IN THE HIGH COURT OF HIACHAL PRADESH SHIMLA.

ITA No. 23 of 2005.

Judgment reserved on: 12.4.2007

Date of Decision: April 18, 2007.

Commissioner of Income Tax ….Appellant.

Versus.

Rajinder Kumar Gandhi …Respondent.

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The Hon'bl;e Mr. Justice Deepak Gupta, Judge.
The Hon'ble Mr. Justice Surinder Singh, Judge.

Whether approved for reporting?

For the Appellant: Mr. Vinay Kuthiala, Advocate.

For the Respondent: Mr. S.K.Mukhi, Advocate.

Deepak Gupta, J.

This appeal by the revenue is directed against the order of the Income Tax Appellate Tribunal, Chandigarh in ITA No. 175/Chandi/2004 dated 25.2.2005.

The brief facts of the case are that the assessee is the proprietor of two industrial units and has claimed deduction under Section 80IB. Unit No.I is in its 7th year of production and is engaged in manufacturing of jericans. Unit No.II is in its 5th year of production and is manufacturing water storage tanks. The main dispute relates to the assessment year 2001- 2002. During the assessment year, the assessee has shown net loss of Rs.43,220/- from Unit No.1 and profit of Rs. 14,89,675/- from Unit No.II. The entire income of Unit No.II was claimed as exemption under Section 80-IB of the Income Tax Act.

The case of the assessee was taken up for scrutiny proceedings after obtaining approval of the CIT, wherein the A.O. was specifically required to check the deduction under Section 80-IB and the Assessing Officer while making the assessment under Section 143 (3) of the Income Tax Act ((for short: the Act) examined the entire record and accepted the plea of the assessee vide her order dated 14.2.2003.

The Commissioner, Income Tax (CIT) took up the matter under Section 263 of the Act and notice was issued to the assessee. The CIT was of the view that the assessee was transferring the income of Unit No.1 to Unit No.2 since the Unit No.1 would soon cease to be entitled to get the benefit of Section 80-IA. The manufacturing expenses of Unit No.2 were also being transferred to Unit No.1 to inflate the expenses of Unit No.1 and decrease its profits.

The version of the assessee before the CIT as well as before this Court is that there has been mushroom growth of units manufacturing jerican in the area in question and, therefore, gross profit rates for jerican has fallen and therefore , there is a disparity between the profit and growth rates of two units. The CIT vide a detailed order came to the conclusion that there was an abnormally huge difference between the profit rates declared by the assessee in these two units, especially in view of the facts that in both the units the same raw material was being used and services of similarly trained staff are required for manufacturing the products. The CIT was obviously influenced by the fact that whereas unit No.1 is entitled to tax deduction @ 25% only and Unit No.2 was entitled to 100% tax exemption. The CIT after considering a number of documents and other material on record has in exercise of his powers under Section 263 of the Act come to the conclusion that the matter needs to be re-examined and directed the A.O. to look into the matter afresh.

The assessee filed an appeal before the Tribunal and the Tribunal after considering the entire facts, held as follows:

> " We have also considered the fact that the assessee was maintaining separate books of account for both the units and had separate electrical registration and industrial registration. After considering all the facts and circumstances of the case, we find that the assessee during original proceedings made under scrutiny on the basis of same reasons which made CIT to set aside the assessment u/s 143(3), since the assessee had produced all the details and relevant material evidence and explanation before the AO in support of its claim u/s 80IB and expenses debited to profit and loss account and no defects could be pointed out in this regard u/s 143(3) proceedings, in our considered opinion, the assumption of jurisdiction by the CIT u/s 263 in the present case on the same ground while approving the case for scrutiny u/s 143(3), keeping in view the fact that the AO had carried out all enquiries as he felt necessary before completing the assessment u/s 143(3) and mere presumption of the CIT that the assessee had diverted its expenditure from unit 2 to Unit 1, is not at all justified. We, in view of the above facts and taking totality of facts and circumstances of the present case, are of the view that the CIT was not justified in assuming the jurisdiction u/s 263 while setting aside the assessee framed by the AO u/s 143(3). We accordingly cancel the order passed by the CIT and accepted the grounds raised in the assessee's appeal."

This order is under challenge before us and the following questions of law arise for determination in this case:-

> "2. Whether on the facts and in the circumstances of the case the Hon'ble Tribunal was right in law in canceling the order u/s 263 without giving finding on any of the above points on the basis of which order u/s 263 was passed by the CIT.
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> 3. Whether on the facts and in the circumstances of the case, the ld. Tribunal was right in law holding that the case was selected for scrutiny with the prior approval of the CIT, then he could not review the same u/s 263 however erroneous or prejudicial the order of assessment passed by the Assessing Officer would have been."

A perusal of the order of the Tribunal quoted above, clearly shows that the Tribunal has disposed of the appeal of the assessee mainly on the ground that since the original assessment proceedings had been made under scrutiny on the basis of the same reasons, therefore, the CIT should not have set aside the assessment for the very same reasons under Section 263 of the Act. This finding of the Tribunal is against the judgment of the apex Court in **T.N.Civil Supplies Corpn Ltd. v. Commissioner of Income Tax, Chennai,** (2003) 9 SCC 235. The apex Court has clearly held that the phrase "order passed by the Income Tax Officer" under Section 263 cannot be limited to exclude the order passed by the Income Tax Officer on the direction of the superior authority. Merely because the CIT had earlier approved the assessment of the returns of the assessee on scrutiny under Section 143 on similar grounds could not debar the jurisdiction of the CIT under Section 283. In fact this position of law was not seriously contested before us. However, Shri Mukhi appearing for the assessee has contended that the CIT could not have exercised his powers under Section 263 without first coming to the conclusion that the order of the AO was erroneous and that it was prejudicial to the interest of the revenue.

We are not inclined to go into the question because in our opinion the Income Tax Appellate Tribunal has not decided this question at all and has only set aside the order of the CIT on the ground that the CIT should not have exercised the powers under Section 263 since on the same grounds it had approved the case for scrutiny of the assessee under Section 143(3). We find that the Tribunal has not dealt with the matter on merits at all. We accordingly, set aside the order of the Tribunal and hold that notwithstanding the fact that the CIT had granted approval for scrutiny of the assessment of the returns of the assessee under Section 143(3) on the similar grounds, the CIT was not debarred

from taking cognizance of the case under Section 263. Since the Tribunal has not dealt with the matter on merits, we remand the case to the learned Tribunal who shall hear the parties and give its finding on all the rival contentions of the parties.

Before parting with the case, we note with dismay the fact that the Income Tax Officer has made another assessment on 31.3.2004, even though the order of the CIT had been set aside on 25.2.2005. It is indeed surprising that the Income Tax Officer proceeded to decide the matter even after the orders of the CIT had been set aside. Affidavit- in-reply has been filed by the concerned Income Tax Officer. According to him, the assessee was not appearing before him and was not cooperating with him and repeated adjournments were being asked. He has admitted that on 2.3.2005, the assessee through his counsel forwarded an uncertified copy of the ITAT, Chandigarh dated 25.5.2005. The explanation is that since no official intimation was received by him and since the assessment was becoming time barred, he proceeded to make the assessment. We are totally unhappy with the manner in which the Income Tax Officer proceeded with the matter. Once it had been brought to his notice that the order of the CIT has been set-aside by the ITAT, judicial propriety demanded that he should have asked the party to produce a certified copy of the order or should himself have made inquiry with regard to this order. In this behalf it would be pertinent to mention that in the grounds of appeal filed by the Commissioner, Income Tax, it is mentioned that notice of the order of the ITAT was served upon him on 24.3.2005. In fact, it was the duty of the CIT also to have informed the Assessing Officer about the order of the ITAT.

We are unable to accept the explanation of the AO and the CIT in this behalf. We are, therefore, of the view that the assessment order dated 31.3.2005 passed by the AO being against the order of the ITAT

was wholly illegal and nonest and the same is accordingly quashed and set aside.

In view of the above discussion, we partly allow the appeal of the revenue and remand the matter to the ITAT to consider the appeal of the assessee on merits.

(Deepak Gupta), J

April 18, 2007. (Surinder Singh), J.
s.

IN THE HIGH COURT OF HIACHAL PRADESH SHIMLA.

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Rajinder Kumar Gandhi …Respondent.

Judgment for consideration, please.

(Deepak Gupta), J.

I agree / do not agree.

(Surinder Singh), J.

List the appeal for pronouncement of judgment on April 18, 2007.

(Deepak Gupta), J.

Court Secy.