

Before S. P. Goyal and J. V. Gupta, JJ.

COMMISSIONER OF INCOME-TAX,—Applicant.

versus

JAGADHRI ELECTRIC SUPPLY & INDUSTRIAL
CO.—Respondent.

Income-tax Reference Nos. 66 & 67 of 1975.

March 17, 1981.

Income-tax Act (XLIII of 1961)—Sections 184(7), 185(3), 253(1) (c) and 263—Income-tax Rules 1962—Rule 24—Firm registered under section 184—Declaration about the continuance of the firm without any change in its constitution filed in the subsequent year—Declaration accepted and registration allowed to continue—Income-tax Officer—Whether could be said to have passed an 'Order' within the meaning of section 263(1)—Order passed by the Commissioner under section 263(1) challenged in appeal by the assessee—Tribunal upholding the order but on different grounds—Tribunal—Whether has jurisdiction to do so.

Held, that from a reading of the provisions of sections 184(7) and 263(1) of the Income-tax Act, 1961 and Rule 24 of the Income-tax Rules, 1962 dealing with the continuation of the registration of a firm in the subsequent year, it cannot be said that the matter of continuation of registration is not a proceeding under the Act. If it is a proceeding under the Act then any order passed thereunder would be covered under section 263(1) of the Act. The Income-tax Officer has to apply his mind to the question whether the declaration furnished by the assessee is in accordance with the provisions of the Act and the Rules framed thereunder or not and after satisfying himself, necessary order, in the nature of grant of a certificate is to be recorded. Even if it may be taken to be a formal order but all the same, it is necessary to record some order and such an order, when, passed by the Income-tax Officer, will be in the proceeding under the Act and would be covered under section 263(1) of the Act; provided the other conditions are also fulfilled. There is another approach as well. If the order thus passed or the certificate so granted by the Income-tax Officer is of such a nature that if erroneous, is likely to prejudice the interests of Revenue, then the provisions of section 263(1) of the Act will be attracted. In other words, it is the nature of the order which will determine the applicability of section 263 of the Act. (Para 9).

Held, that the jurisdiction vested in the Commissioner under section 263(1) of the Act is of a special nature or, in other words, the Commissioner has the exclusive jurisdiction under the Act to revise the order of the Income-tax Officer if he considers that any order passed by him was erroneous in so far as it was prejudicial to the interests of the Revenue. Before doing so, he is also required to give an opportunity of being heard to the assessee. If after hearing the assessee in pursuance of the notice issued by him under section 263(1) of the Act, he is not satisfied, he may pass the necessary orders. Of course, the order thus passed will contain the grounds for holding the order of the Income-tax Officer to be erroneous as contemplated under section 263(1) of the Act. Feeling aggrieved therefrom, the assessee may file an appeal against the same as provided under section 253(1)(c) of the Act. In the memorandum of appeal, the assessee is supposed to attack the order of the Commissioner and to challenge the ground for decision given by him in his order. At the time of the hearing, if the assessee can satisfy the Tribunal that the grounds for decision given in the order by the Commissioner are wrong on facts or are not tenable in law, the Tribunal has no option but to accept the appeal and to set aside the order of the Commissioner. The Tribunal cannot uphold the order of the Commissioner on any other ground which, in its opinion was available to the Commissioner as well. If the Tribunal is allowed to find out the grounds available to the Commissioner to pass an order under section 263(1) of the Act, then it will amount to sharing of the exclusive jurisdiction vested in the Commissioner which is not warranted under the Act. It is all the more so, because the Revenue has not been given any right of appeal under the Act against an order of the Commissioner under section 263(1) of the Act. In case he proceeds thereunder after hearing the assessee in pursuance of the notice given by him, then the appeal filed by the assessee under section 253(1)(c) of the Act cannot be treated on the same footing as an appeal against the order of the Appellate Assistant Commissioner passed in assessment proceedings where both the parties have been given the right of appeal. Thus, the Tribunal while hearing an appeal filed by the assessee against an order passed by the Commissioner under section 263(1) of the Act cannot substitute the grounds which the Commissioner himself did not think proper to form the basis of his order.

(Para 13)

Reference under Section 256(1) of the Income-tax Act, 1961 made by the Income-tax Appellate Tribunal (Chandigarh Bench) Chandigarh for the important question of law arising out of its I.T.A. No. 1318 of 1972-73 R. A. Nos. 73 & 76 of 1974-1975 for the assessment Year 1966-67.

- (i) *Whether on the facts and circumstances of the case, the Appellate Tribunal was justified in law in setting aside*

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the order of the Additional Commissioner instead of remitting the case to him for a fresh decision on the matter by him ?

- (ii) *Whether on the facts and circumstances of the case, the Tribunal was right, in law, in holding that the action of the Income-tax Officer in recording the impugned certificate of registration could not be said to be erroneous on account of distribution of loss by the assessee firm in a ratio different from the one indicated in the instrument of partnership, dated 25th October, 1964 ?*
- (iii) *Whether on the facts and circumstances of the case, the Tribunal was right, in law, in holding that in the instant case, there could be no exercise of jurisdiction under section 263 as there was no order by the Income-tax Officer within the meaning of the section ?*
- (iv) *Whether on the facts and circumstances of the case, the Tribunal was not competent to take into consideration the fact of increase in the number of adult partners from 10 to 11, even though the Additional Commissioner had not in forms (six) relied on the said change as making the Income-tax Officer's order erroneous ?*

D. N. Awasthy, Advocate with B. K. Jhingan Advocate, for the Petitioners.

G. C. Sharma, Advocate, with Ashok Bhan, D. K. Gupta and E. D. Helms, Advocates, for the Respondents.

JUDGMENT

J. V. Gupta, J.

(1) These two references, Nos. 66 and 67 of 1975, arising out of an order of the Income-tax Appellate Tribunal, Chandigarh Bench, (hereinafter called the Tribunal), dated September 3, 1974, have been made under section 256(1) of the Income-tax Act, 1961, at the instance of both the parties, that is, the assessee as well as the Revenue. The Tribunal has referred the following questions of law for the opinion of this Court,—*vide* its order, dated June 17, 1975:

- (i) *Whether on the facts and circumstances of the case, the the Appellate Tribunal was justified in law in setting aside the order of the Additional Commissioner instead of remitting the case to him for a fresh decision on the matter by him?*

- (ii) Whether on the facts and circumstances of the case, the Tribunal was right, in law, in holding that the action of Income-tax Officer in recording the impugned certificate of registration could not be said to be erroneous on account of distribution of loss by the assessee firm in a ratio different from the one indicated in the instrument of partnership, dated 25th October, 1964?
- (iii) Whether on the facts and circumstances of the case; the Tribunal was right, in law, in holding that in the instant case, there could be no exercise of jurisdiction under section 263 as there was no order by the Income-tax Officer within the meaning of the section?
- (iv) Whether on the facts and circumstances of the case, the Tribunal was not competent to take into consideration the fact of increase in the number of adult partners from 10 to 11, even though the Additional Commissioner had not in forms (six) relied on the said change as making the Income-tax Officer's order erroneous?

Subsequently, this Court,—*vide* order, dated July, 1980, in Income-tax Cases Nos. 43 and 44 of 1976, directed the deletion of the above question No. (i) as framed and further directed the Tribunal to submit the supplementary statement of the case. Consequently, the Tribunal,—*vide* its order, dated September 19, 1980, has referred the following supplementary questions of law for the opinion of this Court?

- (1) Whether on the facts and in the circumstances of the case, considering that the assessee had submitted his detailed written objections and had also been given personal hearing through its partner and the express provisions of section 263(1) of the Income-tax Act; the Appellate Tribunal was right in law in holding that the principles of natural justice had been violated by the Additional Commissioner of Income-tax in not granting an adjournment of the hearing?
- (2) If answer to question No. 1 is in affirmative; whether on the facts and in the circumstances of the case, the Appellate Tribunal was justified in law in not remanding the

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case to the Commissioner for deciding the matter afresh after giving the assessee sufficient opportunity of being heard or and with such other direction as it thought fit to give?

2. The brief facts, giving rise to these references are these. The assessee firm was constituted, as per partnership instrument dated October 25, 1964. At that time, there were 10 adult partners and four minors admitted to the benefits of the partnership. Out of the said four minors, one, namely, Ghansham Gupta, attained majority on April 25, 1965, that is, during the relevant previous year and he did not, by October 25, 1965, give any public notice of termination of his connection with the partnership as contemplated under section 30(5) of the Indian Partnership Act, 1952. Clause (6) of the partnership deed, *inter alia* provided for the ten adult partners' respective shares in the firm's profits and for the four minors' shares in the firms' profits. The said clause further provided that in the event of loss, the same was to be apportioned by the ten adult partners in the light of their respective shares.

3. For the assessment year 1966-67, the assessee firm filed its return of income on October 4, 1967, along with the declaration in the prescribed Form No. 12, as contemplated under rule 24 of the Income-tax Rules, 1962 (hereinafter called the Rules) to the effect that there had been no change in the constitution of the firm or in the shares of the partners, as evidenced by the partnership deed dated October 25, 1964, on the basis of which the registration for the earlier assessment year had been granted. Before the completion of the assessment by the Income-tax Officer on December 20, 1978, the firm furnished, under section 139(4) of the Act, a revised return on September 3, 1970. The firm carried on two activities, one by way of electricity supply undertaking and the other by way of an engineering works. The first activity came to an end on November 13, 1965, as a result of the sale of the electricity undertaking in favour of the Punjab State Electricity Board. From the said activity, the firm had, as per the assessee's books of account, made a net profit of Rs. 35,337 over and above the statutory reserve of Rs. 29,738 made under section 57 of the Electricity (Supply) Act, 1948. The engineering works activity, started only in October, 1965, had resulted in a net loss of Rs. 52,187. The sale of this undertaking resulted in the

receipt of Rs. 13,72,402, and a further claim by way of sale consideration is still pending. The revised return furnished by the assessee was accompanied *inter alia* by a revised profit and loss and appropriation account as it stood on March 31, 1966, showing a distribution of the not loss of Rs. 7,482 amongst the eleven partners. Out of them the said Ghansham Gupta was the one who had become partner under the law of partnership only on October 25, 1965, as mentioned above. His loss was worked out in the said revised account at 3-3/4 per cent share. The Income-tax Officer treated the earlier registration of the assessee as being effective for the assessment year, in question, and allocated the share income to all the 14 partners (including the minors, as per the definition of the term 'partner' in section 2(23) of the Act), as per the ratio provided under clause (6) of the partnership deed dated October 25, 1964.

4. The Additional Commissioner of Income-tax initiated proceedings under section 263(1) of the Act, and,—*vide* his order, dated October 13, 1972, held that the registration granted to the assessee for the assessment year 1965-66 was not to have effect for the assessment year 1966-67, as it was observed that "since the share allocation actually adopted in the books was different from that mentioned in the partnership deed, it can be said that the firm in actual practice, was different from that mentioned in the instrument of partnership. The certificate given in the declaration filed under section 184(7) was, therefore, wrong. The constitution of the firm had changed and in any case the shares of the partners as per books were not the same as mentioned in the deed of partnership. The firm was, in the circumstances, not entitled to the benefit of registration. The I.T.O. has allowed the registration erroneously. Since the firm is not legally entitled to registration, the renewal thereof allowed by the I.T.O. is hereby cancelled." Feeling aggrieved against the said order of the Additional Commissioner of Income-tax, the assessee filed an appeal under section 263(1)(c) of the Act before the Tribunal.

5. The Tribunal,—*vide* its order, dated September 3, 1971, held that the Income-tax Officer's action in recording the impugned certificate of registration could not be said to be erroneous on account of the distribution of loss by the assessee in a ratio different from the one indicated in the partnership deed dated October 25, 1964. The other contention of the assessee that the registration already granted to the firm, if allowed to continue under section 184(7) for

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the assessment year 1966-67 did not constitute an order within the meaning of section 263(1) was also accepted and it was held that there existed no order within the meaning of section 263 of the Act which could be revised by the Additional Commissioner of Income-tax. As a result of these findings, the appeal of the assessee was accepted by the Tribunal and the Order of the Additional Commissioner of Income-tax, dated October 13, 1972, was set aside. However, in its order, the Tribunal also observed that "in the instant case, with effect from October 25, 1965, there is an obvious change in the constitution of the firm, inasmuch as in place of 10 partners and 4 minors admitted to the benefits (of the partnership?), we have with effect from that date 11 partners and three minors admitted to the benefits of the partnership. Thus the Income-tax Officer's action, in recording under section 185(4) of the Income-tax Act, a certificate to the effect that the firm has been registered for the assessment year 1966-67, constituted, in our opinion, an obvious error on his part. We find accordingly," It was, in these circumstances, that both the parties, that is, the assessee and the Revenue, sought references on the questions of law arising out of the said order of the Tribunal, for opinion by this Court.

6. As regards question No. 1 (supplementary—after the deletion of the original question No. (i), Mr. G. C. Sharma, the learned counsel for the assessee, at the very outset, conceded that it be decided in favour of the Revenue and against the assessee. In view of this concession, we answer the said question accordingly.

7. In view of the answer to question No. 1, above, question No. 2 (supplementary) as such does not survive and is, therefore, answered accordingly.

Question No. (ii) (original):

8. No meaningful objection could be raised on behalf of the Revenue to the finding recorded by the Tribunal that the Income-tax Officer's action in recording the impugned certificate of registration could not be said to be erroneous on account of the distribution of loss by the assessee firm in a ratio different from the one indicated in the partnership deed dated October 25, 1964. In view of this firm finding arrived at by the Tribunal, the answer to this question is against the Revenue and in favour of the assessee.

Question No. (iii) (original):

9. According to the learned counsel for the Revenue, the Tribunal has erred in holding that there existed no order of the Income-tax Officer within the meaning of section 263(1) of the Act, which could be revised by the Additional Commissioner, Income-tax. He also referred to section 185(3) of the Act as well as rules 22 to 25 of the Rules which deal with the procedure for registration of a firm and the declaration for continuation of registration of a firm. He also referred to the order dated October 20, 1970, passed by the Income-tax Officer in the respect, which *inter alia* reads as follows:

“Declaration under section 184(7) as filed along with the return. It is signed by all the partners. This is in order. As there is no change in the constitution of the firm as of the partners, registration already granted to this firm is continued for the assessment year 1966-67.”

On the other hand, the learned counsel for the assessee, contended that this is not an independent order passed by the Income-tax Officer, as no such order is contemplated under section 184(7) of the Act and only certification is required thereunder. The Income-tax Officer, while making the assessment for the year 1966-67, has mentioned this as a fact only and under these circumstances, it could not be considered to be an order attracting the provisions of section 263 of the Act. He also referred to *Ram Lal Kishore Lal v. Commissioner of Income-tax U.P.* (1972) (1), in support of his contention.

Section 263(1) of the Act, reads,—

“The 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 Income-tax Officer is erroneous in so far as it is prejudicial to the interest of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made 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.”

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Section 184(7) of the Act, provides,—

“Where registration is granted to any firm for any assessment year it shall have effect for every subsequent year:

Provided that:—

- (i) there is no change in the constitution of the firm or the shares of the partners as evidenced by the instrument of partnership on the basis of which the registration was granted; and
- (ii) the firm furnishes, before the expiry of the time allowed under sub-section (1) or sub-section (2) of section 139 (whether fixed originally or on extension) for furnishing the return of Income for such subsequent assessment year, a declaration to that effect, in the prescribed form and verified in the prescribed manner, so, however, that where the Income-tax Officer is satisfied that the firm was prevented by sufficient cause from furnishing the declaration within the time so allowed, he may allow the firm to furnish the declaration at any time before the assessment is made.”

Rule 24 of the Rules, is as follows:—

“The declaration to be furnished under sub-section (7) of section 184 shall be in Form No. 12 and shall be verified in the manner indicated therein and shall be signed by the persons concerned in accordance with sub-rule (5) of rule 22.”

From a reading of the provisions dealing with the continuation of the registration of a firm in the subsequent years, it cannot be said that the matter of continuation of registration is not a proceeding under the Act. If it is a proceeding under the Act, then any order passed thereunder would be covered under section 263(1) of the Act. The contention that it is not an order as such, is not supported by any precedent. Ramlal's case (supra), has no applicability to the facts of the present case. In the said case, the note of the

tax Officer, "penalty dropped" was held to be only for the purpose of completing the record and was not treated as an order within the meaning of section 263(1) of the Act. The relevant observations in this respect, in the above-said case are as follows:—

"The imposition of the penalty rested entirely within the jurisdiction of the Inspecting Assistant Commissioner, and when he made the order which he did, there was nothing more to be done. The Income-tax Officer could not by a subsequent order limit or extend the order made by the Inspecting Assistant Commissioner. When he made the entry of October 3, 1963, it was merely for the purpose of completing the record before him. Thereafter, he wrote to the assessee informing him that the penalty proceeding had been dropped. When he did so it was not because the statute compelled him to do so, but because it was only right that the assessee should know what had happened in the proceeding, especially as after the proceeding had been initiated under section 271(1)(c) the assessee was on no occasion privy to the proceeding before the Inspecting Assistant Commissioner. We are clear in our mind that the entry made by the Income-tax Officer in the order sheet on October 3, 1963, cannot be construed as an order made by him. It was not an order within the meaning of section 263(1) of the Act and, therefore, the Commissioner had no jurisdiction to take proceedings under that provision."

In the present case, the Tribunal has been impressed by what it considered the Act provided under section 184(7). According to it, it is not the same thing as the granting of registration as the Income-tax Officer has not determined the assessee's status as such so as to result in the passing of an order revisable under section 263 of the Act. In our opinion, this approach of the Tribunal is not justified. The Income-tax Officer has to apply his mind to the question whether the declaration furnished by the assessee is in accordance with the provisions of the Act and the rules framed thereunder or not, and after satisfying himself, necessary order, in the nature of grant of the certificate, is to be recorded. Even if it may be taken to be a formal order but all the same, it is necessary to record some order, as has been actually done by the Income-tax Officer in the present case and

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which has been reproduced above. Such an order, when passed by the Income-tax Officer, will be in the proceeding under the Act, and would be covered under section 263(1) of the Act; provided the other conditions are also fulfilled. There is another approach as well. If the order thus passed or the certificate so granted by the Income-tax Officer is of such a nature that if erroneous, is likely to prejudice the interests of Revenue, then the provisions of section 263(1) of the Act, will be attracted. In other words, it is the nature of the order which will determine the applicability of section 263 of the Act. In the present case, it has not been denied that if the certificate granted by the Income-tax Officer is held to be erroneous, it is likely to prejudice the interests of the Revenue. In this view of the matter, the answer to this question is in the negative, that is, in favour of the Revenue and against the assessee.

Question No. (iv) (original):

10. The learned counsel for the assessee contended that the Additional Commissioner of Income-tax found the order of the Income-tax Officer granting the certificate of continuation of the registered firm to be erroneous on the ground that the constitution of the firm had changed and in any case, the shares of the partners, as per the books of the assessee, were not the same as mentioned in the partnership deed, dated October 25, 1964. In appeal filed on behalf of the assessee, the Tribunal found that this conclusion of the Additional Commissioner of Income-tax was not tenable and thus, it accepted the appeal and set aside the order of the Additional Commissioner of Income-tax, but at the same time, it erred in observing that in the present case, with effect from October 25, 1965, there was an obvious change in the constitution of the firm in as much as in place of 10 partners, and 4 minors admitted to the benefits of the partnership, there were 11 partners and 3 minors admitted to the benefit of the partnership. According to the learned counsel, the Tribunal was not competent to substitute its own reasons for upholding the order of the Additional Commissioner and holding the order of the Income-tax Officer to be erroneous as the subject-matter of the appeal before him was whether the order of the Additional Commissioner of Income-tax, under section 263(1) of the Act, as such was valid or not. He further stated that once the reasons given by the Additional Commissioner of Income-tax are held to be

not tenable, then there was an end of the matter. The said order, under appeal, could not be justified by inventing any other ground which never formed the basis of the order of the Additional Commissioner of Income-tax under section 263(1) of the Act. The argument proceeds, that, in appeal, the Tribunal could not substitute its own reasons for upholding the order of the Additional Commissioner of Income-tax under section 263(1) as it will be an encroachment upon the jurisdiction of the Additional Commissioner of Income-tax, which is not legally permissible, as an order to be passed under section 263(1) of the Act, is the exclusive jurisdiction of the Commissioner of Income-tax and his satisfaction is the basis on which he may come to the conclusion that the order passed by the Income-tax Officer is erroneous in so far as it is prejudicial to the interests of the Revenue. Any other consideration which did not weigh with the Commissioner at the time of the passing of the order under section 263(1) of the Act, could not be read into the order of the Commissioner so as to be upheld by the Tribunal in appeal filed on behalf of the assessee. According to the learned counsel, it is particularly so because under section 253(1)(c) of the Act, it is only the assessee who may file an appeal against the order passed by the Commissioner under section 263 of the Act and the Revenue is given no such right under the statute to file any such appeal against the order of the Commissioner under section 263 of the Act in case he comes to the conclusion that the order of the Income-tax Officer is not erroneous so as to prejudice the interests of the Revenue. It was further contended that the orders passed by the Appellate Assistant Commissioners in appeals in assessment proceedings are on a different footing because in those cases, both the parties, that is the assessee as well as the Revenue, have the right to file an appeal before the Tribunal. In support of his contention the learned counsel place reliance on *J. K. Bankers v. Commissioner of Income-tax, U.P. and another*, (2), *R. L. Rajgharia v. Income-tax Officer and others* (3), *Commissioner of Income-tax, Tamil Nadu-I v. Madras Industrial Investment Corporation Ltd.* (4), *Johri Lal (H.U.F.) v. Commissioner of Income-tax, U.P.* (5) and *Commissioner of Income tax v. R. K. Metal Works* (6).

(2) (1974) 94 I.T.R. 107.

(3) (1977) 107 I.T.R. 347.

(4) (1980) 124 I.T.R. 454.

(5) (1973) 88 I.T.R. 439.

(6) (1978) 112 I.T.R. 445.

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11. On the other hand, the learned counsel for the Revenue, argued that the Tribunal was competent to sustain the order of the Additional Commissioner of Income-tax on the ground other than the one given by the Additional Commissioner, as the subject-matter of the appeal was the validity or the invalidity of the order of the Additional Commissioner. In any case, as the Tribunal was seized of the whole matter in appeal, it was competent to pass any order that it deemed proper therein. The illegality in the order of the Income-tax Officer if discovered by the Tribunal, could not be allowed to continue because the additional Commissioner failed to notice the same. In other words, the incomplete expression, by the Additional Commissioner in his order, dated October 13, 1972, will not affect the jurisdiction of the Tribunal to correct the same in appeal though it was filed on behalf of the assessee. In support of his contention, the learned counsel relied upon *Madras Industrial Investment Corporation's case* (supra), *Bhagat Shyam and Company v. Commissioner of Income-tax, Kanpur*, (7), *Commissioner of Income-tax, West Bengal-II v. Electro House*, (8), *Commissioner of Income-tax, New Delhi (Central) v. Edward Keventer, (successors) P. Ltd.* (9), *Steel Containers Ltd. v. Commissioner of Income-tax, West Bengal-II, Calcutta* (10) and *Commissioner of Income-tax, west Bengal v. M/s. Amarendranath Mukherjee and brothers* (11).

12. We have heard the learned counsel for the parties at a great length and have also gone through the case law cited at the bar. None of the cases, referred to above, directly deals with the question to be determined in these references. However, some guidance can be had from the Supreme Court judgment. In *Johri Lal's case* (supra), the final Court, while dealing with a case where certain proceedings were taken by the Income-tax Officer against the assessee under section 34(1) (b) of the Income-tax Act, 1922, and the same were not allowed to be sustained by the Tribunal, under section 34(1) (a) of the above-said Act, held as follows:—

“Where the Income-tax Officer himself proceeds on the basis of section 34(1) (b) of the Indian Income-tax Act, 1922,

- (7) (1980) 123 I.T.R. 164.
- (8) (1971) 82 I.T.R. 824.
- (9) (1980) 123 I.T.R. 200.
- (10) (1978) 112 I.T.R. 995.
- (11) (1973) T.L.R. 113.

and not on the basis of section 34(1) (a), in the absence of material on record to show that the Income-tax Officer had formed the requisite belief, recorded his reasons for taking action under section 34(1) (a) and obtained the sanction of the Central Board or the Commissioner, as the case may be, it is not open to the Appellate Tribunal to justify the proceedings taken by the Income-tax Officer under section 34(1) (a).

The formation of the requisite belief by the Income-tax Officer before proceedings can be validly initiated under section 34(1) (a) is a condition precedent, the fulfilment of this condition is not a mere formality, it is mandatory, and failure to fulfil that condition would vitiate the entire proceedings. Further, the formation of the required belief is not the only requirement, the officer is further required to record his reasons for taking action under section 34(1) (a) and obtained the sanction of the Central Board or the Commissioner, as the case may be.”

The authority of *Electro House's case* (supra), cited on behalf of the Revenue to point out the distinction between the proceedings under section 263(1) and section 147(a) and (b) of the Act is of no help to the case of the Revenue. In the said case, the question involved was regarding notice under section 33-B of the Income-tax Act, 1922, which is equivalent to section 263 of the Act, whereas no such question is involved in the present case. In the above-said case, it was held:—

“Unlike section 34, section 338 of the Income-tax Act, 1922, does not require any notice to be issued by the Commissioner before he assumes jurisdiction to proceed to revise an order passed by the Income-tax Officer. The jurisdiction of the Commissioner to proceed under section 33-B is not dependent on the fulfilment of any condition precedent. He is not required to give any notice before commencing the inquiry. All that he is required to do, before reaching his decision and not before commencing the inquiry, is to give the assessee an opportunity of being heard and make or cause to make such inquiry as he deems necessary. These requirements have nothing to do

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with the jurisdiction of the Commissioner. They pertain to the region of natural justice. Breach of the principles of natural justice may affect the legality of the order made but that does not affect the jurisdiction of the Commissioner."

All other cases deal with the jurisdiction of the Tribunal, while hearing an appeal against the order of the Appellate Assistant Commissioner in assessment proceedings where both the parties have the right to file an appeal against the order. Thus, the said authorities are of no assistance to determine the present controversy..

13. The jurisdiction vested in the Commissioner under section 263(1) of the Act is of a special nature or, in other words, the Commissioner has the exclusive jurisdiction under the Act to revise the order of the Income-tax Officer if he considers that any order passed by him was erroneous in so far as it was prejudicial to the interests of the Revenue. Before doing so, he is also required to give an opportunity of being heard to the assessee. If after hearing the assessee in pursuance of the notice issued by him under section 263(1) of the Act, he is not satisfied, he may pass the necessary orders. Of course, the order thus passed, will contain the grounds for holding the order of the Income-tax Officer to be erroneous, as contemplated under section 263(1) of the Act. Feeling aggrieved therefrom, the assessee may file an appeal against the same, as provided under section 253(1) (c) of the Act. In the memorandum of appeal, the assessee is supposed to attack the order of the Commissioner and to challenge the grounds for decision given by him in his order. At the time of the hearing, if the assessee can satisfy the Tribunal that the grounds for decision given in the order by the Commissioner are wrong on facts or are not tenable in law, the Tribunal has no option, but to accept the appeal and to set aside the order of the Commissioner. The Tribunal cannot uphold the order of the Commissioner on any other ground which, in its opinion, was available to the Commissioner as well. If the Tribunal is allowed to find out the grounds available to the Commissioner to pass an order under section 263(1) of the Act, then it will amount to sharing of the exclusive jurisdiction vested in the Commissioner, which is not warranted under the Act. It is all the more so, because the Revenue has not been given any right of appeal under the Act

against an order of the Commissioner under section 263(1) of the Act. In case he proceeds thereunder after hearing the assessee in pursuance of the notice given by him, then the appeal filed by the assessee under section 253(1)(c) of the Act, cannot be treated on the same footing as an appeal against the order of the Appellate Assistant Commissioner passed in assessment proceedings, where both the parties have been given the right of appeal. In this view of the matter, the argument raised on behalf of the Revenue, that in appeal, the Tribunal may uphold the order appealed against on the grounds other than those taken by the Commissioner in his order, is not tenable. Under section 263 of the Act, it is only the Commissioner who has been authorised to proceed in the matter and, therefore, it is his satisfaction according to which he may pass necessary orders there under in accordance with law. If the grounds which were available to him at the time of the passing of the order do not find mention in his order appealed against, then it will be deemed that he rejected those grounds for the purpose of any action under section 263(1) of the Act. In this situation, the Tribunal while hearing an appeal filed by the assessee cannot substitute the grounds which the Commissioner himself did not think proper to form the basis of his order.

14. As a result of the above discussion, in our opinion, the Tribunal was not competent to take into consideration the fact of increase in the number of adult partners from 10 to 11, when the Additional Commissioner had not, in fact, relied upon the said change in holding the Income-tax Officer's order, dated October 20, 1978, to be erroneous. Thus, the answer to the said question is in favour of the assessee and against the Revenue.

15. The references stand answered accordingly with no order as to costs.

N. K. S.

FULL BENCH

Before S. S. Sandhawalia C.J. and P. C. Jain and J. M. Tandon, JJ.

LAL SINGH,—Petitioner.

versus

STATE OF PUNJAB ETC.,—Respondents.

Civil Writ Petition No. 2421 of 1980.

April 8, 1981.

Constitution of India 1950—Article 162—Code of Criminal Procedure (II of 1974)—Section 378—Decision by Government to file