Delhi High Court
Vijay Gupta vs Commissioner Of Income Tax ... on 23 March, 2016
Author: Sanjeev Sachdeva
* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment reserved on: 05th November, 2015
Judgment delivered on: 23rd March, 2016

+ WP(C) 1572/2013
VIJAY GUPTA .... Petitioner
versus
COMMISSIONER OF INCOME TAX DELHI -XIII AND
ANR. .... Respondents

Advocates who appeared in this case:
For the Petitioner : Mr Ajay Vohra, Sr Advocate with Ms Bhavita Kumar, Advocate with petitioner in person.
For the Respondents : Mr Kamal Sawhney, Mr Raghvendra Singh, Mr Shikhar Garg and Mr Sharad Aggarwal, Advocates.

CORAM:-
HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MR JUSTICE SANJEEV SACHDEVA

JUDGEMENT

SANJEEV SACHDEVA, J

1. The Petitioner has filed the present Writ Petition seeking quashing of the order dated 20.11.2012, passed by the Respondent No. 1 under section 264 of the Income Tax Act, 1962 (hereinafter referred to as the Act) for the assessment years 2008-09, and for a direction to the Respondents to refund the income tax amounting to Rs.2,96,58,825/- for assessment years 2008-09 paid by the Petitioner.

2. The petitioner is an individual. It is contended that during the period July, 2007 to November, 2007, the petitioner sold 2,98,000 shares out of 3,08,000 shares in DLF Ltd., having face value of Rs.2 each, on the recognized stock exchange for a total consideration of Rs.19,78,00,000. It is contended that the said shares in DLF Ltd. were received by the Petitioner as gift from his mother on 30.01.2007.

3. On 31.01.2009, the Petitioner filed his return of income for assessment year 2008-09 declaring total income of Rs. 20,57,73,420/-. By adopting the date of gift from the mother as the date of acquisition of shares, the Petitioner offered for tax, gains arising on sale of shares in the DLF Ltd. as "short term capital gains". The gains were computed as under:

> Sale consideration of 2,98,000 shares : Rs.19,78,00,000 Less: Proportionate cost of acquisition : Rs. 74,500 Short term capital gains : Rs.19,77,25,500

4. The Assessing Officer (Respondent No. 2) on 27.03.2010 issued intimation under section 143(1) of the Act accepting the returned income. The Assessing Officer, however levied tax @ 30% instead of 10% as computed by the Petitioner.

5. On 14.01.2011 the Petitioner filed an application under section 154 of the Act before the Respondent No. 2 contending that the capital gains on transfer of shares in DLF Ltd., were actually in the nature of "long term capital gains" and since the shares were sold on the recognized stock exchange, the entire gains were exempt from tax under section 10(38) of the Act.

6. The assessing Officer by order dated 21.02.2011, passed under section 154, of the Act partly rectifying the intimation and computed the tax on capital gains @ 10% as against 30% computed in the intimation.

7. The Assessing Officer passed another order dated 12.07.2011 under section 154/143(1) of the Act thereby rejecting the application filed by the Petitioner under section 154 of the Act holding inter-alia as under:-

> "Since the assessee has paid major part of taxes as self assessment tax hence the assessee plea cannot be accepted as he was not aware about his income from sale of shares. However the assessee has not claimed any refund during the time prescribed in section 139 of the IT Act, 1961, hence the assessee's plea for refund cannot be accepted at this stage. This issue does not fall in the ambit of section 154 of the IT Act, 1961. In the above mentioned circumstances, the assessee's application under sec. 154 is hereby rejected."

8. The order dated 12.07.2011, rejected the application for rectification primarily on the ground that the Petitioner did not claim any refund in the return filed under section 139 of the Act and further that the issue of refund did not fall within the ambit of section 154 of the Act.

9. Thereafter, the Petitioner approached the Commissioner of Income Tax (Respondent No. 1) by a revision application under section 264 dated 09.11.2011 impugning the intimation under section 143(1) dated 27.03.2010 and the rectification order dated 12.07.2011.

10. By the Impugned Order dated 20.11.2012 the application of the petitioner under section 264 has been rejected, first of all, holding that the petition was not filed with the prescribed fee of Rs 500/- and, secondly, that the order dated 12.11.2011 was proper as the scope of interference under section 154 of the Act was very limited and had to be strictly based on the return filed by the Petitioner/assessee and, thirdly, holding that there was no material on the basis of which capital gains could be calculated by taking the date of acquisition as the year 1987 or 2005 and, lastly, holding that the Intimation under section 143(1) could not be regarded as an order and was thus not amenable to revisionary jurisdiction under section 264 of the Act.

11. The Petitioner has impugned the said decision contending that the respondents do not dispute the fact that the gains disclosed in the return were exempt from tax under section 10(38) of the Act.

It is not in dispute that while filing the return of income the Petitioner had calculated his period of holding the shares in DLF Ltd. from the date on which the said shares were received by him as gift from his mother. Shares in DLF Ltd were acquired by the mother partly in the year 1987 and partly consequent to conversion of secured convertible debentures issued by the said company in December, 2005. Thus computing the period as less than 12 months, the Petitioner declared income from transfer of such shares as taxable short term capital gains. Reliance is also placed on Circular No. 14(XL-35) of 1955, dated 11.4.1955 of the Central Board of Direct Taxes.

12. To settle the controversy that arises in the present petition, we need to examine the scheme of the Act.

13. The Relevant provisions of Section 2 of the Act read as under:

> "2. Definitions ***** ***** ***** (29A) "long-term capital asset" means a capital asset which is not a short-term capital asset;
>
> (29B) "long-term capital gain" means capital gain arising from the transfer of a long-term capital asset;
>
> ***** ***** ***** (42A) "short-term capital asset" means a capital asset held by an Petitioner for not more than thirty-six months immediately preceding the date of its transfer:
>
> Provided that in the case of a share held in a company or any other security listed in a recognised stock exchange in India or a unit of the Unit Trust of India established under the Unit Trust of India Act, 1963 (52 of 1963) or a unit of a Mutual Fund specified under clause (23D) of section 10 or a zero coupon bond , the provisions of this clause shall have effect as if for the words "thirty-six months", the words "twelve months" had been substituted.
>
> Explanation 1-
>
> (i) In determining the period for which any capital asset is held by the assessee-
>
> ***** ***** *****
>
> (b) in the case of a capital asset which becomes the property of the assessee in the circumstances mentioned in sub-section (1) of section 49, there shall be included the period for which the asset was held by the previous owner referred to in the said section;
>
> ***** ***** *****

(f) in the case of a capital asset, being a financial asset, allotted without any payment and on the basis of holding of any other financial asset, the period shall be reckoned from the date of the allotment of such financial asset;

***** ***** ***** (42B) "short-term capital gain" means capital gain arising from the transfer of a short-term capital asset;

***** ***** *****"

14. The relevant provisions of section 49, referred to in clause (b) of Explanation 1 to section 2 (42A) of the Act reads as under:

"49. Cost with reference to certain modes of acquisition.

(1) Where the capital asset became the property of the assessee-

***** ***** *****

(ii) under a gift or will;

***** ***** *****"

15. Reading Explanation I to section 2(42A) with section 49 of the Act shows that for computing the period of holding a capital asset, which becomes the property of the assessee by way of gift or will, the period for which the asset was held by the previous owner shall be included.

16. Therefore, for the purposes of computing capital gains on transfer of shares in DLF Ltd., the Petitioner should have included the period for which the said shares were held by his mother. This, it is contended, was not done when the return of income was filed. Since the period for which the mother had held the shares was in excess of the stipulated period for computing "short term capital gains", the gains made by the petitioner on sale of the subject shares were "long term capital gains" which were exempt from tax under section 10(38) of the Act.

17. Article 265 of the Constitution of India reads that "No tax shall be levied or collected except by the authority of law." In terms of the Article 265 of the Constitution, tax can be levied only if it is authorized by law. The taxing authority cannot collect or retain tax that is not authorized. Any retention of tax collected, which is not otherwise payable, would be illegal and unconstitutional.

18. The Supreme Court of India in CIT v. Shelly Products and another 261 ITR 367 held that if the assessee has by mistake or inadvertence or on account of ignorance, included in his income any amount which is exempted from payment of income-tax or is not income within the contemplation of law, the assessee may bring the same to the notice of the assessing officer, which if satisfied, may grant the assessee necessary relief and refund the tax paid in excess, if any.

19. In CIT v. Bharat General Reinsurance Co. Ltd. 81 ITR 303 (Del), this court held that merely because the assessee wrongly included the income in its return for a particular year, it cannot confer jurisdiction on the department to tax that income in that year even though legally such income did not pertain to that year.

20. The Bombay High Court in Balmukund Acharya vs DCIT, CIT and UOI 310 ITR 310 held that Tax can be collected only as provided under the Act. If any assessee, under a mistake, misconception or on not being properly instructed is over assessed, the authorities under the Act are required to assist him and ensure that only legitimate taxes due are collected.

21. The Bombay High Court in Nirmala L. Mehta v. A.

Balasubramaniam, C.I.T. (2004) 269 ITR 1 held that there cannot be any estoppel against the statute. Article 265 of the Constitution of India in unmistakable terms provides that no tax shall be levied or collected except by authority of law. Acquiescence cannot take away from a party the relief that he is entitled to where the tax is levied or collected without authority of law.

22. Circular No. 14(XL-35) of 1955, dated 11.4.1955, issued by the Central Board of Direct Taxes and relied upon by the Petitioner reads as under:

> "Officers of the department must not take advantage of ignorance of an assessee as to his rights. It is one of their duties to assist a tax payer in every reasonable way, particularly in the matter of claiming and securing reliefs and in this regard the officers should take the initiative in guiding a tax payer where proceedings or other particulars before them indicate that some refund or relief is due to him. This attitude would, in the long run, benefit the department, for it would inspire confidence in him that he may be sure of getting a square deal from the department. Although, therefore, the responsibility for claiming refunds and reliefs rests with the assesses on whom it is imposed by law, officers should -
>
> (a) draw their attention to any refunds or reliefs to which they appear to be clearly entitled but which they have omitted to claim for some reason or other;
>
> (b) freely advise them when approached by them as to their rights and liabilities and as to the procedure to be adopted for claiming refunds and reliefs".

23. A reading of the circular shows that a duty is cast upon the assessing officer to assist and aid the assessee in the matter of taxation. They are obliged to advise the assessee and guide them and not to take advantage of any error or mistake committed by the assessee or of their ignorance. The function of the Assessing Officer is to administer the statute with solicitude for public exchequer with an inbuilt idea of fairness to taxpayers.1

24. Section 264 of the Act read as under:

264. Revision of other orders (1) In the case of any order other than an order to which section 263 applies passed by an authority subordinate to him, the Commissioner may, either of his own motion or on an application by the assessee for revision, call for the record of CIT V. Rajesh Jhaveri Stock Brokers (P) Limited: 291 ITR 500 (SC) any proceeding under this Act in which any such order has been passed and may make such inquiry or cause such inquiry to be made and, subject to the provisions of this Act, may pass such order thereon, not being an order prejudicial to the assessee, as he thinks fit.

(2) The Commissioner shall not of his own motion revise any order under this section if the order has been made more than one year previously.

(3) In the case of an application for revision under this section by the assessee, the application must be made within one year from the date on which the order in question was communicated to him or the date on which he otherwise came to know of it, whichever is earlier: Provided that the Commissioner may, if he is satisfied that the assessee was prevented by sufficient cause from making the application within that period, admit an application made after the expiry of that period. (4) The Commissioner shall not revise any order under this section in the following cases-

(a) where an appeal against the order lies to the Deputy Commissioner (Appeals) or to the Commissioner (Appeals) or to the Appellate Tribunal but has not been made and the time within which such appeal may be made has not expired or, in the case of an appeal to the Commissioner (Appeals) or to the Appellate Tribunal, the assessee has not waived his right of appeal; or

(b) where the order is pending on an appeal before the Deputy Commissioner (Appeals)]; or

(c) where the order has been made the subject of an appeal to the Commissioner (Appeals) or to the Appellate Tribunal.

(5) Every application by an assessee for revision under this section shall be accompanied by a fee of twenty five rupees Explanation 1-An order by the Commissioner declining to interfere shall, for the purposes of this section, be deemed not to be an order prejudicial to the assessee.

Explanation 2.- For the purposes of this section, the Deputy Commissioner (Appeals) shall be deemed to be an authority subordinate to the Commissioner.

25. Section 264 of the Act empowers the Commissioner to revise any order other than an order to which section 263 applies passed by an authority subordinate to him, of his own motion or on an application by the assessee for revision. The Commissioner is empowered to call for the record of any proceeding under this Act in which such order has been passed and may make such inquiry or

cause such inquiry to be made and, subject to the provisions of this Act, pass such order thereon, not being an order prejudicial to the assessee, as he thinks fit. This power has been conferred on the Commissioner to correct any order passed by a subordinate authority.

26. In Pt. Sheonath Prasad Sharma v. CIT, [1967] 66 ITR 647 (All) while determining the question, whether the assessee can, in revision question the taxability of particular amounts offered by him as income for assessment, the Allahabad High Court observed as under:

> " It seems to me, however, that the order of the Commissioner rejecting the previous applications, on the mere ground that the petitioner had shown the income in his return, is erroneous. The Commissioner was bound to apply his mind to the question whether the petitioner was taxable on that income. The Income-tax Officer is entitled under Section 23(1) to make an assessment on the basis of the return if he is satisfied, without requiring the presence of the assessee or the production of evidence in support of the return, that the return is correct and complete. But it may be that the assessee may have committed a mistake in treating a certain receipt as taxable. The mere circumstance that he has shown that receipt as income in his return does not make him liable to tax thereon. An assessee is liable to tax only upon such receipt as can be included in his total income and is assessable under the Income-tax Act. The law empowers the Income-tax Officer to assess the income of an assessee and determine the tax payable thereon. In doing so, he may proceed on the basis that, where an assessee discloses that a certain sum of money has been deceived by him, the fact of that receipt may be accepted without anything more as constituting an admission on the part of the assessee. That would be an admission as to a state of fact. But whether the receipt can be considered as taxable income is quite another matter, and consideration of that question leads into the realm of law. If the Income-tax Officer assesses an assessee upon a receipt which is not taxable in law, it is always open to the assessee to take the case in appeal or in revision thereafter. It is then for the Appellate Assistant Commissioner or the Commissioner of Income-tax, as the case may be, to examine the matter and determine whether, although the money has been received by the assessee, it is taxable in law. The assessee is then within his rights in requiring the appellate or the revisional authority to examine the validity of the assessment to tax of a receipt which, though admitted by him, is not taxable in law."

27. In O.C.M. Ltd. (London) v. ITO, [1977] 110 ITR 722, a Division Bench of the Allahabad High Court following the decision in the case of Pt. Sheonath Prasad Sharma (Supra) held as under:

> "In our opinion, the Commissioner has taken a too narrow view of the scope of the revision under Section
>
> 264. Though the Income-tax Officer accepted the income as returned by the petitioner and made assessment, its case is that the order of assessment has to be revised in view of the fact that a sum of Rs. 2,30,000 which ought to have been

included in the return filed by it was omitted by inadvertence and, consequently, it was deprived of the refund of Rs. 11,500. This aspect of the case has not at all been considered by the Commissioner, ***** ***** ***** In the light of the aforesaid decision of this court, it is clear that the Commissioner should have applied his mind to the petitioner's plea that it had inadvertently omitted to include in its return the amount of interim dividend received by it from M/s. O.C.M. India (Private) Ltd. and that the assessment made by the Income-tax Officer without taking into account that amount of interim dividend, should be revised and that it (the petitioner) should be given the benefit of the refund of the super-tax which was deducted at source before payment of the interim dividend to it. Hence, the impugned order of the Commissioner suffers from a manifest error and has to be quashed."

28. Similar is the view taken by the Gujarat High Court in C. Parikh & Co. v. CIT: [1980] 122 ITR 610 (Guj), wherein it is observed as under:

"It is clear that under s. 264, the Commissioner is empowered to exercise revisional powers in favour of the assessee. In exercise of this power, the Commissioner may, either of his own motion or on an application by the assessee, call for the record of any proceeding under the Act and pass such order thereon not being an order prejudicial to the assessee, as the thinks fit. Sub-sections (2) and (3) of s. 264 provide for limitation of one year for the exercise of this revisional power, whether suo motu, or at the instance of the assessee. Power is also conferred on the Commissioner to condone delay in case he is satisfied that the assessee was prevented by sufficient cause from making the application within the prescribed period. Sub-section (4) provides that the Commissioner has no power to revise any order under s. 264(1) : (i) while an appeal against the order is pending before the AAC, and (ii) when the order has been subject to an appeal to the Income-tax Appellate Tribunal. Subject to the above limitation, the revisional powers conferred on the Commissioner under s. 264 are very wide. He has the discretion to grant or refuse relief and the power to pass such order in revision as he may think fit. The discretion which the Commissioner has to exercise is undoubtedly to be exercised judicially and not arbitrarily according to his fancy. Therefore, subject to the limitation prescribed in s. 264, the Commissioner in exercise of his revisional power under the said section may pass such order as he thinks fit which is not prejudicial to the assessee. There is nothing in s. 264 which places any restriction on the Commissioner's revisional power to give relief to the assessee in a case where the assessee detracts mistakes on account of which he was over-assessed after the assessment was completed. We do not read any such embargo in the Commissioner's power as read by the Commissioner in the present case. It is open to the Commissioner to entertain even a new ground not urged before the lower authorities while exercising revisional powers. Therefore, though the petitioner had not raised the grounds regarding under-totalling of purchases before the ITO, it was with in the power of the Commissioner of admit such a ground in revision. The Commissioner was also not right in holding that the over-assessment did not arise from the order the assessment. Once the petitioner was

able to satisfy that there was a mistake in totalling purchases and that there was under-totalling of purchases to the tune of Rs. 20,000, it is obvious that there was over-assessment. In other words, the assessment of the total income of the assessee is not correctly made in the assessment order and it has resulted in over-assessment. The Commissioner would not be acting de hors the I.T. Act, if he gives relief to the assessee in a case where it is proved to his satisfaction that there is over-assessment, whether such over- assessment is due to a mistake detected by the assessee after completion of assessment or otherwise. In our opinion, the Commissioner has misconstrued the words "subject to the provisions of this Act" in s. 264(1) and read a restriction on his revisional power which does not exist. The Commissioner was, therefore, not right in holding that it was not open to him to give relief to the petitioner on account of the petitioner's own mistake which it detected after the assessment was completed. Once it is found that there was a mistake in making an assessment, the Commissioner had power to correct it under s. 264(1). In our opinion, therefore, the Commissioner was wrong in not giving relief to the petitioner in respect of over-assessment as a result of under-totalling of the purchases to the extent of Rs. 20,000."

(underlining supplied)

29. Relying upon the above decisions, the Kerala High Court in the case of Parekh Brothers v. CIT: 150 ITR 105 (Ker) held as under:

In the light of the above discussions, we have no hesitation to hold that the Commissioner of Income-tax committed an error of law in holding that it is not open to him for the first time to entertain a relief of the kind pleaded by the assessee and in denying jurisdiction. We hold, that even though a mistake was committed by the assessee and it was detected by him after the order of assessment, and the order of assessment is not erroneous, none the less it is open to the assessee to file a revision before the Commissioner under Section 264 of the Act and claim appropriate relief. But it should not be forgotten that the power to be exercised under Section 264 is a revisionary one. The limitations implicit in the exercise of such power are well known. The jurisdiction is discretionary; Whether in a particular case, on the basis of facts disclosed, the Commissioner will exercise his jurisdiction and interfere in the matter, is a matter of discretion. It is certainly a judicial discretion vested in the Commissioner, to be exercised in accordance with law. We are not called upon to pronounce on the scope and amplitude of the revisional power. The only question mooted for our consideration in this case is whether the Commissioner has got revisional jurisdiction at all, where the assessee having included the income for assessment, can claim the relief of weighted deduction under Section 35B of the Act, for the first time, in a petition filed under Section 264 of the Act. On that aspect of the question, we have no doubt in our mind that the Commissioner has jurisdiction to entertain a revision petition under Section 264 of the Act.

30. The High Court of Gujarat in Digvijay Cement Co. Ltd. V CIT:

210 ITR 797 has held that "the power of revision under section 264 cannot be restricted to such erroneous Orders which have become erroneous as a result of some error committed by the Income-tax Officer while passing the Orders. Independently of any decision or absence of any decision on the part of the Income-tax Officer, the Order of assessment can be challenged as erroneous if, for example, some provision was overlooked not only by the assessee but also by the Income-tax Officer. Even in such a case, the Order of assessment can be challenged by filing a revision application before the Commissioner."

31. In the case of Smt. Sneh Lata Jain v. CIT: 192 CTR (J&K) 50, the High Court of Jammu & Kashmir, considered a similar issue, where the assessee filed a return of income without claiming exemption under section 54F of the Act. The return was processed under section 143(1) of the Act. Subsequently, the mistake came to the notice of the assessee. The assessee filed revision petition under section 264 of the Act. The Commissioner rejected the contention of the petitioner on the ground that since the return of income filed by the assessee under section 139(1) of the Act had been accepted by the assessing authority, the revisional powers could not be invoked to allow relief not claimed in the return. The assessee filed a Writ Petition impugning the order of the Commissioner. The contention raised by the Department was that a claim was admissible only where such claim was made by the assessee in the return of income and not when the petitioner did not make any such claim in her return. Relying upon the decisions of the Gujarat High Court in Digvijay Cement Co. Ltd. (Supra) which in turn relied upon the decisions in the cases of C. Parikh & Co (Supra), Parekh Brothers (Supra), and Pt. Sheo Nath Prasad Sharma (Supra) the High Court held as under:

> "A bare reading of section makes it abundantly clear that the Commissioner has discretion to invoke the revisional jurisdiction. However, once he entertains a revision he has the power to call for the record of any proceedings under this Act and is also entitled to make any inquiry himself or cause any inquiry to be made and pass such order as he thinks fit. The only impediment on the power of the revisional authority is that he will not pass any order prejudicial to the assessee. The respondent No. 1 has much wider power under section 264. It does not circumvent and confine the power of the revisional authority in any manner.....
>
> ***** ***** ***** Though the assessing authority was not aware of the purchase of the property by the petitioner and proceeded on the basis of the admitted facts disclosed in the return. However, the revisional authority could not be oblivious of its duty to accept the contention of the assessee when the facts were brought to its notice about the capital gain being not chargeable to tax under law. What to say of its duty to advice the assessee the revisional authority rejected the contention of the petitioner only on technical grounds. When the substantive law confers a benefit on the assessee under a statute, it cannot be taken away by the adjudicatory authority on mere technicalities. It is settled proposition of law that no tax can be levied or recovered without authority of law. Article 265 of the Constitution of India and section 114 of the State Constitution imposes an embargo on imposition and

> collection of tax if the same is without authority of law. Admittedly, on the basis of facts disclosed before the revisional authorities and this Court, the petitioner is not liable to tax on the capital gain. Once it is found that the petitioner has no tax liability, the respondents cannot be permitted to levy the tax and collect the same in contravention to article 265 of the Constitution of India, which provides a constitutional safeguard on levy and collection of tax. It is true that this Court is not to act as Court of Appeal while exercising the writ jurisdiction, but at the same time where the admitted facts disclosed non-exercise of jurisdiction by an adjudicatory authority and a citizen is subjected to tax not payable by him, interference by this Court is warranted. The respondent No. 2 is directed to reassess the taxable income of the petitioner, by taking into consideration the benefit available to her under section 54F of the Income-tax Act and pass appropriate order."

32. By the impugned order dated 20.11.2012, the Commissioner has rejected the revision petition under section 264 of the Act on two grounds. Firstly, on the ground of that the Petitioner did not comply with the mandatory requirement of payment of prescribed fees. Secondly on the technical ground that the intimation under section 143(1) does not qualify as an order and there was no error committed by the assessing officer based on the record available before him.

33. It is an admitted position that the requisite fee was paid during the pendency of the revision petition. The rejection of the application on the technical ground of non payment of would be taking a hyper technical view. The condition requiring the payment of fees prior to the filing of the revision application would be directory in nature. From a reading of the provisions of Section 264 of the Act, it cannot be gathered that the non payment of the prescribed fee prior to the institution of the application for revision would be fatal. The non payment of the requisite fee would be a mere irregularity which could be cured at a later stage. The applicant can always be called upon to pay the requisite fee and make good the deficiency. If the deficiency is cured, the irregularity would be rectified. In the present case, the petitioner paid the requisite fee, though belatedly and thus cured the irregularity. The finding returned by the commissioner that the application was not maintainable on this account cannot be sustained and is accordingly set aside.

34. The other ground for rejection was that the assessing officer was not at fault as there was no material on the basis of which period of holding shares by the petitioner could be calculated, by taking the date of acquisition as the year 1987 or 2005 and no fault could be found with the action of the Assessing Officer in the processing/rectification under section 143(1)/154 of the Act.

35. From the various judicial pronouncements, it is settled that the powers conferred under section 264 of the Act are very wide. The Commissioner is bound to apply his mind to the question whether the petitioner was taxable on that income. Since section 264 uses the expression "any order", it would imply that the section does not limit the power to correct errors committed by the subordinate authorities but could even be exercised where errors are committed by assesses. It would even cover situations where the assessee because of an error has not put forth a legitimate claim at the time of filing the return and the error is subsequently discovered and is raised for the first time in an application under Section 264.

36. An assessee is liable to tax only upon such receipt as can be included in his total income and is assessable under the Income-tax Act. There is nothing in s. 264, which places any restriction on the Commissioner's revisional power to give relief to the assessee in a case where the assessee detracts mistakes because of which he was over-assessed after the assessment was completed. Once it is found that there was a mistake in making an assessment, the Commissioner had power to correct it under s. 264(1). When the substantive law confers a benefit on the assessee under a statute, it cannot be taken away by the adjudicatory authority on mere technicalities. It is settled proposition of law that no tax can be levied or recovered without authority of law. Article 265 of the Constitution of India and section 114 of the State Constitution imposes an embargo on imposition and collection of tax if the same is without authority of law.

37. The Commissioner further erred in rejecting the application under section 264 holding that intimation under section 143(1) could not be regarded as an order and was thus not amenable to revisionary jurisdiction under section 264 of the Act. The Intimation under section 143(1) is regarded as an order for the purposes of section 264 of the Act. 2 He failed to appreciate that the petitioner was not only impugning the intimation under section 143(1) but also the rejection of the application under section 154 of the Act.

Commissioner Of Income Tax vs K.V. Manakram & Co. [2000] 111 TAXMAN 439 Ker; Assam Roofing Ltd. vs Commissioner of Income Tax [2014] 43 taxmann.com 316 (Gau); S R Koshti vs Commissioner of Income Tax 276 ITR 165 (Guj)

38. In the present case, as per the Petitioner, in his return of income, he has erroneously offered to tax gains arising on sale of shares as short term capital gains instead of same being long term capital gains exempt from tax. Subsequently, the petitioner on 14.01.2011 filed the application under section 154 of the Act. The assessing officer on 21.02.2011 partly rectified the intimation and computed the tax on capital gains @ 10% as against 30% computed in the intimation issued under section 143(1) of the Act. The assessing officer, however refused to accept the application under section 154 filed by the petitioner. When the assessing officer could rectify the intimation on 21.02.2011, he could also consider the prayer of the petitioner made in the rectification application under section 154 of the Act, which was already pending before him on that date.

39. When the commissioner was called upon to examine the revision application under section 264 of the Act, all the relevant material was already available on the record of the assessing officer. The commissioner instead of merely examining whether the intimation was correct based on the material then available should have examined the material in the light of the Circular No. 14(XL-35) of 1955, dated 11.4.1955 and Article 265 of the Constitution of India. The commissioner has erred in not doing so and in failing to exercise the jurisdiction vested in him on mere technical grounds.

40. In view of the above, the impugned order dated 20.11.2012 is set aside. The revision application under section 264 of the Act is restored to the file of the Commissioner. The commissioner is directed to consider the same afresh on merits and dispose the same within a period of eight weeks from today. The Writ petition is disposed of, leaving the parties to bear their own costs.

SANJEEV SACHDEVA, J BADAR DURREZ AHMED, J MARCH 23 , 2016 HJ