](#) or under section [144](#) or under section [147](#), as the case may be, with respect to the cases referred to in sub-section (2), shall be made in a faceless manner as per the following procedure, namely:—

(3) The Board may, for the purposes of faceless assessment, set up the following Centre and units and specify their functions and jurisdiction, namely:—

- (i) a National Faceless Assessment Centre to facilitate the conduct of faceless assessment proceedings in a centralised manner;
- (ii) such assessment units, as it may deem necessary to conduct the faceless assessment, to perform the function of making assessment, which includes identification of points or issues material for the determination of any liability (including refund) under this Act, seeking information or clarification on points or issues so identified, analysis of the material furnished by the assessee or any other person, and such other functions as may be required for the purposes of making faceless assessment, and the term "assessment unit", wherever used in this section, shall refer to an Assessing Officer having powers so assigned by the Board;
such verification units, as it may deem necessary to facilitate the conduct of faceless assessment, to perform the function of verification, which includes enquiry, cross verification, examination of books of account, examination of witnesses and recording of statements, and such other functions as may be required for the purposes of verification and the term "verification unit", wherever used in this section, shall refer to an Assessing Officer having powers so assigned by the Board;
- (iv) such technical units, as it may deem necessary to facilitate the conduct of faceless assessment, to perform

the function of providing technical assistance which includes any assistance or advice on legal, accounting, forensic, information technology, valuation, transfer pricing, data analytics, management or any other technical matter under this Act or an agreement entered into under section [90](#) or [90A](#), which may be required in a particular case or a class of cases, under this section and the term "technical unit", wherever used in this section, shall refer to an Assessing Officer having powers so assigned by the Board;

- (v) such review units, as it may deem necessary to facilitate the conduct of faceless assessment, to perform the function of review of the income determination proposal assigned under sub-clause (b) of clause (xvi) of sub-section (1), which includes checking whether the relevant and material evidence has been brought on record, relevant points of fact and law have been duly incorporated, the issues requiring addition or disallowance have been incorporated and such other functions as may be required for the purposes of review and the term "review unit", wherever used in this section, shall refer to an Assessing Officer having powers so assigned by the Board.

Current Mechanism

In the new system the assessment worked is handled by faceless assessing officer (FAO). He is assisted by a verification unit, a technical unit as well as a review unit to facilitate the work of assessment. Vide Ss.(1) of section [144B](#) a request is initiated for gathering of information, documents or evidence, for conduct of enquiry or verification and for seeking technical assistance. Ss. (2) provides that the faceless assessment under sub-section (1) shall be made in respect of such territorial area, or persons or class of persons, or incomes or class of incomes, or cases or class of cases, as may be specified by the Board. Ss. (3) of section 144B provides further that such verification units shall facilitate the conduct of faceless assessment and in this regard shall perform the function of verification, which includes enquiry, cross verification, examination of books of account, examination of witnesses and recording of statements, and such other functions as may be required for the purposes of verification. Ss. (4) further provides that the verification unit shall have its own set up with following authorities, namely: —

- (i) Additional Commissioner or Additional Director or Joint Commissioner or Joint Director, as the case may be;
- (ii) Deputy Commissioner or Deputy Director or Assistant Commissioner or Assistant Director, or Income-tax Officer, as the case may be;
- (iii) such other income-tax authority, ministerial staff, executive or consultant, as may be considered necessary by the Board.

Power of sec 263 in the transformed set-up is rather a de trop

Given that there is both a verification unit as well as technical and review unit to facilitate the conduct of assessment there shall be no any further rationale for the Commissioner to call and review record of assessment to form an opinion whether or not a particular order is passed without verification or enquiry which should have been made and to hold the same as erroneous on that ground. Even when according to him a particular verification or inquiry is not made it would only point a failure to utilise given resources/units for carrying out enquiry and verification and that shall not derail the assessment by calling it erroneous.

Under the faceless scheme and procedures outlined in section 144B the Government has consciously provided different units for different tasks to facilitate the conduct of faceless assessment and one of such units is meant to do enquiries and verifications. Over and above there is a technical unit to provide technical assistance on any technical matter. More so there is a review unit to check whether all the facts, law and procedures are followed at each stage.

Given these checks and balances there is no any rationale anymore to provide a further right of appeal in the form of revisionary powers u/s 263 to the Assessing Officer/NaFAC against the assessment order on the ground that a particular order is passed without verification or enquiry which should have been made.

In the current scenario of conscious and supervised nature of assessment procedures drawn u/s 144B with no any subordinate structure it is therefore time to discontinue and withdraw section 263 remedial power to the Commissioner to order for revision of an assessment for any kind of lack of verification or inquiry or for reasons that the order is

passed allowing any relief without inquiring into the claim or that the order has not been made in accordance with any order, direction or instruction issued by the Board under section [119](#) or that the order has not been passed in accordance with any decision which is prejudicial to the assessee, rendered by the jurisdictional High Court or Supreme Court in the case of the assessee or any other person.

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