

CALCUTTA HIGH COURT

Russell Properties Pvt. Ltd

Vs

A. Chowdhury, Addl. Commissioner

(Sabyasachi Mukharji ,J.)

06.05.1976

JUDGMENT

Sabyasachi Mukharji, J.

1. The petitioner, Russell Properties Pvt. Ltd. acquired premises No. 6, Little Russell Street, Calcutta, comprising an area of about 17 cottahs, together with an incomplete building for commercial purpose as well as for the purpose of having its registered office. The petitioner-company, thereafter, completed the construction of the said building and let it out to various tenants. In or about June, 1964, there was an indenture of lease entered into by and between the petitioner-company and the first tenant of the building, M/s. Siemens Engineering and Manufacturing Co. of India Ltd. Assessments for the assessment years 1965-66 and 1966-67 were completed by the Income-tax Officer on the 29th of March, 1971, and 26th of April, 1971, respectively. The question involved in the said assessments was about the true nature and character of the service and maintenance charges received by the assessee-company from its tenants in the multi-storeyed building at No. 6, Little Russell Street, Calcutta. In the said assessments, the Income-tax Officer included the amounts received on account of service and maintenance charges in the rental income and computed the total income of the assessee on the aforesaid basis. Appeals were preferred against the said orders of the Income-tax Officer for the assessment years 1965-66 and 1966-67. The Appellate Assistant Commissioner in his order for the assessment year 1965-66 dated 25th February, 1972, observed, inter alia, as follows :

"At the time of the appeal hearing the appellant took up the plea that income from service charges were taxable under the head 'business'. In this connection the appellant placed reliance on the decision of the Supreme Court in Karnani Properties Ltd. v. Commissioner of Income-tax . In that case their Lordships of the Supreme Court held that if the services rendered by an assessee to its tenants were the result of its activities carried on continuously in an organised manner for a set purpose and with a view to earning profits, those activities were business activities and the

income arising therefrom was assessable to tax under the head 'business'. It was argued before me that the services rendered by the appellant were analogous to the service rendered by M/s. Karnani Properties Ltd. to its tenants. It was submitted that the appellant had installed an electric transformer for the regulation of supply of electricity to its tenants. It had also erected lift and employed liftman and it was also supervising, scavenging and other works which was very necessary to keep that premises healthy and clean. In the circumstances, the appellant's income from service charges was liable to be assessed under the head 'income from business.' "

2. I have considered the submission of the appellant and in my opinion they carry sufficient force. I find that provision of services in this case is one continuous and organised process and this was done with a view to earning profits. The facts of this case are on all fours similar with the facts in the case of M/s. Karnani Properties Ltd. and, therefore, the ratio of the decision in that case is equally applicable in the case of the appellant. The income under the head "services and maintenance charges" is, therefore, liable to be assessed under the head "income from business". The property income has to be computed as under:

Rs.

Rent received 2,28,625 Less : 50% of the collection charges 25,000 2,03,625 Less : 1/6th for repairs 33,971 6% collection charges 12,230 Property income 1,57,424

3. There were similar observations in the order dated 2nd March, 1972, passed by the Appellate Assistant Commissioner for the assessment year 1966-67. Appeals against both the said orders were preferred by the revenue to the Income-tax Appellate Tribunal. Both these appeals came up for hearing before the Income-tax Appellate Tribunal and by an order dated 15th September, 1973, were disposed of by the Tribunal, The Tribunal observed, inter alia, as follows :

"(a) We have already given the factual background of the issues involved in this case and have described the various services rendered by the assessee to the tenants. They are practically the same as rendered by M/s. Karnam Properties Ltd., with one minor difference.

(b) Considering the elaborate services undertaken by the assessee in the form of watch and ward and scavenging facilities, maintenance of underground drainage for the benefit of the tenants, maintenance of electric installations and electric pumps, constant supply of filtered and unfiltered water, conversion of electricity from high voltage to low voltage and to supply to the tenants, etc., we have no doubt in mind that the Appellate Assistant Commissioner of Income-tax was right in his decision that he took.

(c) The services rendered by the assessee had to be viewed against time and expense and energy involved expended in these services. They really partake of the nature of an organised business activity conducted in a systematic manner.

(d) In the words of the Bombay High Court decision in the case of National Storage Pvt. Ltd. [1963] 48 ITR 577 (Bom) as approved by the Hon'ble Supreme Court (See the services rendered by the assessee are complex and not merely incidental to the ownership of the property."

4. In the meantime, between 11th February, 1972, and 21st February, 1972, orders of assessment were passed by the Income-tax Officer for the assessment years 1967-68, 1968-69 and 1969-70. The assessee being aggrieved on certain points by the said orders of assessment preferred appeals before the Appellate Assistant Commissioner on or about the 29th March, 1972. In July, 1972, the petitioner-assessee made an application for expeditious hearing of the appeals before the Appellate Assistant Commissioner. Thereafter, it is stated that diverse dates were fixed for disposal of the appeal in 1972 and 1973, but the appeal was adjourned though the petitioner-company was ready to proceed with the hearing. On March 5, 1973, the petitioner-company made an application before the Commissioner of Income-tax, West Bengal-II, under Section 264 of the Income-tax Act for reduction of interest charged for the assessment years 1967-68, 1968-69 and 1969-70 as the petitioner contended that the petitioner-company was prevented by sufficient cause from filing the returns within the time. On 15th September, 1973, as mentioned hereinbefore, an order was passed by the Income-tax Appellate Tribunal affirming the order of the Income-tax Appellate Assistant Commissioner for the assessment years 1965-66 and 1966-67. Thereafter, on 8th January, 1974, a notice was given of the application under Section 256(1) of the Income-tax Act for referring certain questions of law to the High Court.

5. On 11th January, 1974, the petitioner received the impugned notice under Section 263 of the Income-tax Act proposing to rectify the assessment orders for the assessment years 1967-68, 1968-69 and 1969-70. It would be relevant to set out the material portion of the said impugned notice:

"It appears from the assessment records of M/s. Russell Properties Private Ltd. that the receipts from tenants in respect of Russell Street property in its entirety was subjected to tax under the head 'property' up to the assessment year 1964-65. For the assessment years 1965-66 and 1966-67 you pleaded before the Appellate Assistant Commissioner that a part of such receipts from tenants relating to maintenance and service charges are assessable under the head 'business'. The Appellate Assistant Commissioner allowed your plea following the decision of the Supreme Court in the case of Karnani Properties Ltd. v. Commissioner of Income-tax . But, as the facts of your case appeared to be distinguishable from the facts of the aforesaid case relied on by the Appellate Assistant Commissioner, second appeals were filed before the Appellate Tribunal. The

Tribunal, however, has upheld the Appellate Assistant Commissioner's orders for the said two years and the department has filed reference applications under Section 256(1) of the Income-tax Act, 1961, which are still pending. Notwithstanding the fact that the department had not accepted the orders of the Appellate Assistant Commissioner for the earlier assessment years 1965-66 and 1966-67 and the matter is now the subject of reference application under Section 256(1) of the Income-tax Act, 1961, the Income-tax Officer, D-Ward, Comp. Dist. III, who made the assessments in your case on February 11, 1972, February 21, 1972, and February 21, 1972, respectively, for the assessment years 1967-68, 1968-69 and 1969-70 has accepted your plea in this regard and assessed a portion of such receipts from tenants in respect of Russell Street property under the head 'business' with the consequential loss to revenue. On the facts, as stated above, the orders of assessment as framed by the Income-tax Officer for the aforesaid three assessment years are considered erroneous and prejudicial to the interests of the revenue.

2. I, therefore, propose to pass such orders thereon under Section 263 as the circumstances of the case may justify including an order cancelling the assessment under section...for the assessment years 1967-68 and 1968-69 as rectified under Section 154 subsequently and also the order under Section 143(3) for the assessment year 1969-70 and directing the Income-tax Officer to make fresh assessments according to law and facts of the case."

6. The petitioner, thereupon, represented to the Commissioner asking the Commissioner for certain clarifications of the alleged grounds for rectification. On the 15th January, 1974, the Appellate Assistant Commissioner passed an order for the assessment year 1964-65 holding that service charges were liable to be assessed under the head "business" following the decision of the Tribunal in other years. On 24th January, 1974, the petitioner moved this application under Article 226 of the Constitution and obtained a rule nisi. An ad interim order of injunction was granted pending the hearing of the application and the respondents were restrained from passing any final order. Thereafter, on 30th January, 1974, this court varied the interim order to the extent that the respondent, Commissioner of Income-tax, was given liberty to proceed with the matter and to make such order as he considered fit and proper but it was directed that the said order should not be communicated to the petitioner or given effect to until the disposal of the present writ application. On the 20th March, 1975, an order was passed by the Commissioner of Income-tax rejecting the petitioner's application under Section 264 of the Income-tax Act for reduction of interest charged for the assessment years 1967-68, 1968-69 and 1969-70, on the ground that the orders of assessment in question have already been set aside by an order under Section 263 of the Income-tax Act on the 7th February, 1974, by the Additional Commissioner of Income-tax, West Bengal-II. On the 4th April, 1974, the Tribunal under Section 256 of the Act framed a question of law as to whether the Tribunal was correct in holding that the service and maintenance charges were for the maintenance of lifts alone or for other services rendered by the assessee. The

Commissioner of Income-tax thereafter made an application under Section 256(2) of the Act, but the High Court has dismissed the said application.

On the 31st January, 1975, the Tribunal passed the order in respect of the assessment year 1964-65, holding that the service charges were income from business.

7. In this application, as mentioned hereinbefore, the challenge is to the notice issued under Section 263 of the Income-tax Act, 1961, for the assessment years 1967-68, 1968-69 and 1969-70. For the aforesaid assessment years the main question involved was whether the income received by the assessee from maintenance and service charges should be treated as income from business or as income of rent from house property. It has to be further noted that for all these years the assessee has preferred appeals to the Income-tax Appellate Assistant Commissioner and at the time when the impugned notice was issued, the said appeals were pending. It may, however, be mentioned that the appeals were not preferred on this ground as to whether the amount received on account of maintenance and service charges should be treated as income from house property or not but the appeals were directed on other disallowances made by the Income-tax Officer not relevant for the present purpose. In support of this application the first contention that was urged was that during the pendency of an appeal before the Appellate Assistant Commissioner the Commissioner of Income-tax was not competent to issue any notice under Section 263 of the Income-tax Act, 1961. It was contended that in an appeal before the Appellate Assistant Commissioner though at the instance of the assessee, the Appellate Assistant Commissioner had jurisdiction and competency to enhance the assessment and to rectify any error committed by the Income-tax Officer which might have caused prejudice to the revenue. In those circumstances it was contended that the Commissioner did not have jurisdiction to invoke his powers under Section 263 of the Act. It was urged that Section 263 of the Act had its inception in Section 33B of the Act of 1922, which was introduced to give the Commissioner power to meet a particular situation, namely, to correct an erroneous order which could not be appealed from because the department was not competent to appeal from the order of the Income-tax Officer which has caused prejudice to the revenue. It was, therefore, submitted that in a situation where the department had the remedy of rectifying the alleged prejudice in the appellate order of the Appellate Assistant Commissioner, there was no occasion and purpose for resorting to the revisional power of the Commissioner. It was submitted that Section 33B of the Indian Income-tax Act, 1922, as well as Section 263 of the Income-tax Act, 1961, were revisional powers, and therefore, on the principle that the revisional powers should not be available where there was an appellate jurisdiction, the Commissioner was incompetent in the facts and circumstances of the case to invoke revisional powers under Section 263 of the Act. In aid of this submission reliance was placed on the observations of the Bombay High Court in the case of Commissioner of Income-tax v. Amritlal Bhogilal and Co. [1953] 23 ITR 420 (Bom).

There Chief Justice Chagla, speaking for the court held that an order of the Commissioner under Section 33B(1) of the Indian Income-tax Act, 1922, setting aside the order of the Income-tax Officer while an appeal from the said order was pending before the Appellate Assistant Commissioner was invalid. In that case for three assessment years the Income-tax Officer had made assessment on the assessee which was a registered firm under Section 26A of the Indian Income-tax Act, 1922. The assessee appealed and the Appellate Assistant Commissioner reduced the assessments for the two years and kept the appeal for the third year pending before him. The Commissioner subsequently passed an order under Section 33B directing the Income-tax Officer to cancel the registration of the firm under Section 26A of the Indian Income-tax Act, 1922, and to assess the assessee as an unregistered firm for all these three years. On a reference, the High Court held that the order of the Commissioner under Section 33B was invalid. Chief Justice Chagla at page 425 of the report observed that if one analysed Section 33B a little more closely, it was apparent that the legislature never intended to give the power to the Commissioner to revise an order of the Income-tax Officer when the assessee had appealed from that order. The object of enacting Section 33B according to the learned Chief Justice was to confer a power upon the Commissioner in the interest of the revenue to revise the orders of the Income-tax Officer which could not be revised under any circumstances if the assessee did not appeal from those orders. However erroneous the order of the Income-tax Officer might be, however prejudicial to the revenue, the assessee by refusing to exercise his right of appeal could make that order conclusive. In order to fill up this obvious lacuna the legislature had enacted Section 33B. But, once the assessee had appealed, according to the learned Chief Justice, there was no difficulty whatsoever in the way of the department in agitating the question before the Appellate Assistant Commissioner which in its opinion should be agitated and decided in the interest of the public revenue. When an appeal was pending before the Appellate Assistant Commissioner, the Income-tax Officer had the right to be heard either in person or by a representative and the point which the Commissioner had taken and on which the Commissioner had given his decision under Section 33B could be urged upon the direction of the Commissioner before the Appellate Assistant Commissioner. According to the learned Chief Justice when no remedy was open to the Commissioner to revise the order of the Income-tax Officer, this jurisdiction under Section 33B arose. But when a legal remedy was given to him to get the order of the Income-tax Officer revised, he could not requisition to his aid the power conferred upon him under Section 33B. Once the appeal with regard to the year, in that case 1949-50, was pending before the Appellate Assistant Commissioner, he had the full right to get the order of the Income-tax Officer revised in any manner he thought necessary in the interest of the public revenue. The learned Chief Justice observed that revisional powers were exceptional powers to be exercised at exceptional times for exceptional reasons and the exceptional reason for which the powers could be and should be exercised was when the Commissioner felt that the public revenue was likely to be

suffered and that no remedy was open to him to get the order of the Income-tax Officer revised. The learned Chief Justice in the aforesaid decision was proceeding on the well-known principle as to how revisional powers are to be exercised and construed. But, in a fiscal statute the ambit and the content of the power must be determined by the language used in the enacting provision, though it is necessary that such expression used in the enacting provision must be construed in the light of the context in which the expression is used and in the context of the entire Act. The occasion for grant of a power does not and need not necessarily limit the amplitude of the grant. In the Indian Income-tax Act, 1922, Section 33B had to be introduced by amendment to meet perhaps an exceptional situation, namely, where an erroneous order, was passed by the Income-tax Officer but where the assessee had not preferred an appeal, in such a case to give to the Commissioner a remedy to rectify the error, Section 33B was introduced in the Indian Income-tax Act, 1922. But the question for determination in this case is whether the enacting provision of Section 33B of the Indian Income-tax Act, 1922, or the provision of Section 263 of the 1961 Act limits the power to such exceptional situation only. In my opinion it does not. In this connection reference may be made to the decision of the Supreme Court in the appeal from the judgment of the Bombay High Court in the case of Commissioner of Income-tax v. Amritlal Bhogilal & Co. . There, of course, the Supreme Court found as a fact that under Section 31 of the 1922 Act there was no appeal from an order granting registration to a firm under Section 26A of that Act. The Supreme Court held that an order granting registration to a firm under Section 26A of the Indian Income-tax Act, 1922, merely affected or governed the procedure of collecting or recovering the tax found due from a firm and was separate from and independent of the order of assessment. Therefore, as there was no appeal from an order granting registration to a firm, the Appellate Assistant Commissioner could not cancel, in exercise of his appellate jurisdiction under Section 31, an order granting registration to a firm. In that context the Supreme Court observed that an order of the Income-tax Officer registering a firm could be revised by the Commissioner under Section 33B whenever he considered that it was erroneously passed and was prejudicial to the interests of the revenue even while an appeal was pending from the order of the assessment and even after the appeal was disposed of by the Appellate Assistant Commissioner. Counsel for the petitioner in the instant case before me sought to argue that the Supreme Court did not differ from the views of Chief Justice Chagla referred to hereinbefore that the revisional power under Section 33B of the Act was only available where there was no appeal. The Supreme Court found in that case that the order granting registration was not appealable and, as such, such an order was revisable by the Commissioner at any time even if an appeal was pending. It is true, as learned counsel rightly contended, that the point at issue in the aforesaid decision of the Supreme Court was whether the order of registration was independent from the order of assessment and whether an appeal could be preferred from the order of registration and in that context the Supreme Court was concerned with the question whether the order for registration passed by the

Income-tax Officer could be revised by the Commissioner. Counsel is right that the Supreme Court was not concerned with the orders which were appealable and which had been appealed from; in such cases whether the revisional powers could be exercised by the Commissioner, the Supreme Court was not actually concerned. But the Supreme Court made some significant observations about the scope and effect of Section 33B of the Indian Income-tax Act, 1922. The Supreme Court observed as follows :--See .

"The case in regard to the subsequent year 1949-50 presents no difficulty. The appeal preferred by the respondent against the Income-tax Officer's assessment order in respect of this year was pending at the material time before the Appellate Assistant Commissioner; and so no question of merger arose in respect of the order granting renewal of registration for this period. There can be no doubt that even on the theory of merger the pendency of an appeal may put the order under appeal in jeopardy but until the appeal is finally disposed of the said order subsists and is effective in law. It cannot be urged that the mere pendency of an appeal has the effect of suspending the operation of the order under appeal. The High Court, however, appears to have taken the view that the revisional power is an extraordinary power and can be exercised only for unusual and extraordinary reasons. It was also assumed by the High Court that, in the pending appeal, the department would have an alternative remedy because, according to the High Court, the department could have challenged the validity or the propriety of the respondent's registration and could have asked the Appellate Assistant Commissioner to cancel it. As we have already pointed out, the department could not challenge the validity of the registration order in the assessee's appeal before the appellate authority and so the argument that the department had an alternative remedy is not correct.

It is clear from the judgment of the High Court that it is the assumption that the department had an alternative remedy which weighed with the learned judges in reaching their final conclusion. Then the argument that the extraordinary revisional power must be exercised only for extraordinary reasons is really not very material. Whether or not the revisional power can be exercised in a given case must be determined solely by reference to the terms of Section 33B itself. Courts would not be justified in imposing additional limitations on the exercise of the said power on hypothetical considerations of policy or the extraordinary nature of the power. We must, therefore, hold that the High Court was also in error in holding that the Commissioner was not authorised in cancelling the order of the respondent's registration for the year 1949-50. The result is that the view taken by the High Court must be reversed and the first question framed by the Tribunal as well as the additional question framed by the High Court must be answered in favour of the appellant."

8. Therefore, the principle, in my opinion, that the Supreme Court laid down to find out whether

the revisional powers can be exercised in particular situations must be determined solely by reference to the terms of the Section granting such revisional powers. Section 263 of the 1961 Act prescribes the circumstances and conditions upon which such power can be exercised. The section authorises the Commissioner to call for and examine the record of any proceeding under this Act and, if, thereupon, he considers that any order passed by the Income-tax 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 enquiry as he deems necessary, pass such order thereon as the circumstances of the case justify subject to the limitations mentioned in Sub-sections (2) and (3) of the Act with which I am not concerned in the instant case. In this connection Section 264 may also be referred to. Section 264 also deals with the power of revision of certain other orders. In this context, in any opinion, it would not be appropriate to impose further limits on the powers under Section 263 that the orders appealed from or appealable would be immune from the scope of operation of Section 263 of the Act.

9. Counsel for the petitioner referred to certain other decisions as to how the Supreme Court judgment referred to hereinbefore has been construed. He referred to the decision in the case of Commissioner of Income-tax v. Smt. Durgabati. He also drew my attention to certain observations of the Division Bench of the Andhra Pradesh High Court in the case of Merla Sitarama Prasad v. Assistant Controller of Estate Duty. He referred me to the observations of the Master of the Rolls, Evershed, in the case of Wright v. Walford [1955] 1 QB 363 (CA) that after a matter had come before the courts on the meaning of a phrase in an Act of Parliament there was a danger that the courts would thereafter construe not the Act and the words in it but expositions of the Act expressed in judgments of the courts, which expositions were in a sense necessarily limited to the particular facts of the particular case. But having regard to the well-known principle of construction of fiscal statutes and the language used in Section 263 of the Act, in my opinion, quite apart from the observations of the Supreme Court, it would not be proper to exclude the jurisdiction of the Commissioner in cases where appeals have been preferred from the order of the Income-tax Officer. Section 33B was enacted and thereafter it was re-enacted as Section 263 of the 1961 Act to arm the Commissioner with the power of revising any order which is erroneous and is prejudicial to the interest of the revenue inasmuch as the department has no right of appeal to the Appellate Assistant Commissioner against any order passed by the Income-tax Officer. But the enacting provisions of the section are not restricted to any order which is not the subject-matter of appeal. Therefore, it would be inappropriate to read any limitation to that extent in the section. In this connection, it is material to contrast the provisions of Sub-section (4) of Section 264 of the Act which deals with the revision of orders other than those mentioned in Section 263 of the Act. In the aforesaid view of the matter I am unable to accept the contention that in a matter where an appeal lies and an appeal was pending the Commissioner was not incompetent to exercise powers under the provisions of Section 263

of the Act. The first ground of challenge, therefore, fails.

10. The next contention urged on behalf of the petitioner was that in this case the Commissioner had no material to proceed on the basis that the order in question was erroneous or prejudicial to the interest of the revenue and the conditions precedent for the issuance of the notice in this case were not fulfilled. Notice under Section 263 of the Act is not, unlike Section 148 of the Act, a mandatory requirement for the exercise of the power. The section requires only such reasonable opportunity be given as is consistent with the principle of natural justice. But the power under Section 263 is not unchartered and can be exercised only on fulfilment of certain conditions. The conditions are, first, the Commissioner must call for and examine the records of the proceedings under the Act. It is not in dispute in the instant case that the said condition was fulfilled. Second condition required to be fulfilled is that the Commissioner must consider the order passed therein by the Income-tax Officer to be erroneous in so far as it is prejudicial to the interest of the revenue.

11. If these conditions are fulfilled, he may, after giving the assessee reasonable opportunity, pass such orders as he deems fit and proper. The section as mentioned hereinbefore does not require service of any notice as condition precedent for initiation of the proceeding. Unlike section 34 of the Indian Income-tax Act, 1922 or Section 148 of the Income-tax Act, 1961, Section 33B of the 1922 Act or Section 263 of the 1961 Act does not require that any notice should be issued by the Commissioner before he assumes jurisdiction to proceed to revise the order passed by the Income-tax Officer. He is not required to give any notice before commencing the enquiry. What he is required to do before passing his order and not before commencement of the enquiry is to give the assessee an opportunity of being heard and to make such enquiry as he deems necessary. These requirements have nothing to do with the jurisdiction of the Commissioner but these requirements appertain to the region of natural justice. See the observations of the Supreme Court in the case of Commissioner of Income-tax v. Electro House . But, in my opinion, exercise of power given under Section 263 of the Act is dependent upon certain conditions as mentioned in the section. It is true that exercise of power is dependent upon the consideration by the Commissioner but consideration by the Commissioner must be based on objective conditions laid down in Section 263 of the Act. Where powers are conferred on statutory authorities to exercise the same when "they are satisfied" or when "it appears to them" or when "in their opinion" or if they consider that "certain state of affairs exists" or when powers enable the statutory authorities to take such action as they think fit in relation to a subject-matter, the court would not readily defer to the conclusiveness of an executive authority's opinion as to the existence of a matter of law or fact upon which the validity of the exercise of the power is predicated. Where reasonable conduct is required, the criterion of reasonableness is not subjective but objective. The onus of establishing unreasonableness, however, rests upon the

person challenging the validity of the action. Administrative decisions in exercise of powers even if conferred in subjective terms are to be made in good faith on relevant consideration. The courts can enquire whether a reasonable man would have come to the decision in question. The standard of reasonableness to which an administrative body is required to conform may range from the court's own opinion of what is reasonable to the criterion to what a reasonable body might have decided. Courts can find out whether conditions precedent to the formation of the opinion have a factual basis. See the observations of the Supreme Court in the case of M. A. Rasheed v. State of Kerala of the report, as well as the observations of Lord Atkin in the case of Liversidge v. Andersen [1942] AC 206 at pages 228 to 229 of the report. In the instant case exercise of the power is dependent upon the Commissioner considering the order of the Income-tax Officer to be erroneous in so far as it is prejudicial to the interest of the revenue. Therefore, there must be material before the Commissioner before he passes the order to come to the conclusion that the order sought to be rectified was erroneous in so far as it was prejudicial to the interest of the revenue. To such a conclusion the Commissioner can come on relevant material facts in respect of which reasonable opportunity must be given to the person sought to be affected and such reasonable opportunity again, on the principles of natural justice, requires that the person to be affected should be given intimation of the materials. It is true that if the basic materials upon which the Commissioner proposes to act are intimated or communicated to the assessee, the Commissioner may in his order rely on other supporting materials. It is fundamental that such basic materials upon which the Commissioner proposes to act in an action under Section 263 must be intimated to the assessee concerned. In the instant case, such basic materials upon which the Commissioner proposed to act have been communicated to the petitioner. Furthermore, in the instant case there is a challenge thrown by the assessee that there were no materials on the facts and circumstances of the case for the Commissioner to come to the conclusion that the order in question was erroneous in so far as it was prejudicial to the interest of the revenue. The said challenge has been met by the answer to this rule nisi. It is, therefore, relevant and necessary to consider whether the ground communicated to the assessee or the statements contained in the affidavit-in-opposition are sufficient materials upon which the Commissioner can come to the conclusion that the order in question was erroneous in so far as it was prejudicial to the interests of the revenue. I have set out the grounds mentioned in the notice. It is clear that in respect of the previous years the Tribunal has come to the conclusion, following the decision of the Supreme Court in the case of Karnani Properties Ltd. v. Commissioner of Income-tax, that receipts from the tenants for the maintenance of service charges were assessable under the head "business" and not assessable under the head "property". The Supreme Court observed that the said decision in the aforesaid case was given on the facts and on the circumstances of that case. The Tribunal, on examination of the facts in the instant case, found that facts were identical upon which the ratio of the Supreme Court decision was dependent. In

the aforesaid view of the matter, the Tribunal in the previous years' assessments had followed the Supreme Court decision and had come to the conclusion that income in this case was chargeable under the head "business". Following the decision of the Tribunal, the Income-tax Officer has proceeded to assess such income under the head "business".

12. The Commissioner of Income-tax feels that such income should have been assessed to tax under the head "property" as in respect of the prior years' findings reference application was pending before the High Court. In those circumstances, can it be said that the Income-tax Officer who had accepted the Tribunal's decision as correct and applied that decision to the facts of this case acted erroneously and his such action caused prejudice to the interests of the revenue. Counsel for the revenue contended that inasmuch as a reference was pending for the previous year, there was no question of res judicata on this issue. He relied on the observations of a Division Bench of this court in the case of Satyanarayan Prosad v. Diana Engineering Co. . Counsel for the revenue is right that there is no question of finality, but, though as a general Rule the principle of res judicata was not applicable to the decisions of the income-tax authority and an assessment for a particular year was final and conclusive between the parties only in relation to the assessment for that year and the decision given in an assessment for an earlier year were not binding either on the assessee or the department in the subsequent year, this rule was subject to limitation that there should be finality and certainty in all litigations including litigations arising out of the Income-tax Act and an earlier decision on the same question should not be reopened if that decision was not arbitrary or perverse and if it had been arrived at after due enquiry and if no fresh facts were placed before the authority giving the later decision and if the earlier decisions were based on all materials and relevant consideration. Furthermore, a revising decision for the subsequent year should not lead to injustice and the court must avoid injustice to all concerned. Reliance in this connection may be placed on the observations of the Division Bench of the Bombay High Court in the case of H. A. Shah & Co. v. Commissioner of Income-tax and Excess Profits Tax [1956] 30 ITR 618 (Bom). The section requires the Commissioner to come to the conclusion that the Order of the Income-tax Officer was erroneous and prejudicial to the interests of the revenue. It is not sufficient that the order was merely erroneous. It must be erroneous in so far as it is prejudicial to the interests of the revenue. Again, it is not sufficient for the order in question to be prejudicial. An order must be erroneous so as to be prejudicial to the interests of the revenue. It may, however, be stated that anything which is prejudicial to the interests of the revenue would be erroneous and that anything which is not lawful would be prejudicial to the interests of the revenue. For the ingredients or the requirements of the section reliance may be placed on the observations of the Supreme Court in the case of Smt. Tara Devi Aggarwal v. Commissioner of Income-tax and also on the observations of the Karnataka High Court in the case of Commissioner of Income-tax v, T. Narayana Pai [1975] 98 ITR 422 (Kar), I have set out before that the basis of the Commissioner's notice to the assessee is that the

Commissioner feels that the decision of the Tribunal based upon the decision of the Supreme Court requires reconsideration in the facts of this case. In answer to the rule nisi Shri Ahindra Chaudhuri, Commissioner of Income-tax, West Bengal, in his affidavit in paragraphs 3 and 4 has stated as follows:

"3. With regard to the allegations contained in paragraphs 3, 4, 5, 6 and 7 of the petition, I say that I crave leave to refer to the assessment orders, the orders of the Appellate Assistant Commissioner as well as of the Income-tax Appellate Tribunal to ascertain the correct facts and the true scope, purport and intent of the aforesaid orders. Save as would appear therefrom the allegations contained therein are denied each and all. I say that the revenue has not accepted the orders of the Tribunal confirming the decision of the Appellate Assistant Commissioner treating the income in question under the head 'service and maintenance charges' as 'income from business'. The case of the revenue at all material times was and still is that the income from service and maintenance charges should be assessed as income from house property. Reference applications under Section 256 of the Income-tax Act, 1961, have been filed against the aforesaid Tribunal's orders and the said cases are still pending before this hon'ble court. In this connection it should be noted that up to the assessment year 1964-65 the income from service and maintenance charges was assessed under the head 'income from house property' and the said position was accepted by the assessee,

4. With regard to the allegations contained in paragraphs 8, 9 and 10, I say that I crave leave to refer to the assessment orders for the assessment years 1967-68, 1968-69 and 1969-70 to ascertain the true scope, purport and intent thereof. Save as would appear therefrom the allegations contained in paragraphs 8 to 10 are denied. I say that on an examination of the records of the assessment proceedings for the assessment years 1967-68, 1968-69 and 1969-70, it appeared that the said orders were erroneous and prejudicial to the interests of the revenue. A notice, therefore, was issued to the assessee in order to enable the assessee to make out its case before any final decision was taken in this matter. Save as aforesaid and save as will appear from the records the allegations contained in paragraphs 8 to 10 are denied."

13. It is, therefore, clear that the Commissioner is proceeding on the basis that the revenue has not accepted the order of the Tribunal and the revenue's case is that the income from service and maintenance charges should be assessed as income from house property. The Commissioner has not indicated either in the notice or in the affidavit-in-answer to rule nisi that there were any factual materials for holding that the ratio of the decision of the Supreme Court would not be applicable to the facts of the instant case for those years or that the Tribunal committed any error in following the decision of the Supreme Court on the facts of this case. The Commissioner seems to be proceeding only on the basis that the contention of the revenue to agitate for a review

of the Supreme Court's decision has not been kept open by the Income-tax Officer by his impugned order. It may be, however, stated that the position is not factually correct in view of the fact that the appeal is pending before the Appellate Assistant Commissioner and the revenue would have an opportunity to induce the Appellate Assistant Commissioner to accept the revenue's point of view and if the Appellate Assistant Commissioner does not accept the revenue's contention and enhance the assessment on the basis that the receipts from service and lift charges are income from house property the revenue will have another opportunity of preferring an appeal before the Tribunal and thereafter come up before the High Court on an application under Section 256 of the Income-tax Act, 1961. The Income-tax Officer has merely followed the decision of the Tribunal. No error has been pointed out in the said decision of the Income-tax Officer. It has not been pointed out that there were materials for the Income-tax Officer not to follow the decision of the Tribunal. As a matter of fact whenever there is a decision of the higher appellate authority, the subordinate authorities are bound to follow the said decision if judicial discipline is to be maintained. Reliance may be placed in this connection on the observations of the Supreme Court in the case of East India Commercial Co. Ltd. v. Collector of Customs of the report. In the aforesaid view of the matter I must hold that the conditions for exercise of the power under Section 263 of the Act, namely, that there must be material for the Commissioner to consider that the order passed by the Income-tax Officer was erroneous in so far as it is prejudicial to the interests of the revenue were not fulfilled in the instant case. If that is the position, then the notice must be held to be without authority. It is true, unlike Section 148 of the Income-tax Act, 1961, for the initiation of the proceeding under Section 263 no conditions precedent are required to be fulfilled but when a statutory authority proceeds to act by virtue of the power given under a statutory enactment, exercise of which is dependent upon the existence of certain objective factors and when a challenge is thrown that such objective factors are not present and such challenge is met by placing before the court factors which the statutory authority considers to be factors relevant for the exercise of the power, it is open for the courts to examine whether such factors are relevant for the exercise of the power. It is in this light that I have proceeded to examine the factors upon which it is proposed by the Commissioner to consider that the order passed by the Income-tax Officer was erroneous in so far as it is prejudicial to the interests of the revenue. Whether in cases where the revenue wants to keep alive a contention even though that contention has been concluded by the decision of the higher authorities the Commissioner should have power to revise or set aside or not to give effect to the order of the Income-tax Officer by adding another provision in the Income-tax Act or whether the Income-tax Act, 1961, as it is by virtue of the provision of Section 147 or Sub-section (3) of Section 263 of the Act is sufficient to arm the Commissioner with the power to deal with such situation is another question with which I am not concerned in this application.

14. In the aforesaid view of the matter I must hold that the proposed exercise of the power under

Section 263 of the Income-tax Act is illegal and without jurisdiction. There is another aspect of the matter. I have mentioned before that the interim order as varied by the order dated the 30th January, 1974, directed that the Commissioner might pass the order but he should not communicate the order to the petitioner or give effect to the same. In the instant case the order has been passed by the Commissioner pursuant to that leave but the Commissioner has not gone further as mentioned hereinbefore. I have indicated that there was an application under Section 264 of the Act for the assessment years 1967-68, 1968-69 and 1969-70. The Commissioner by the order dated the 20th March, 1975, which is annexure "B" to the affidavit-in-reply of Harak Chand Kankaria, affirmed on the 5th of September, 1975, has dismissed the application on the ground that the assessment order has been set aside by the order passed pursuant to the notice under Section 263 of the Act. Therefore, the Commissioner by the order dated the 20th March, 1975, has given effect to the order passed under Section 263 of the Act which he was restrained to do so. In any event this is not permissible. I, therefore, set aside the order dated the 20th March, 1975, and direct the Commissioner to consider the application under Section 264 for the said assessment years. In the view I have taken the Commissioner must be restrained from giving effect to the notice under Section 263 of the Act which is under challenge in this writ application for the reasons mentioned hereinbefore. In the aforesaid view of the matter if any order has been passed pursuant to the notice as it has been passed in the instant case, the same is also quashed and set aside. The respondents are restrained from giving effect to the same. The rule is made absolute to the extent indicated above. There will be no order as to costs. Operation of this order is stayed for eight weeks.