(2000) 03 KL CK 0050

High Court Of Kerala

Case No: W.A. No. 310 of 2000

Bismillah Trading Co.		APPELLANT
	Vs	
Intelligence Officer, Squad No. II, Agricultural Income Tax and Sales Tax and Others		RESPONDENT

Date of Decision: March 3, 2000

Acts Referred:

- Income Tax Act, 1961 - Section 263, 263(1)
- Kerala General Sales Tax Act, 1963 - Section 17(3), 37, 45A, 45A(1), 45A(3)

Citation: (2001) 248 ITR 292

Hon'ble Judges: D. Sreedevi, J; Ar. Lakshmanan, J

Bench: Division Bench

Advocate: T.M. Sreedharan, for the Appellant; R.K. Muraleedharan, Government Pleader (Taxes), for the Respondent

Judgement

A.R. Lakshmanan J.

1. The matter arises under the Kerala General Sales Tax Act, 1963 (hereinafter referred to as "the KGST Act") and the question involved herein relates to the legality of the notice issued u/s 45A(5) of the Kerala General Sales Tax Act (imposition of penalty by officers and authorities).

2. In the instant case, a notice u/s 45A, dated May 5, 1998, was issued by the successor-in-office of the Intelligence Officer, Squad No. II, Agricultural Income Tax and Sales Tax, Kasaragod, proposing to impose a penalty u/s 45A(1)(b) for the alleged offence of failure to keep true and complete accounts for 1994-95. According to the appellant-asses-see, before issuing the notice, the successor-in-office of the first respondent did not himself verify the accounts and the notice dated May 5, 1998, was issued without verifying the accounts and without satisfying whether the books of account maintained were true and complete. The

appellant was required to show cause against the notice on May 18, 1998, at 11 a.m. under exhibit P-1. No hearing took place on May 18, 1998, as per the notice exhibit P-1 because by the time the appellant''s part-time accountant reached the camp office of the first respondent, the first respondent had finished camp work and left the camp office. Thereafter there was no further hearing in the matter and a penalty of Rs. 12,60,450 was imposed by order dated May 29, 1998, which has been marked as exhibit P-2. According to the appellant, the huge penalty was imposed without affording the appellant a reasonable opportunity for personal hearing and representation. The appellant filed statutory revision u/s 45A(3) before the Deputy Commissioner, Commercial Taxes, Kasaragod, who was satisfied that there was gross violation of the principles of natural justice in passing the penalty order exhibit P-2 without affording the appellant a reasonable opportunity of hearing and representation. The Deputy Commissioner set aside the penalty order exhibit P-2 as per his order dated January 8, 1999, in R. P. No. 18 of 1998 and remanded the case for fresh disposal after affording the appellant a reasonable opportunity of hearing and representation. The said order has been marked as exhibit P-4. When the matter was pending for fresh consideration before the Intelligence Officer as a result of the remand order, the Commissioner of Commercial Taxes, Thiruvananthapuram, issued notice dated September 6, 1999, u/s 45A(5) of the Act proposing to set aside the order exhibit P-4 and to restore the penalty order exhibit P-2 passed by the Intelligence Officer, Squad No. II, by invoking suo motu power of revision. A true copy of the said notice dated September 6, 1999, issued u/s 45A(5) read with Section 37 of the Kerala General Sales Tax Act, has been marked as exhibit P-5.

3. The validity of exhibit P-5 notice was challenged as arbitrary, illegal and without jurisdiction in the original petition. It was contended in the original petition that the order exhibit P-4 cannot be considered as an order prejudicial to the interests of the Revenue, in order to invoke the revisional jurisdiction u/s 45A(5) read with Section 37 of the Kerala General Sales Tax Act. The original petition was disposed of on January 18, 2000, by directing the appellant to file a detailed objection and by directing the third respondent herein--the Commissioner of Commercial Taxes--to dispose of the objections. Aggrieved by the said judgment, the present writ appeal has been filed.

4. It is submitted that the revisional order, exhibit P-4, passed by the Deputy Commissioner cannot be regarded as an order prejudicial to the interests of the Revenue and by exhibit P-4 order, the Deputy Commissioner had only remanded the penalty proceedings to the Intelligence Officer for fresh consideration for observance of the statutory requirements of Section 45A in regard to grant of opportunity for hearing and representation. The question that arises for consideration is as to whether the third respondent--the Commissioner of Commercial Taxes--has jurisdiction to issue exhibit P-5 notice and that the order exhibit P-4 passed by the Deputy Commissioner can be regarded as an order prejudicial to the interests of the Revenue and by such remand order whether any

revenue is likely to be lost for the State.

5. We have heard the arguments of Mr. T.M. Sreedharan for the appellant, and Mr. R.K. Muraleedharan, Government Pleader for the respondents.

6. In this case, the appellant was a partnership-firm carrying on business in hill produce during 1994-95. The business was discontinued in 1996. The place of business was inspected by the Intelligence Squad on February 23, 1995, and stocks were verified. According to the appellant, none of the partners of the firm was present at the time of inspection. After the inspection, the regular books of account of the appellant-firm were called for and verified on November 24, 1997, nearly two and a half years after the inspection by the Intelligence Officer. Thereafter notice dated May 5, 1998, u/s 45A(1)(b) of the Kerala General Sales Tax Act was issued by the successor-in-office of the first respondent proposing to impose penalty u/s 45A(1)(b) for the alleged failure to keep true and complete accounts for 1994-95. It is stated that before issuing the notice the incumbent in office did not verify the books of account of the appellant-firm and without verifying whether the books of account maintained were true and complete, the notice dated May 5, 1998, was issued proposing to impose a penalty of Rs. 12 lakhs and odd, which is the maximum penalty imposable under that section. The appellant was required to show cause against the imposition of penalty on May 18, 1998, at 11.00 a.m. The appellant could not attend the hearing as he was not well and, therefore, his part-time accountant was deputed and by the time the accountant reached the camp, the Intelligence Officer had left the camp office and, hence, the appellant could not represent the case. The Intelligence Officer imposed a penalty of Rs. 12 lakhs and odd under exhibit P-2 without giving the appellant any further opportunity of hearing. A revision before the second respondent-Deputy Commissioner was filed and the second respondent disposed of the same on January 8, 1999, setting aside the order exhibit P-2 imposing penalty and directing the first respondent-Intelligence Officer-to verify the books of account and to allow the appellant an opportunity to explain the seized records. The Deputy Commissioner found as follows : "The seized records were not returned to the appellant as such he could not explain his case with facts and figures before the Intelligence Officer. This contention of the revision-petitioner carries some force, if any documentary evidence are used against the party, he has the right to have a copy of the same. Further, under the Kerala General Sales Tax Act the seized records cannot be retained more than 45 days unless it is required for prosecution. In this case, the Intelligence Officer has retained the seized records beyond the statutory limit and has not returned to the revision-petitioner. Thus, the revision-petitioner is denied natural justice in this case. Further, the revision-petitioner contends that his accountant could not meet the Intelligence Officer on the date of hearing, as such he was prevented from the opportunity of being heard in this case. On verification of the crime files it is seen that the officer who has imposed the penalty has not verified the books of account of the revision-petitioner. Now, the revision-petitioner is supplied with the xerox

copy of the records and documents by the assessing authority and he is in possession of the same. Thus, the revision-petitioner has to be given an opportunity to explain the documents before the Intelligence Officer."

7. It is thus contended that the Deputy Commissioner in exercise of the statutory power u/s 45A(3) has set aside the order imposing penalty for cogent and valid reasons and that the above sub-section empowered the Deputy Commissioner to confirm, reduce, or waive such penalty or remand the case to the assessing authority or Appellate Assistant Commissioner, as the case may be, for reconsideration.

8. While so, the appellant is now served with a notice dated September 6, 1999, by the Commissioner of Commercial Taxes, issued u/s 45A(5) stating as follows:

"On a perusal of the proceedings read above (i.e., the order exhibit P-4 passed by the Deputy Commissioner) with reference to the records and the provisions of the Act, it is found that the order of the revision authority is against law, facts and interests of the Revenue. It is also noted from the records that you were given ample opportunity of being heard in person and also to file objections to the proposal to the penalty by the Intelligence Officer, but you have not availed of it and it can only be construed that you are a defaulter. On that basis, it is proposed to set aside the order of the Deputy Commissioner, Kasaragod, dated January 8, 1999, and to take up the matter suo motu u/s 37 of the Kerala General Sales Tax Act, to restore the order dated May 29, 1998, of the Intelligence Officer, Squad No. II, Kasaragod."

9. The above notice is challenged in the original petition by the appellant contending that the order in exhibit P-4 is not and cannot be construed as prejudicial to the interests of the Revenue and in fact the interests of the Revenue are not affected in any manner by the order exhibit P-4.

10. A counter-affidavit was filed by the Assistant Commissioner (Law), Office of the Deputy Commissioner (Law), Ernakulam. It is submitted that as per exhibit P-5 notice the appellant was given an opportunity of being heard on September 28, 1999, and the appellant availed of the opportunity and final orders were not passed in view of the interim stay granted by this court and that the revisional authority without properly looking into the entire facts of the case, set aside the order imposing penalty and remanded the matter to the first respondent and that the second respondent set aside the order mainly on the ground that the appellant was not given an opportunity to explain the case. It is also submitted that the appellant has no case that the Commissioner of Commercial Taxes has no jurisdiction to exercise the power of suo motu revision and, therefore, the issuance of exhibit P-5 notice is legally justifiable and that as per the said notice, hearing was conducted and final orders were not passed due to the interim stay granted by this court.

11. Before considering the rival submissions, it is useful to reproduce Sections 37, 45A(1), 45A(3) and 45A(5):

"37. Powers of revision of the Board of Revenue suo motu.--(1) The Board of Revenue may suo motu call for and examine any order passed or proceeding recorded under this Act by any officer or authority, subordinate to it other than an Appellate Assistant Commissioner which in its opinion is prejudicial to the Revenue and may make such enquiry or cause such enquiry to be made and subject to the provisions of this Act may pass such order thereon as it thinks fit.

(2) The Board of Revenue shall not pass any order under Sub-section (1) if--

(a) the time for appeal against that order has not expired;

(b) the order has been made the subject-matter of an appeal to the Appellate Assistant Commissioner or the Appellate Tribunal or of a revision in the High Court; or

(c) more than four years have expired after the passing of the order referred to therein.

(2A) Notwithstanding anything contained in Sub-section (2), the Board of Revenue may pass an order under Sub-section (1) on any point which has not been decided in an appeal or revision referred to in Clause (b) of Sub-section (2), before the expiry of a period of one year from the date of the order in such appeal or revision or before the expiry of a period of four years referred in Clause (c) of that sub-section, whichever is later.

(3) No order under this section adversely affecting a person shall be passed unless that person has had a reasonable opportunity of being heard."

"45A. Imposition of penalty by officers and authorities.-(1) If the assessing authority or the Appellate Assistant Commissioner is satisfied that any person,--

(a) being a person required to register himself as dealer under this Act, did not get himself registered ; or

(b) has failed to keep true and complete accounts ; or

(c) has failed to submit any return as required by the provisions of this Act or the rules made thereunder; or

(d) has submitted an untrue or incorrect return ; or

(e) has failed to comply with all or any of the terms of any notice or summons issued to him by or under the provisions of this Act or the Rules made thereunder; or

(f) after purchasing any goods in respect of which he has made a declaration under the proviso to Sub-section (3) of Section 5, has failed to make use of the goods for the declared purpose; or

(g) has acted in contravention of any of the provisions of this Act or any rule made thereunder, for the contravention of which no express provision for payment of

penalty or for punishment is made by this Act;

such authority or officer may direct that such person shall pay, by way of penalty, an amount not exceeding twice the amount of sales tax or other amount evaded or sought to be evaded where it is applicable to quantify the evasion or an amount not exceeding ten thousand rupees in any other case.

Explanation I.--The burden of proving that any person is not liable to the penalty under this section shall be on such person.

Explanation II.--For the purposes of this sub-section the expression ''assessing authority'' includes any officer not below the rank of Sales Tax Officer specified by the Government in this behalf by notification in the Gazette. . . .

(3) The Deputy Commissioner may, on application by any person on whom a penalty is imposed under Sub-section (1) within thirty days from the date of receipt by him of the order imposing such penalty, for reasons to be recorded in writing confirm, reduce or waive such penalty or remand the case to the assessing authority or Appellate Assistant Commissioner, as the case may be, for reconsideration :

Provided that the Deputy Commissioner may admit an application made after the expiry of the said period of thirty days if he is satisfied that the applicant had sufficient cause for not making the application within the said period ....

(5) The Board of Revenue may, either suo motu or on application, call for and examine the record of any order passed under Sub-section (1) or Sub-section (3) and make such order as it thinks fit:

Provided that the Board of Revenue shall not admit an application made after the expiry of thirty days from the date of receipt by the applicant of the order under Sub-section (1) or Sub-section (5), as the case may be, unless it is satisfied that the applicant had sufficient cause for not making the application within the said period :

Provided further that no order enhancing a penalty or cancelling the waiver of a penalty shall be passed unless the person affected thereby is given an opportunity of being heard in the matter . . ."

12. A reading of Section 45A would show that the procedural formalities contemplated u/s 17(3) of the Kerala General Sales Tax Act will apply. Section 17(3) provides that before taking action under Sub-section (3) of Section 17 the dealer shall be given a reasonable opportunity of being heard and, where a return has been submitted to prove the correctness or completeness of such return, there must be adequate and effective opportunity for the assessee to file his objections and substantiate the case by producing evidence.

13. In the case on hand, though the appellant''s business place was inspected on February 23, 1995, the regular books of account were called for and verified only on November 24, 1997, nearly two and a half years after the inspection, by the

Intelligence Officer and thereafter notice dated May 5, 1998, u/s 45A(1)(b) was issued by the successor-in-office of the first respondent proposing to impose penalty u/s 45A(1)(b) for the alleged failure to keep true and complete accounts for 1994-95. The appellant was required to show cause against the imposition of penalty on May 18, 1998, at 11.00 a.m. and as the partner of the firm was not well, he could not attend the hearing on May 18, 1998, and, therefore, the part-time accountant, who was attending to the account writing of the firm, was deputed to the camp of the first respondent on that day. However, by the time the accountant reached the camp, the Intelligence Officer had left the office and hence the appellant could not represent the case and thereupon the first respondent imposed the penalty of Rs. 12 lakhs and odd on the appellant as proposed in the notice without giving the appellant any further opportunity for hearing and representation. In our view, in proceedings u/s 45A, the procedural formalities contemplated u/s 17(3) of the Kerala General Sales Tax Act, will apply and there must be adequate and effective opportunity for the asses-see to file his objections and substantiate the case by producing evidence. This view was taken by P.A. Mohammed J., while deciding a similar case u/s 45A, which is reported in Golden Timber Corporation v. Intelligence Officer [1996] KLJ (TC) 492.

14. Next we come to penalty. Section 45A provides that the assessing authority can impose penalty if any person has submitted an untrue and incorrect return. Since the power to impose penalty is of quasi-criminal nature, mens rea is necessarily attracted. According to the appellant, the business place was inspected by the Intelligence Officer on February 23, 1995, and the stocks were verified and at that time, none of the partners of the firm was present and after the inspection, the regular books of account of the appellant-firm were called for and verified on November 24, 1997, nearly two and a half years after the inspection, and the successor-in-office, who did not verify the books of account of the appellant-firm and without verifying whether the books of account maintained were true and complete, issued notice dated May 5, 1998--exhibit P-1--proposing to impose a penalty of Rs. 12 lakhs and odd u/s 45A(1)(b). Exhibit P2 is the proceedings of the Intelligence Officer imposing the penalty for non-maintenance of true and complete accounts for the year 1994-95 u/s 45A(1)(b). The appellant-firm preferred a revision to the Deputy Commissioner under Rule 39A and Section 45A and thereupon exhibit P-4 order was passed setting aside the penalty. Thereupon notice u/s 45A(5) of the Kerala General Sales Tax Act under exhibit P-5 was issued. It was proposed to set aside the order of the Deputy Commissioner dated January 8, 1999, and take up the matter suo motu u/s 37 of the Kerala General Sales Tax Act to restore the order dated May 29, 1998 of the Intelligence Officer. Section 37 of the Kerala General Sales Tax Act, which is invoked, says that "the Board of Revenue may suo motu call for and examine any order passed or proceeding recorded under this Act by any officer or authority, subordinate to it other than an Appellate Assistant Commissioner which in its opinion is prejudicial to the Revenue and may make such enquiry or cause such

enquiry to be made and subject to the provisions of this Act may pass such order thereon as it thinks fit".

15. We have perused exhibit P-4 which, in our opinion, is not and cannot be construed to be prejudicial to the interests of the Revenue. The penalty order in exhibit P-2, in our opinion, was passed in violation of the principles of natural justice and hence is invalid. The Deputy Commissioner was fully justified in setting aside the order and directing the first respondent to grant a reasonable opportunity to the appellant for hearing and representation. The order is legal and valid and not liable to be suo motu revised u/s 45A(5) read with Section 37 of the Kerala General Sales Tax Act. The Deputy Commissioner has set aside exhibit P-2 order, which was illegal and arbitrary, by directing the intelligence Officer to allow the appellant an opportunity for hearing and representation. Exhibit P-4 order, as already noticed, was passed by the Deputy Commissioner in exercise of his statutory power u/s 45A(3), which cannot be said to be against the law and against the interests of the Revenue. In our opinion, granting of an opportunity for hearing and representation cannot be said to be an illegal act or act prejudicial to the interests of the Revenue so as to justify the invocation of the power of suo motu revision by the Commissioner of Commercial Taxes u/s 45A(5). In fact, the interests of the Revenue are not affected in any manner by the order exhibit P-4. By exhibit P-4 order any revenue due to the State is also not likely to be lost.

16. Learned counsel for the appellant, in support of his contention, cited the decisions reported in R.V.S. Textiles v. Commissioner of Commercial Taxes [1999] 116 STC 366 and Avon Plastics v. State of Tamil Nadu [1982] 49 STC 268, of the Madras High Court.

17. In Avon Plastics v. State of Tamil Nadu [1982] 49 STC 268, a Division Bench of the Madras High Court held that the power of suo motu revision by the Board of Revenue u/s 34 of the Tamil Nadu General Sales Tax Act, 1959, is not intended to be exercised in a routine or casual manner but only on special occasions and that, therefore, unless it is found in any particular case that the discretion to exercise the appellate powers vested with the Appellate Assistant Commissioner u/s 31(3)(a) of the Act has been wrongly exercised, it would not be proper for the Board to interfere with the order of the Appellate Assistant Commissioner. In that case, the assessee--a partnership firm consisting of three ladies as its partners--failed to appear and did not produce the accounts on several occasions, but requested further extension of time on the ground of illness of its accountant and also enclosed a medical certificate to that effect. The Assessing Officer considered that no further extension of time could be granted. He, after a pre-assessment show-cause notice, determined the turnover of the assessee to the best of his judgment. On appeal, the Appellate Assistant Commissioner set aside the assessment on the ground that sufficient opportunity was not given to the assessee to file the objections and remanded it back to the Assessing Officer for fresh

assessment after affording another opportunity to the assessee to produce the accounts. The Board of Revenue, in exercise of its suo motu power of revision, held that the Appellate Assistant Commissioner was not justified in setting aside the assessment order and remanding the case back to the Assessing Officer. On appeal, the Madras High Court held, in the facts and circumstances of the case, that the power of remand was properly exercised by the Appellate Assistant Commissioner and if on an examination of the books, it was found that a higher turnover was liable to be taxed, then certainly the assessing authority could exercise his power and tax the turnover accordingly. Thus, there was no prejudice to or loss of revenue by the manner in which the Appellate Assistant Commissioner had exercised his power and, therefore, the exercise of the power of suo motu revision by the Board was uncalled for. The principles laid down in the above judgment by the Madras High Court, in our opinion, squarely apply to the facts and circumstances of the case on hand.

18. In R.V.S. Textiles v. Commissioner of Commercial Taxes [1999] 116 STC 366 (Mad), was also rendered by a Division Bench, comprising of Mishra and Govindasamy, JJ. The Division Bench held that the power of revision conferred on the Board of Revenue u/s 34 of the Tamil Nadu General Sales Tax Act, 1959, is not intended to be exercised in a routine or casual manner, but only on special occasions. Otherwise, there would always be a chance of the suo motu power of revision being used to defeat the course of proceedings in appeal and in revision. The suo motu revisional power should be used sparingly and only when it is found that without such interference, the interests of the Revenue will suffer. That no interest of the Revenue was likely to suffer was clear by the fact that in case any order against the Revenue is passed by the assessing authority, the Revenue was safeguarded by the power of suo motu revision provided under Sections 32 and 34. By holding so, the Bench held that the Board had wrongly exercised its jurisdiction. In the result, the Division Bench allowed the appeal by the assessee and set aside the order of the Board of Revenue and restored the order of the Appellate Assistant Commissioner and remitted the matter to the assessing authority.

19. Learned counsel for the appellant has also relied on Section 263 of the Income Tax Act, which corresponds to Section 37 of the Kerala General Sales Tax Act. He also cited the decision reported in COMMISSIONER OF Income Tax Vs. SMT. MINALBEN S. PARIKH., , of the Gujarat High Court, interpreting the words "prejudicial to the interests of the Revenue". The Gujarat High Court held (headnote) :

"However, giving the ordinary meaning to the words used in the statute, they must mean that the orders under consideration are such as are not in accordance with law and, in consequence whereof, the lawful revenue due to the State has not been realised or cannot be realised. The well-settled principle in considering the question as to whether an order is prejudicial to the interests of the Revenue or not is to address oneself to the question whether the legitimate revenue due to the

exchequer has been realised or not or can be realised or not if the orders under consideration are allowed to stand. For arriving at this conclusion, it becomes necessary and relevant to consider whether the income in respect of which tax is to be realised has been subjected to tax or not or if it is subjected to tax, whether it has been subjected to tax at the rate at which it could yield the maximum revenue in accordance with law or not. If the income in question has been taxed and legitimate revenue due in respect of that income had been realised, though as a result of an erroneous order having been made in that respect, the Commissioner cannot exercise the powers for revising the order u/s 263 merely on the basis that the order under consideration is erroneous. If the material in that regard is available on the record of the assessee concerned, the Commissioner cannot exercise his powers by ignoring that material which links the income concerned with the tax realisation made thereon. The two questions are interlinked and the authority exercising the powers u/s 263 is under an obligation to consider the entire material about the existence of income and the tax which is realisable in accordance with law and further what tax has in fact been realised under the assessment orders."

20. The learned Government Pleader cited the decision reported in X-Ray and Allied Products v. State of Tamil Nadu [1983] 54 STC 121 (Mad). In this case, the assessee had nearly three months from the date of the pre-assessment notice to produce C and D forms, but did not do so. The orders were passed by the assessing authority without further notice. The Appellate Assistant Commissioner held that the assessees were not given sufficient opportunity to produce D and C forms and hence set aside that part of the assessment order and remanded the case. The Board of Revenue, in suo motu revision, set aside the order of the Appellate Assistant Commissioner and restored the order of the Assessing Officer. But, this case, in our opinion, does not apply to the facts on hand. In the above Madras case sufficient opportunity to produce the C and D forms was given to the assessee. The assessee had nearly three months within which they could have produced all the relevant forms. As they did not do so, the Board came to the conclusion that the Appellate Assistant Commissioner was not justified in saying that sufficient time was not given to the assessee by the Assessing Officer. In the above circumstances, the Bench held that the order of the Board cannot be said to suffer from any error and dismissed the appeal.

21. In our anxiety to see the correct legal position in regard to the corresponding provision u/s 263 of the Income Tax Act we also glanced through the digest and certain rulings by the Supreme Court and other High Courts in so far as the meaning given to the words "prejudicial to the interests of the Revenue". Section 263 authorises the Commissioner to call for and examine the record of any proceeding under the Act and if he considers that any order passed therein by the Assessing Officer is erroneous in so far as it is prejudicial to the interests of the Revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as

the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment. Section 263 is reproduced here-under:

"263. Revision of orders prejudicial to revenue--(1) 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 Assessing Officer is erroneous in so far as it is prejudicial to the interests of the Revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment."

22. Certain judgments say that the scope of the power of interference under this Section is not merely to set aside unfavourable orders and bring some more money to the treasury nor is it meant to get at sheer escapement of revenue. The prejudice must be prejudice to the revenue administration. It is an extraordinary revisional power to be employed not as a jurisdictional corrective or as a review of a subordinate''s order in exercise of supervisory power. It is to be invoked and employed only for the purpose of setting right distortions and prejudices to the Revenue. The above view was expressed by the Madras High Court in Venkatakrishna Rice Company Vs. Commissioner of Income Tax, , The above view was dissented from in Malabar Industrial Co. Ltd. Vs. Commissioner of Income Tax, . The Supreme Court in a later case Smt. Tara Devi Aggarwal Vs. Commissioner of Income Tax, West Bengal, Calcutta, , went further as to the interpretation of the expression "prejudicial to the Revenue". Where an assessee is assessed on an income voluntarily returned, it is not prejudicial to the interests of the Revenue, only if it is found that the assessment was made on the basis that the income had been earned by the assessee which was assessable. Where an income has not been earned and is not assessable, merely because the assessee wants it to be assessed in his or her hands in order to assist someone else who would have been assessed to a larger amount, an assessment so made will be erroneous and prejudicial to the Revenue and the Commissioner has jurisdiction to cancel the assessment and proceedings for assessment can be initiated under the provisions of the Act against some other assessee who, according to the Income Tax authorities, would be liable to be assessed for the income in question. It was held on the facts that there were materials before the Commissioner of Income Tax to justify his finding that the order of assessment for the year 1960-61 was erroneous in so far as it was prejudicial to the interests of the Revenue. The result of the above decision is that even where an assessment is made with reference to an income which despite the return voluntarily filed by the assessee would not be assessable in his or her hands, it would be prejudicial.

22. The expression "erroneous" refers to an order which has an error or is contrary to law. An order will be erroneous if it is based on a mistaken view of law or on erroneous application of legal principles. It is necessary that the Commissioner must come to a definite finding that the order is both erroneous as well as prejudicial to the interests of the Revenue. Even if an order is prejudicial to the interests of the Revenue, it cannot be interfered with, if it is not erroneous. Again the Commissioner should not interfere with an order which is not prejudicial to the interests of the Revenue, even if it is erroneous. The above view was considered and affirmed by the recent judgment of the Supreme Court in Malabar Industrial Co. Ltd. v. CIT [2000] 243 ITR 83, while affirming the judgment of the Division Bench of the Kerala High Court in Malabar Industrial Co. Ltd. Vs. Commissioner of Income Tax, . Before the Division Bench (K.S. Paripoornan and K.A. Nayar, JJ.) two questions of law were referred for its decision. We are concerned in this case only with the first question. The Division Bench referred in this context to the judgment reported in DAWJEE DADABHOY and CO. Vs. S. P. JAIN AND ANOTHER., . In that case Sinha J., interpreted the words "prejudicial to the interests of the Revenue" thus (page 881) :

"The words ''prejudicial to the interests of the Revenue'' have not been defined, but it must mean that the orders of assessment challenged are such as are not in accordance with law, in consequence whereof the lawful revenue due to the State has not been realised or cannot be realised. It can mean nothing else."

23. A Bench of the Gujarat High Court had also quoted the above observation with approval. Similarly, a Bench of the Allahabad High Court in Addl. CIT v. Saraya Distillery (1978) 115 ITR 34 quoted the above observations of Sinha J. with approval. In Smt. Tara Devi Aggarwal Vs. Commissioner of Income Tax, West Bengal, Calcutta, , the Supreme Court had occasion to interpret the words "prejudicial to the interests of the Revenue". In the above case, the Supreme Court followed its earlier decision in Rampyari Devi Saraogi Vs. Commissioner of Income Tax, West Bengal and Others, . The Division Bench of this court accepted the above observation of Sinha J., followed by various other High Courts and observed that the words "prejudicial to the interests of the Revenue" are of wide import and that they should not be limited to a case where the order passed by the Income Tax Officer can be considered to be one prejudicial to the revenue administration as such. On the facts, the Division Bench held that the Income Tax Officer has failed to apply his mind to the case in all its perspective and that the order passed by the Income Tax Officer is erroneous in so far as it is prejudicial to the interests of the Revenue and, therefore, the assumption of jurisdiction by the Commissioner of Income Tax u/s 263 of the Income Tax Act was legal, valid and justified. The Division Bench, therefore, answered question No. 1 referred to it in the affirmative, against the assessee and in favour of the Revenue.

24. In our opinion the word "prejudice" must be judicially examined. What constitutes "prejudice to the Revenue" has been the subject-matter of a judicial

debate. One view was that "prejudicial to the interests of the Revenue" does not necessarily mean loss of revenue. The expression "prejudicial to the interests of the Revenue" is not to be construed in a petti-fogging manner, but must be given a dignified construction. The interests of the Revenue are not to be equated to rupees and paise merely. There must be some grievous error in the order passed by the Income Tax Officer which might set a bad trend or pattern for similar assessments which, on a broad reckoning, the Commissioner might think to be prejudicial to the Revenue administration. The prejudice must be prejudice to the Revenue administration.

25. The judgment rendered by the Kerala High Court in Malabar Industrial Co. Ltd. Vs. Commissioner of Income Tax, was taken on appeal by the unsuccessful assessee by special leave. The judgment of the Supreme Court is reported in M/s. The Malabar Industries Co. Ltd. Vs. Commissioner of Income Tax, Kerala State, . The Supreme Court, after considering Section 263(1), has in paragraphs 6 and 7 of its judgment observed as follows (page 87):

"A bare reading of this provision makes it clear that the pre-requisite to the exercise of jurisdiction by the Commissioner suo motu under it, is that the order of the Income Tax Officer is erroneous in so far as it is prejudicial to the interests of the Revenue. The Commissioner has to be satisfied of twin conditions, namely, (i) the order of the Assessing Officer sought to be revised is erroneous ; and (ii) it is prejudicial to the interests of the Revenue. If one of them is absent--if the order of the Income Tax Officer is erroneous but is not prejudicial to the Revenue or if it is not erroneous but is prejudicial to the Revenue--recourse cannot be had to Section 263(1) of the Act.

There can be no doubt that the provision cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer, it is only when an order is erroneous that the section will be attracted. An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous. In the same category fall orders passed without applying the principles of natural justice or without application of mind."

26. The Supreme Court has also referred to the judgments of the High Court of Calcutta in DAWJEE DADABHOY and CO. Vs. S. P. JAIN AND ANOTHER., , the High Court of Karnataka in Commissioner of Income Tax, Mysore Vs. T. Narayana Pai, , the High Court of Bombay in Commissioner of Income Tax Vs. Gabriel India Ltd., and the High Court of Gujarat in COMMISSIONER OF Income Tax Vs. SMT. MINALBEN S. PARIKH., , which considered the words "prejudicial to the interests of the Revenue". All the four High Courts treated loss of the tax as prejudicial to the interests of the Revenue. The judgment of the Madras High Court reported in Venkatakrishna Rice Company Vs. Commissioner of Income Tax, , which was also not accepted as correct by this court, was also cited before the Supreme Court. The Supreme Court in paragraph 9 (page 88 of 243 ITR) has observed that in their view the interpretation

given by the Madras High Court is too narrow to merit acceptance. Explaining further, the Supreme Court has observed in para. 10 (page 88) as follows :

"The phrase ''prejudicial to the interests of the Revenue'' has to be read in conjunction with an erroneous order passed by the Assessing Officer. Every loss of revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interests of the Revenue, for example, when an Income Tax Officer adopted one of the courses permissible in law and it has resulted in loss of revenue ; or where two views are possible and the Income Tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the Revenue, unless the view taken by the Income Tax Officer is unsustainable in law. It has been held by this court that where a sum not earned by a person is assessed as income in his hands on his so offering, the order passed by the Assessing Officer accepting the same as such will be erroneous and prejudicial to the interests of the Revenue."

27. Applying the principles laid down by the Supreme Court in Malabar Industrial Co. Ltd. v. CIT [2000] 243 ITR 83, to the case on hand, the following factual and legal positions would emerge. The Supreme Court held that the Commissioner has to be satisfied of twin conditions before invoking Section 263 : (i) the order of the Assessing Officer sought to be revised is erroneous ; and (ii) it is prejudicial to the interests of the Revenue and if one of them is absent recourse cannot be had to Section 263(1) of the Act. In our opinion, the order of the Deputy Commissioner, the revisional authority, under exhibit P-4, sought to be revised under exhibit P-5 is not erroneous in any manner and it is also not prejudicial to the interests of the Revenue. The revisional authority under exhibit P-4, after considering the arguments of either side and after perusing the records and considering the whole facts and circumstances of the case, set aside the penalty imposed under exhibit P-2 and has only directed the Intelligence Officer to verify the books of account and allow the revision-petitioner an opportunity to explain the seized records. It was further directed that the revision-petitioner shall also be given a reasonable opportunity of being heard before passing a final order in this case. A further direction to complete the penalty proceedings as expeditiously as possible was also made. Since the matter is remitted for fresh consideration, the said order, in our view, is not prejudicial to the interests of the Revenue. The Deputy Commissioner was compelled to pass the said order since he was satisfied that the assessee was not given a proper and sufficient opportunity to put forth his case. The Deputy Commissioner was also satisfied that the Intelligence Officer, who passed the order, had no occasion to verify the books of account which were seized by his predecessor in office and that the notice was issued nearly 2 1/2 years after inspection and the order was issued by the successor in office proposing to impose penalty u/s 45A of the Kerala General Sales Tax Act without perusing the books of account, etc. In our opinion, "prejudicial to the interests of the Revenue" must mean that the orders under consideration are such as are not in accordance with law in consequence

whereof the lawful revenue due to the State has not been realised or cannot be realised. It is not the case of the Revenue that the revenue due to the State cannot be realised because of the remittal order made by the Deputy Commissioner. Though it is stated in paragraph 5 that the appellant was given ample opportunity of being heard in person and also to file objections to the proposed penalty, he has not availed of it. This statement is factually incorrect as could be seen from the proceedings as referred to in paragraph supra. As pointed out by the Supreme Court, the provision can be invoked only when an order is erroneous. We have already referred to the judgments of the Calcutta High Court, Karnataka High Court, Bombay High Court and the Gujarat High Court, which treated loss of tax as prejudicial to the interests of the Revenue. It is not the case of the learned Government Pleader that there is loss of tax to the State. By the order passed by the Deputy Commissioner, the matter has only been remitted to the original authority and the collection of tax is postponed to a later date. We are of the opinion that there is no grievous error in the order passed by the Deputy Commissioner in exhibit P-4.

28. In our opinion there was no material before the Commissioner of Commercial Taxes to justify his notice that the order passed in exhibit P-4 was erroneous and it was prejudicial to the interests of the Revenue.

29. The writ appeal is allowed and the order of the learned single judge dated January 18, 2000, is set aside. The Intelligence Officer shall verify the books of account and also afford an opportunity to the appellant to explain the seized records. The appellant is also given a further opportunity to place before the Intelligence Officer any further representation in writing and also place before the said officer any further materials/records in support of his contention. However, in the circumstances of the case, we order no costs.