APPEALS AND REVISION

QUESTION 1:

The Commissioner of Income-tax issued notice to revise the order passed by an Assessing Officer under section 143. During the pendency of proceedings before the Commissioner, on the basis of material gathered during survey under section 133A after issue of the first notice, the Commissioner of Income-tax issued a second notice, the contents of which were different from the contents of the first notice. Examine whether the action of the Commissioner is justified as to the second notice.

ANSWER:

The action of the Commissioner in issuing the second notice is not justified. The term "record" has been defined in clause (b) of Explanation 1 to section 263(1). According to this definition "record" shall include all records relating to any proceeding under the Act **available at the time of examination** by the Commissioner. In other words, the information, material, report etc. which were not in existence at the time the assessment was made and came into existence afterwards can be taken into consideration by the Commissioner for the purpose of invoking his jurisdiction under section 263(1). However, information, material, report etc which **came in to existence after the examination** by Commissioner **cannot be taken in to consideration** for the purpose of sec. 263.

In this case, proceedings took place in following sequence:

- First, assessment took place u/s 143(3);
- Then, examination of records by CIT;
- Then, issue of first notice u/s 263;
- Then, materials gathered during survey u/s 133A;
- Then, issue of second notice based on such materials.

Based on above sequence, action u/s 263 is justified only on the basis of examination of records before issue of first notice. Since, **materials gathered during survey** u/s 133A came in to existence **after the examination** by commissioner, the issue of second notice is **not justified**.

QUESTION 2:

A petition for stay of demand was filed by XYZ Ltd. before the Income-tax Appellate Tribunal in respect of a disputed demand for which appeal was pending before it. The Appellate Tribunal granted stay vide order dated 1.1.2025 for a period of 180 days from the date of such order, on deposit of 20% of the amount of tax by XYZ Ltd. Thereafter, the bench was functioning intermittently till 1.2.2026 and therefore, the disputed matter could not be disposed of. In the meanwhile, in June 2025, XYZ Ltd. had made an application for extension of stay and was granted extension of stay upto 31.12.2025. Thereafter, on 5.1.2026, the Assessing Officer attached the bank account of XYZ Ltd. and recovered the amount of ₹15 lakhs against the arrear demand of ₹25 lakhs. The company requested the Assessing Officer to refund the amount as it holds stay over it. The Assessing Officer, however, rejected the contention of the assessee stating that the stay period expired on 31.12.2025, after which the order of stay stood vacated automatically. Examine the correctness of contention of the Assessing Officer.

ANSWER:

While filing appeal to ITAT, the assessee can apply to ITAT for stay of demand. If the ITAT is satisfied then it can grant a stay of **maximum 180 days**. During this period, the ITAT shall give its judgement (if possible). If the ITAT fails to give the judgement with this period and if the delay is not due to the fault of assessee then the assessee can apply for extension of stay. In such case, the ITAT can **extend** the stay but the total period of stay (original + extension) should not exceed **365 days**. After this period, the order of stay shall stand **vacated**.

This provision would result in **automatic vacation** of stay on expiry of 365 days even in cases where the ITAT could not dispose off due to its own fault or due to the fault of Department [and no fault of assessee]. This would cause **undue hardship** to the assessee even where the assessee is not at fault. In this sense, the **provision is arbitrary** and disproportionate so far as the assessee is concerned. Hence, the order of stay shall stand **vacated** after expiry of 365 days **only if the delay** in disposing of the appeal is **due to the fault of assessee**. This was held by Supreme Court in the case of **Pepsi Foods Ltd.**

Accordingly, if an appeal is not heard by the bench, due to the bench functioning intermittently, the **delay is not attributable to XYZ Ltd.** and the order of stay **shall not vacate** after expiry of 365 days. In such a case, the recovery of 15 lakhs against the arrear demand of 25 lakhs made by the A.O. on 5.1.2025 is not in order.and the **contention of the Assessing Officer is not correct**.

QUESTION 3:

XYZ Limited entered into a contract for purchase of software with M/s. Delta Inc, a non-resident company based in Sweden. It filed an application u/s 195(2) before the Assessing Officer to make payment to the non-resident company for purchase of software without deducting tax at source.

The assessee, XYZ Limited, contended that said non-resident company had no Permanent Establishment in India and in terms of the DTAA between India and Sweden, no tax was to be deducted in India on same. The AO rejected the assessee's application on grounds that consideration for software licensing constituted royalty u/s 9(1)(vi) and was liable to be taxed in India and, accordingly, assessee was directed to deduct tax at source at rate of 10% on said royalty payment.

On Appeal, the Commissioner (Appeals) passed an order in favour of the assessee. On further appeal, the Tribunal upheld the order passed by the Assessing Officer on grounds that payments made for purchase of software were in nature of royalty and tax at source to be deducted on such payment.

The assessee company filed a miscellaneous application for rectification under Section 254(2) before the Tribunal. The assessee had also filed an appeal before the High Court.

Tribunal allowed said application in exercise of his powers under section 254(2) and reheard entire appeal on merits and recalled its original order and passed an order in favour the assessee. Thereafter, the writ petition filed by the assessee with High Court was also withdrawn. Is Tribunal justified in recalling its original order? Please state your answer on the basis of latest provisions of the Act and Supreme Court rulings. Your answer should cover:

(a) Issue involved

(b) Provisions applicable

(c) Analysis and Conclusion

ANSWER:

Issue Involved:

The issue under consideration is whether the powers under section 254(2) can be exercised by the Tribunal to recall an order and rehear the entire appeal on merits.

Provisions applicable:

Sec. **254(1)** empowers the ITAT to **pass** such **order** as it thinks fit, after giving both the parties to the appeal an opportunity of being heard.

Sec. **254(2)** empowers the ITAT to **rectify** any **apparent mistake** in an order passed by it u/s 254(1).

Analysis and Conclusion:

The power u/s 254(2) is limited to rectification of a mistake apparent on record and therefore, the Tribunal must restrict itself within those parameters.

A detailed order was passed by the ITAT upholding [supporting] the order passed by the A.O. While allowing the application u/s 254(2) and recalling its earlier order, the **ITAT had reheard the entire appeal**. The subsequent order passed by the ITAT recalling its earlier order was **beyond the scope** and ambit of the powers u/s 254(2) and is **not tenable in law**.

Note – The facts given in the question are similar to the facts in the case of **Reliance Communications Ltd.** wherein the issue came up before the Supreme Court. The above answer is based on the rationale of the Supreme Court in the said case.

QUESTION 4:

The assessment of Vindhyas Ltd. was completed under section 143(3) with an addition of ₹ 21 lakhs to the returned income. Vindhyas Ltd. preferred appeal before the Commissioner (Appeals) which is pending now. In this backdrop, examine the following issues:

(i) Based on fresh information that there was escapement of income for the same assessment year, can the Assessing Officer initiate reassessment proceedings when the appeal is pending before Commissioner (Appeals)?

(ii) Can the Assessing Officer pass an order under section 154 for rectification of mistake in respect of issues not being subject matter of appeal?

(iii) Can the assessee-company seek revision under section 264 in respect of matters other than those preferred in appeal?

(iv) Can the Commissioner make a revision under section 263 both in respect of matters covered in appeal and other matters?

ANSWER:

(i) **Section 147** empowers the A.O. to assess/reassess escaped incomes if he has information suggesting escapement.

As per the third proviso to sec. 147, the A.O. cannot assess/reassess an escaped income which involves appeal matters. However, the A.O. can assess/reassess other matters of the same order. The **doctrine of partial merger** would apply in this case.

Therefore, even when an appeal is pending on the matter of additions of ₹ 21 lakhs to the returned income, the A.O. can initiate reassessment proceedings in respect of other matters.

(ii) **Section 154** empowers the Income Tax Authority to rectify mistakes in the order or intimation if the mistakes are apparent from the record.

As per this section, the Income Tax Authority cannot rectify apparent mistake in relation to appeal matters. However, the A.O. can rectify apparent mistake in relation to other matters of the same order. Thus, the **doctrine of partial merger** holds good for section 154 also.

Since the issue under consideration in this case relates to rectification of a mistake in respect of a non-appeal matter, the A.O. can pass an order u/s 154 for rectification of the same provided the mistake is apparent from the record.

(iii) **Section 264** empowers the Commissioner to revise an order which is prejudicial to the assessee.

As per this section, once the assessee files an appeal on a particular matter, the Commissioner can neither revise that matter not any other matter of the same order. Thus, the **doctrine of total merger** would apply u/s 264.

Therefore, under section 264, the Commissioner cannot revise an order which is pending before the commissioner (Appeals), even if the revision pertains to a matter, other than the matter(s) covered in the appeal.

(iv) **Section 263** empowers the Commissioner to revise an order which is erroneous and prejudicial to the Govt.

As per this section, the Commissioner cannot revise appeal matters. However, he can revise other matters of the same order. Here again, the **doctrine of partial merger** applies.

Therefore, where an appeal is pending on a particular matter, the Commissioner cannot revise such matter but he can revise other matters if the same are erroneous and prejudicial to the Govt.

QUESTION 5:

ABC Ltd. has approached the Supreme Court under a special leave petition. There has been a delay of 439 days in filing the appeal under section 260A for which reason ABC Ltd. requested for a condonation of delay under section 14 of Limitation Act, 1963. The company submitted that the delay was on account of pursuing an alternate remedy of filing a miscellaneous application before the Income-tax Appellate Tribunal (ITAT) under section 254(2).

From the above facts, examine whether delay in filing appeal under section 260A can be condoned under section 14 of Limitation Act, 1963 where the stated reason for delay is the pursuance of an alternate remedy by way of filing an application before the ITAT under section 254(2) for rectification of mistake apparent on record.

ANSWER:

The issue under consideration is whether delay in filing appeal under section 260A can be condoned under section 14 of the Limitation Act, 1963, where the stated reason for delay is the pursuance of an alternate remedy by way of filing an application before the ITAT under section 254(2) for rectification of mistake apparent on record.

This issue came up before the Supreme Court in the case of **Spinacom India (P.) Ltd.** In this case, the Supreme Court rejected the question of invoking section 14 of the Limitation Act 1963 which allows condonation of delay on demonstration of sufficient cause. The Apex Court did not accept that the rectification application before the ITAT under section 254(2) was an alternate remedy to filing appeal to High Court u/s 260A. The former is an application for rectifying a 'mistake apparent from the record' which is much narrower in scope than the latter. The Court stated that the appellant had the **option of filing an appeal** to High Court **while the rectification application was pending** before the ITAT. The time period for filing an appeal to High Court does not get suspended on account of the pendency of a rectification application before the ITAT.

Accordingly, applying the rationale of the above Supreme Court ruling to the facts of this case, the delay in filing appeal to HC due to pursuance of an alternate remedy by way of filing an rectification application before the ITAT **cannot be condoned**.

QUESTION 6:

M/s. Uranus LLP filed its return for the A.Y. 2022-23 on 23-07-2022. The assessment u/s 143(3) was completed on 15.06.2024. The A.O. made 2 additions to the income of the LLP, namely:

- ₹12 lakhs towards unexplained investment u/s 69; and
- ₹ 4 lakhs u/s 40(b) due to excess interest paid to partners.

The assessee contested the addition of ₹ 12 lakhs u/s 69 and filed an appeal before the Commissioner (Appeals). The appeal was decided on 12th February, 2025 against the LLP. In March, 2025, the LLP approaches you to know whether it should apply for revision to Principal Commissioner u/s 264 or for rectification u/s 154 to the Assessing Officer as regards disallowance u/s 40(b). You are required to advise the LLP, keeping in mind the relevant provisions of income-tax law.

ANSWER:

Section 264 empowers the Commissioner to revise an order which is prejudicial to the assessee. As per this section, once the assessee files an appeal on a particular matter, the Commissioner can neither revise that matter not any other matter of the same order. Thus, the **doctrine of total merger** would apply u/s 264.

Section 154 empowers the Income Tax Authority to rectify mistakes in the order or intimation if the mistakes are apparent from the record. As per this section, the Income Tax Authority cannot rectify apparent mistake in relation to appeal matters. However, the A.O. can rectify apparent mistake in relation to other matters of the same order. Thus, the **doctrine of partial merger** would apply u/s 154.

In the present case, since the order passed by the A.O. in respect of the addition of unexplained investment of ₹ 12 lakhs became the subject matter of an appeal to CIT(A), M/s. Uranus LLP, can **neither apply for revision u/s 264** for the matter of **unexplained investment nor** for the matter of **addition u/s 40(b)**.

However, M/s Uranus LLP **can apply** to the A.O. **for rectification u/s 154** in relation to matter **of addition u/s 40(b)** if the mistake is apparent from the record (as it is not an appeal matter).

In the view of above, the assessee, M/s Uranus LLP should seek rectification under section 154.

QUESTION 7:

An assessee who had been served with an order of assessment passed under section 143(3) on 1.1.2025 had filed an application against this order before the CIT as per section 264 on 11.1.2025. However, the CIT refused to entertain the application on the pretext of premature application. Assessee seeks your opinion.

ANSWER:

An assessee, who is aggrieved by the order of the A.O. can apply to CIT/CCIT for revision u/s 264 within 1 year from the date of receipt of order of A.O. The assessee can make such application either **after the time limit of filing appeal** to CIT(A) expires and if he applies before such time limit expires then he should **expressly waive his right to appeal**.

In the present case, the time limit for filing appeal to CIT(A) had not expired on 11.1.2025 and the assessee had also not waived the right of appeal while filing the application to CIT for revision u/s 264. Therefore, the **Commissioner's refusal** to entertain such application is **correct**.

QUESTION 8:

The assessment of AUM Enterprises u/s 143(3) for the A.Y.2020-21 was completed on 15th June, 2021 as follows:

(a) Addition of ₹ 8 Lakhs for unexplained cash credit u/s 68;
(b) Allowance of expenditure "P" – 5 lakhs;
(c) Allowance of expenditure "R" – 12 lakhs.

On 4th August, 2022, a notice u/s 148 was sent to the assessee in order disallow expenditure "P" and the income of P.Y. 2019-20 was reassessed u/s 147 by passing an order on 9th December, 2022.

Later, the Commissioner discovered that the expenditure "R" was erroneously allowed against the judgement of Supreme Court. Hence, he initiated the proceedings u/s 263 and disallowed expenditure "R" by passing a revisionary order on 17th August, 2024.

Examine whether the revisionary power exercised by Commissioner u/s 263 is in order or barred by limitation.

ANSWER:

Section 263 empowers CIT/CCIT to revise an order passed by his sub-ordinate authority if the same is erroneous and prejudicial to the Govt. The time limit prescribed for such revision is **2 years** from the end of the year in which the **order containing error was passed**.

In case of AUM Enterprises:

- Order u/s **143(3)** was passed on **15th June, 2021** and
- Order u/s **147** was passed on **9th December, 2022**.

The issue involved is whether the time limit of 2 years u/s 263 shall be reckoned from the date of original assessment order u/s 143(3) or the date of reassessment order u/s 147.

The facts of the case are similar to the case of **Industrial Development Bank of India Ltd.** where the **Supreme Court** held that if the **issue** before the Commissioner **relates to the original** assessment order then the time limit shall be **reckoned from the date of original**

assessment order. However, if the **issue** before the Commissioner **relates to the reassessment** order then the time limit shall be **reckoned from the date of reassessment** order.

In this case, the issue before the Commissioner was **expenditure "R"** which **relates to the original** assessment order [It was not related to reassessment order as the reassessment was in relation to a different issue i.e. expenditure "P"]. Hence, the time limit of **2 years** u/s 263 shall be **reckoned from** the end of the year in which the **original** assessment order u/s 143(3) was passed which comes to **31st March, 2024**. Since the revisionary order was passed on **17th August, 2024**, it is **barred by limitation**.

QUESTION 9:

Doctrine of precedence would be applicable in case of tax laws. In light of the Doctrine of Precedence, comment on correctness or otherwise of following statements alongwith reasons for your answers:

(a) The ***ratio decidendi*** (the rationale for deciding a case) of a Supreme Court decision is absolutely binding on all lower courts, Tribunals & authorities. However, the lower courts, Tribunals & authorities are not bound by the:
- ***obiter dicta*** (additional remarks or things said by the way) of Supreme Court decisions and
- judgments passed by Supreme Court ***per incuriam*** (i.e. without referring the statutory provision).

(b) Where there are two irreconcilable decisions of two Benches of similar strength of the Supreme Court, the decision with more detailed discussion on the subject shall prevail.

(c) Lower authorities may deviate from the decision of the jurisdictional High Court, only in a situation to keep the issue alive where the Department has not accepted the said decision and has taken the matter to the Supreme Court.

ANSWER:

(a) **Incorrect** - Not only the ***ratio decidendi*** (the rationale for deciding a case), but also ***obiter dicta*** (additional observations, remarks, and opinions given while deciding a case) of the Supreme Court are binding on all the Courts. Judgments passed by Supreme Court ***per incuriam*** (i.e. without referring the statutory provision) are also **binding** on the lower courts.

(b) **Incorrect** - When there are two irreconcilable decisions of two Benches of similar strength of Supreme Court, the decision **later in time** shall prevail.

(c) **Incorrect** - Lower authorities **cannot pass** orders which are **inconsistent with** the decisions of the **jurisdictional High Court** even for the purpose of keeping the issue alive.

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