

The provisions of Section 263 and various judgments and decisions rendered with regard to Section 263 of the Act.

Important points

It is well settled law that for invoking the provisions of section 263 of the Act both the conditions that the order must be erroneous and prejudicial to the interest of revenue needs to be satisfied.

- A. THE ORDER MUST BE ERRONEOUS AND THE ORDER OF ASSESSMENT ITSELF SHOULD BE PREJUDICIAL TO THE INTERESTS OF THE REVENUE AND THIS PREJUDICE HAS TO BE PROVED BY REFERENCE TO THE ASSESSMENT ORDER ONLY. Kindly see Point 3A.**
- B. IN ORDER TO INVOKE SECTION 263 ASSESSING OFFICER'S ORDER MUST BE ERRONEOUS AND ALSO PREJUDICIAL TO REVENUE AND IF ONE OF THEM IS ABSENT, I.E., IF ORDER OF INCOME-TAX OFFICER IS ERRONEOUS BUT IS NOT PREJUDICIAL TO REVENUE OR IF IT IS NOT ERRONEOUS BUT IS PREJUDICIAL TO REVENUE, RECOURSE CANNOT BE HAD TO SECTION 263(1). Kindly see point 3B**
- C. THE WELL- SETTLED PRINCIPLE IN CONSIDERING THE QUESTION AS TO WHETHER AN ORDER IS PREJUDICIAL TO THE INTERESTS OF THE REVENUE OR NOT IS TO ADDRESS ONESELF TO THE QUESTION WHETHER THE LEGITIMATE REVENUE DUE TO THE EXCHEQUER HAS BEEN REALISED OR NOT OR CAN BE REALISED OR NOT IF HIS ORDERS UNDER CONSIDERATION ARE ALLOWED TO STAND. Kindly see point 3C.**
- D. WHEN THE MATERIAL WAS THERE ON RECORD AND THE SAID MATERIAL WAS CONSIDERED BY THE INCOME-TAX OFFICER AND A PARTICULAR VIEW WAS TAKEN, THE MERE FACT THAT DIFFERENT VIEW CAN BE TAKEN SHOULD NOT BE THE BASIS FOR AN ACTION UNDER SECTION 263. THE ORDER OF REVISION WAS NOT JUSTIFIED. Kindly see point 3D.**
- E. Limitation period. Section 263 ITAT DELHI on May 14, 2020 Issues subject to revision u/s 263 were pertaining to original assessment u/s 143(3) and not the reopened assessment u/s 147; the limitation should also start from the original assessment. In this case as original assessment order u/s 143(3) of the act was passed on 16.01.2014, the revision thereof could have been taken up to 31.3.2016. Impugned order u/s 263 of the act was passed on 26/2/2019, therefore it is clearly beyond the limitation prescribed u/s 263 (2) of the act. JINDAL STEEL & POWER LTD. vs. PCIT. Kindly see point 3E.**

1. Section 263 of the Act reads as under:-

263. (1) The 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 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 an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment.

Explanation 1.—For the removal of doubts, it is hereby declared that, for the purposes of this sub-section,—

(a) an order passed on or before or after the 1st day of June, 1988 by the Assessing Officer shall include—

(i) an order of assessment made by the Assistant Commissioner or Deputy Commissioner or the Income-tax Officer on the basis of the directions issued by the Joint Commissioner under section 144A;

(ii) an order made by the Joint Commissioner in exercise of the powers or in the performance of the functions of an Assessing Officer conferred on, or assigned to, him under the orders or directions issued by the Board or by the Principal Chief Commissioner or Chief Commissioner or Principal Director General or Director General or Principal Commissioner or Commissioner authorised by the Board in this behalf under section 120;

(b) "record" shall include and shall be deemed always to have included all records relating to any proceeding under this Act available at the time of examination by the Principal Commissioner or Commissioner;

(c) where any order referred to in this sub-section and passed by the Assessing Officer had been the subject matter of any appeal filed on or before or after the 1st day of June, 1988, the powers of the Principal Commissioner or Commissioner under this sub-section shall extend and shall be deemed always to have extended to such matters as had not been considered and decided in such appeal.

Explanation 2.—For the purposes of this section, it is hereby declared that an order passed by the Assessing Officer 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 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.

(2) No order shall be made under sub-section (1) after the expiry of two years from the end of the financial year in which the order sought to be revised was passed.

(3) Notwithstanding anything contained in sub-section (2), an order in revision under this section may be passed at any time in the case of an order which has been passed in consequence of, or to give effect to, any finding or direction contained in an order of the Appellate Tribunal, National Tax Tribunal, the High Court or the Supreme Court.

Explanation.—In computing the period of limitation for the purposes of sub-section (2), the time taken in giving an opportunity to the assessee to be reheard under the proviso to section 129 and any period during which any proceeding under this section is stayed by an order or injunction of any court shall be excluded.

2. From perusal of the aforesaid section, it is apparent that there are mainly following features of the power for revision to be exercised u/s 263 of the Act by the Principal Commissioner or Commissioner (hereinafter is called as the PCIT/CIT).
 - A. The PCIT/CIT may call for and examine the records of any proceedings under the Act and for this purpose The PCIT/CIT need not to show any reason or record any reason to belief as it is required u/s 147 or 143(2) of the Act.
 - B. The PCIT/CIT may consider any order passed by the Assessing Officer as erroneous as well as prejudicial to the interest of the Revenue. This is exercised by calling for and examining the record available at this stage.
 - C. If after calling for and examining the records the PCIT/CIT considers that the order of the Assessing Officer is erroneous is so far it is prejudicial to the interest of the Revenue, the PCIT/CIT is bound to give an opportunity to the assessee of being heard and after that as he/she may deem fit, pass such order thereon as the circumstances of the case may justify including an order enhancing or modifying the assessment or cancelling assessment and directing a fresh assessment or make such enquiries as he deems necessary.
 - D. Under the provisions of section 263 of the Act PCIT/CIT can enhance or modify the assessment as a result of inquiry conducted and hearing of the assessee.
 - E. Limitation period and when to start

3. **It is well settled law that for invoking the provisions of section 263 of the Act both the conditions that the order must be erroneous and prejudicial to the interest of revenue needs to be satisfied.** This ratio stands laid down by various Hon'ble Courts few of which are as under:-

A. THE ORDER MUST BE ERRONEOUS AND THE ORDER OF ASSESSMENT ITSELF SHOULD BE PREJUDICIAL TO THE INTERESTS OF THE REVENUE AND THIS PREJUDICE HAS TO BE PROVED BY REFERENCE TO THE ASSESSMENT ORDER ONLY

Hon'ble Jurisdictional High Court of Madhya Pradesh in the case of H.H. Maharaja Raja Power Dewas (1983) 15 Taxman 363 in para 10 of this order held that

"However, the first argument, viz., that an assessment order without compliance with the procedure laid down in section 144B is erroneous but not prejudicial to the interests of the revenue conferring revisional jurisdiction on the Commissioner under section 263(1), has force. Under section 263(1) two pre-requisites must be present before the Commissioner can exercise the revisional jurisdiction conferred on him. First is that the order passed by the ITO must be erroneous. Second is that the error must be such that it is prejudicial to the interests of the revenue. If the order is

erroneous but it is not prejudicial to the interests of the revenue, the Commissioner can not exercise the revisional jurisdiction under section 263(1)

.....*There cannot be any prejudice to the revenue on account of the ITO's failure to follow the procedure prescribed under section 144B, and unless the prejudice to the interests of the revenue is shown, the jurisdiction under section 263(1) cannot be exercised by the Commissioner, even though the order is erroneous. The argument that such an order may possibly be challenged in appeal by the assessee, and for this reason it is prejudicial to the interests of the revenue, has no merit. Section 263(1) clearly contemplates that the order of assessment itself should be prejudicial to the interests of the revenue and this prejudice has to be proved by reference to the assessment order only. It cannot be argued that there is some possibility of the assessment order being challenged or revised in appeal and, therefore, on account of this contingency, the order becomes prejudicial to the interests of the revenue[emphasis supplied]*

B. IN ORDER TO INVOKE SECTION 263 ASSESSING OFFICER'S ORDER MUST BE ERRONEOUS AND ALSO PREJUDICIAL TO REVENUE AND IF ONE OF THEM IS ABSENT, I.E., IF ORDER OF INCOME-TAX OFFICER IS ERRONEOUS BUT IS NOT PREJUDICIAL TO REVENUE OR IF IT IS NOT ERRONEOUS BUT IS PREJUDICIAL TO REVENUE, RECOURSE CANNOT BE HAD TO SECTION 263(1)

- i. Hon'ble Apex Court in the case of Malabar Industrial Co. Ltd. - [2000] 243 ITR 83 - order pronounced on 10.02.2000 - HEAD NOTE - "Section 263 of the Income-tax Act, 1961 - Revision - Of orders prejudicial to interests of revenue - Assessment year 1983-84 - Whether in order to invoke section 263 Assessing Officer's order must be erroneous and also prejudicial to revenue and if one of them is absent, i.e., if order of Income-tax Officer is erroneous but is not prejudicial to revenue or if it is not erroneous but is prejudicial to revenue, recourse cannot be had to section 263(1) - Held, yes - Whether if due to an erroneous order of ITO, revenue is losing tax lawfully payable by a person, it will certainly be prejudicial to interests of revenue - Held, yes - Assessee-company entered into agreement for sale of estate of rubber plantation - As purchaser could not pay installments as scheduled in agreement, extension of time for payment of installments was given on condition of vendee paying damages for loss of agricultural income and assessee passed resolution to that effect - Assessee showed this receipt as agricultural income - Resolution passed by assessee was not placed before Assessing Officer - Assessing Officer accepted entry in statement of account filed by assessee and accepted same - Commissioner under section 263 held that said amount was not connected with agricultural activities and was liable to be taxed under head 'Income from other sources' - Whether, where Assessing Officer had accepted entry in statement of account filed by assessee, in absence of any supporting material without making any enquiry, exercise of jurisdiction by Commissioner under section 263(1) was justified - Held, yes.
- ii. Hon'ble Karnataka High Court in the case of V. G. Krishnamurthy - [1985] 20 Taxman 65 - order pronounced on 19.03.1984 - Para 10 - "Section 263 can be invoked by the Commissioner only when he prima facie finds that the order made by the ITO was erroneous and was prejudicial to the interests of the

revenue. Both these factors must simultaneously exist. An order that is erroneous must also have resulted in loss of revenue or prejudicial to the interests of the revenue. Unless both these factors co-exist or exist simultaneously, the Commissioner cannot invoke or resort to section 263. It cannot be exercised to correct every conceivable error committed by an ITO. Before the suo motu power of revision can be exercised, the Commissioner must at least prima facie find both the requirements of section 263, namely, that the order sought to be revised is prima facie erroneous and prejudicial to the interests of the revenue. If one of the other factor was absent, the Commissioner cannot exercise the suo motu power of revision under section 263." [emphasis supplied]

C. THE WELL- SETTLED PRINCIPLE IN CONSIDERING THE QUESTION AS TO WHETHER AN ORDER IS PREJUDICIAL TO THE INTERESTS OF THE REVENUE OR NOT IS TO ADDRESS ONESELF TO THE QUESTION WHETHER THE LEGITIMATE REVENUE DUE TO THE EXCHEQUER HAS BEEN REALISED OR NOT OR CAN BE REALISED OR NOT IF HIS ORDERS UNDER CONSIDERATION ARE ALLOWED TO STAND.

- i. Hon'ble Gujarat High Court in the case of Smt. Minalben S. Parikh - [1995] 215 ITR 81 - order pronounced on 17.10.1994 - Para 12 - "From the aforesaid, it can well be said that the well- settled principle in considering the question as to whether an order is prejudicial to the interests of the revenue or not is to address oneself to the question whether the legitimate revenue due to the exchequer has been realised or not or can be realised or not if his orders under consideration are allowed to stand. For arriving at this conclusion, it becomes necessary and relevant to consider whether the income in respect of which tax is to be realised, has been subjected to tax or not or if it is subjected to tax, whether it has been subjected to tax at a rate at which it could yield the maximum revenue in accordance with law or not. If income in question has been taxed and legitimate revenue due in respect of that income had been realised, though as a result of erroneous order having been made in that respect, in our opinion, the Commissioner cannot exercise powers for revising the order under section 263 merely on the basis that the order under consideration is erroneous. If the material in that regard is available on the record of the assessee concerned, the Commissioner cannot exercise his powers by ignoring that material which links the income concerned with the tax realization made thereon. The two questions are inter-linked and the authority exercising powers under section 263 is under an obligation to consider the entire material about the existence of income and the tax which is realizable in accordance with law and further what tax has in fact been realised under the alleged assessment orders.[emphasis supplied]
- ii. In the case of CIT V/s Nagesh Knitwears P. Ltd (2012) 345 ITR 135 (Delhi) the Hon'ble Delhi High Court has elucidated and explained the scope of provision of Section 263 of the Act and the same has been extracted by the Hon'ble Delhi High Court in the case of CIT V/s Goetze (India) Ltd 361 ITR 505 as under :-

"Thus, in cases of wrong opinion or finding on merits, the Commissioner of Income tax has to come to the conclusion and himself decide that the order is erroneous, by conducting necessary enquiry, if required and necessary, before the order under section 263 is passed. In such cases, the order of the Assessing Officer will be erroneous because the order is not sustainable in law and the said finding must be recorded. The Commissioner of Income tax cannot remand the matter to the Assessing Officer to decide whether the findings recorded are erroneous. In cases where there is inadequate enquiry but not lack of enquiry, again the Commissioner of Income tax must give and record a finding that the order/inquiry made is erroneous. This can happen if an enquiry and verification is conducted by the Commissioner of Income tax and he is able to establish and show the error or mistake made by the Assessing officer, making the order unsustainable in law. In some cases possibly though rarely, the Commissioner of Income tax can also show and establish that the facts on record or inferences drawn from facts on record per se justified and mandated further enquiry or investigation but the Assessing officer had erroneously not undertaken the same. However, the said finding must be clear, unambiguous and not debatable. The matter cannot be remitted for a fresh decision to the Assessing Officer to conduct further enquiries without a finding that the order is erroneous. Finding that the order is erroneous is a condition or requirement which must be satisfied for exercise of jurisdiction under section 263 of the Act. In such matters, to remand the matter/issue to the Assessing Officer would imply and mean the Commissioner of Income tax has not examined and decided whether or not the order is erroneous but has directed the Assessing Officer to decide the aspect/question...." Similar view has been expressed by Hon'ble Madras High Court in the case of CIT Vs. Amalgamations Ltd (238 ITR 963)

- iii. The law interpreted by the Hon'ble courts makes it clear that Ld. PCIT before holding the order of the Ld. A.O as erroneous in so far as prejudicial to the interest of revenue should have to conduct necessary enquiries or verification in order to show that the findings given by Ld. A.O is unsustainable in law. Similar view was taken by the Hon'ble Delhi High Court in the case of Income Tax Officer v/s D.G. Housing Projects Ltd (2012) 343 ITR 329 (Delhi) wherein the Hon'ble Court after referring to judgments of Hon'ble High Court in the case of Addl. CIT V/s Gee Vee Enterprise (1975) 99 ITR 375 (Delhi), CIT V/s Sunbean Auto Ltd (2011) 332 ITR 167(Delhi), Malabar Industries 243 ITR 83(SC) held in favour of the assessee confirming the order of the Tribunal observing as follows:-

"19. In the present case, the findings recorded by the Tribunal are correct as the CIT has not gone into and has not given any reason for observing that the order passed by the Assessing Officer was erroneous. The finding recorded by the CIT is that "order passed by the Assessing Officer may be erroneous". The CIT had doubts about the valuation and sale consideration received but the CIT should have examined the said aspect himself and given a finding that the order passed by the Assessing Officer was erroneous. He came to the conclusion and finding that the Assessing Officer had examined the said aspect and accepted the respondent's computation figures but he had reservations. The CIT in the order has recorded that the consideration receivable was

examined by the Assessing Officer but was not properly examined and therefore the assessment order is "erroneous". The said finding will be correct, if the CIT had examined and verified the said transaction himself and given a finding on merits. As held above, a distinction must be drawn in the cases where the Assessing Officer does not conduct an enquiry; as lack of enquiry by itself renders the order being erroneous and prejudicial to the interest of the Revenue and cases where the Assessing Officer conducts enquiry but finding recorded is erroneous and which is also prejudicial to the interest of the Revenue. In latter cases, the CIT has to examine the order of the Assessing Officer on merits or the decision taken by the Assessing Officer on merits and then hold and form an opinion on merits that the order passed by the Assessing Officer is erroneous and prejudicial to the interest of the Revenue. In the second set of cases, CIT cannot direct the Assessing Officer to conduct further enquiry to verify and find out whether the order passed is erroneous or not. The CIT is patently wrong in mentioning and stating that Schedule III to the Wealth Tax Act, 1957 was not applicable but, the Assessing Officer should have adopted the said formula/ method. The aforesaid reasoning cannot be accepted and does not show or establish that the assessment order was erroneous. In view of the aforesaid reasoning, the question of law is answered in favour of respondent assessee and against the Revenue and the appeal is accordingly dismissed. No costs."

- iv. Hon'ble High Court of Delhi in the case of CIT vs. DLF Ltd. (2013) 350 ITR 555 (Delhi) laid down the ratio that it is not mere prejudice to the Revenue or a mere erroneous view which can be revised u/s 263 of the Act but also there should be the element of "unsustainability" in the order of the assessing officer, which empowers the commissioner to issue notice and to proceed to pass an appropriate order. That Hon'ble High Court has held as under (at page 562) :

"In this case, the record reveals that the Assessing Officer had issued notice, and held proceedings on several dates (of hearing) before proceeding to frame the assessment. He added nearly Rs. 2 crores to the income at that time. The Commissioner took the view that the assessment order disclosed an error, in that the deduction under section 14 A had not been made. Now, while the statutory direction to the Assessing Officer to calculate, proportionately, the expenditure which an assessee may incur to obtain the dividend income, for purposes of disallowance, cannot be lost sight of, equally, such a requirement has to be viewed in the context and circumstances of each given case. In the present case, it was repeatedly emphasized that the assessee's dividend income was confined to what it received from investment made in a sister concern, and that only one dividend warrant was received. These facts, in the opinion of this court, were material, and had been given weightage by the Tribunal in its impugned order. There is no dispute that the investment to the sister concern, was not questioned; even the Commissioner has not sought to undermine this aspect. Equally, there is no material to say that apart from that single dividend warrant, any other dividend income was received. Furthermore, there is nothing on record to say that the assessee had to expend effort, or specially allocate resources to keep track of its investments, especially dividend yielding ones. In these circumstances, it can be said that whether the deduction under section 14A was warranted, was a debatable fact. In any event, even if it were

not debatable, the error by the Assessing Officer is not "unsustainable". Possibly he could have taken another view; yet, that he did not do so, would not render his opinion an unsustainable one, warranting exercise of section 263."

D. WHEN THE MATERIAL WAS THERE ON RECORD AND THE SAID MATERIAL WAS CONSIDERED BY THE INCOME-TAX OFFICER AND A PARTICULAR VIEW WAS TAKEN, THE MERE FACT THAT DIFFERENT VIEW CAN BE TAKEN SHOULD NOT BE THE BASIS FOR AN ACTION UNDER SECTION 263. THE ORDER OF REVISION WAS NOT JUSTIFIED

- i. Hon'ble Gujarat High Court in the case of Arvind Jewellers (259 ITR 502) held that:

"Held, that the finding of fact by the Tribunal was that the assessee had produced relevant material and offered explanations in pursuance of the notices issued under section 142(1) as well as section 143(2) of the act and after considering the material and explanations, the Income-tax Officer had come to a definite conclusion. Since the material was there on record and the said material was considered by the Income-tax Officer and a particular view was taken, the mere fact that different view can be taken should not be the basis for an action under section 263. The order of revision was not justified 44. Hence, the proposition and ratio laid down by Hon'ble Gujarat High Court is that, when the assessee had produced relevant material and offered explanation in pursuance of notices u/s 143(2) and 142(1) of the Act and after considering the material and explanations, the AO had come to a definite conclusion. Their Lordship further held that in this situation, since the material was there on record and the said material was considered by the AO and a particular view was taken, the mere fact that a different view can be taken should not be the basis for a valid action u/s 263 of the Act and therefore, dismissing the appeal of the revenue the Hon'ble High Court held that the order u/s 263 of the Act was not justified and valid.

- ii. **VINOD BHANDARI & ORS. vs. PRINCIPAL COMMISSINER OF INCOME TAX & ORS. IN THE ITAT INDORE KUL BHARAT, JM & MANISH BORAD, AM. ITA No. 350/Ind/2017, 66/Ind/2017, 57/Ind/2019 Mar 20, 2020 Section 143(3), 263, 271(1)(c) AY 2012-13 para 41**

"Assessing officer has raised number of queries regarding the issues now sought to be revised by the CIT which were replied by the assessee through detailed submissions supported by relevant documents and other evidence coupled with legal propositions and decisions. It is also pertinent to note that the AO has passed a detailed order / note sheet entry while dealing and adjudicating the issues. There must be some prima facie material on the record to show that the order is unsustainable in law and the tax which was legally eligible has not been imposed. The present case is neither a case of "no enquiry" nor is a case where the AO, failed to make necessary enquiry and the assessment order was passed after making detailed inquiry and application of

mind. order of PCIT of setting aside the assessment order u/s 143(3) under consideration are beyond the scope of Section 263 and hence not valid"

E. Limitation period and when to start

Section 263 ITAT DELHI on May 14, 2020 Issues subject to revision u/s 263 were pertaining to original assessment u/s 143(3) and not the reopened assessment u/s 147; the limitation should also start from the original assessment. In this case as original assessment order u/s 143(3) of the act was passed on 16.01.2014, the revision thereof could have been taken up to 31.3.2016. Impugned order u/s 263 of the act was passed on 26/2/2019, therefore it is clearly beyond the limitation prescribed u/s 263 (2) of the act. JINDAL STEEL & POWER LTD. vs. PCIT

para 14

"14. Admittedly in the present case the case of the assessee which was earlier assessed by the order passed by under section 143 (3) of the income tax act on 16/01/2014 which was passed in pursuance of the draft assessment order subject to the direction of The Dispute Resolution Panel. Therefore if any issue which is found not have been dealt with or erroneously dealt with by the Ld AO and if it is subject to revision u/s 263 of the act, than the requisite action should have been concluded by 31.03.2016 [i.e. within two years from the end of the year in which order was passed.] as in the impugned case assessment order was passed in FY 2013 - 2014. Impugned order us/ 263 of the act was passed on 26/02/2019."

Para 15

"15. Subsequently, the learned assessing officer recorded the reason for reopening of the assessment which is provided to the assessee on 29/6/2016 by The Deputy Commissioner Of Income Tax. Such reasons captioned are already reproduced above. It is apparent that case of the assessee was reopened to examine the deduction u/s 80 IA and 80 IB of the act as assessee claimed the same on power plant used for captive consumption and further it was not maintaining allegedly separate books of accounts of the eligible undertaking. Thus the issue of production of coal mines was not at all an issue in reopened assessment proceedings. The precise issues for which an action u/s 263 is initiated are for assessing the income of the assessee on account of showing the alleged incorrect production as per M B Shah Report. Actions u/s 263 of the act is not initiated for claim of deduction of the assessee u/s 80 IA or 80 IB of the act. Therefore the issue for which revision u/s 263 is proposed is not the issue for which case of the assessee was reopened u/s 147 of the act. Thus it is apparent that action u/s 263 of the act is initiated for the issues which are already decided in the original assessment u/s 143 (3) of the act and not in reopened assessment. Therefore in such circumstances, if Ld. PCIT wants to touch any issue of the original assessment order, the time limit for passing the order us/ 263 of the act should run from the date of the original order passed u/s 143(3) of the act and not the subsequently reopened assessment order u/s 147 of the act."