आयकर अपीलीय अधिकरण पुणे न्यायपीठ "बी" पुणे में
IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "B", PUNE

सुश्री सुषमा चावला, न्यायिक सदस्य एवं श्री अनिल चतुर्वेदी, लेखा सदस्य के समक्ष
BEFORE MS. SUSHMA CHOWLA, JM AND SHRI ANIL CHATURVEDI, AM

आयकर अपील सं. / ITA Nos.725 to 728/PUN/2015
निर्धारण वर्ष / Assessment Years : 2005-06 to 2008-09

Shri Tushar R. Jagtap,
Row House No.2/3,
Damodar Housing Society,
Bibwewadi, Pune – 411 037 …. अपीलार्थी/Appellant

PAN : AAXPJ4638C

Vs.

The Asst. Commissioner of Income Tax,
Circle-4, Pune …. प्रत्यर्थी / Respondent

आयकर अपील सं. / ITA Nos.729 to 732/PUN/2015
निर्धारण वर्ष / Assessment Years : 2006-07 to 2009-10

Smt. Shakuntala R. Jagtap,
Row House No.2/3,
Damodar Housing Society,
Bibwewadi, Pune – 411 037 …. अपीलार्थी/Appellant
PAN : AAXPJ2061K

Vs.

The Asst. Commissioner of Income Tax,
Circle-4, Pune …. प्रत्यर्थी / Respondent

आयकर अपील सं. / ITA Nos.733 to 736/PUN/2015
निर्धारण वर्ष / Assessment Years : 2005-06 to 2008-09

Smt. Vaishali Tushar Jagtap,
Row House No.2/3,
Damodar Housing Society,
Bibwewadi, Pune – 411 037 …. अपीलार्थी/Appellant
PAN : AHIPJ6547Q

Vs.

The Asst. Commissioner of Income Tax,
Circle-4, Pune …. प्रत्यर्थी / Respondent

अपीलार्थी की ओर से / Appellant by : Shri Rajiv Thakkar
प्रत्यर्थी की ओर से / Respondent by : Dr. Vivek Aggarwal & Shri Mukesh Jha

सुनवाई की तारीख / **Date of Hearing : 20.12.2017**		घोषणा की तारीख / **Date of Pronouncement: 09.02.2018**

आदेश / ORDER

PER SUSHMA CHOWLA, JM:

This bunch of appeals filed by different assessees are against the respective orders of CIT(A)-4, Pune dated 13.03.2015 & 16.03.2015 relating to assessment year 2005-06 to 2009-10 against levy of penalty under section 271(1)(c) of the Income Tax Act 1961 (in short the ‘Act’).

2. This bunch of appeals relating to three different assessees for different years were heard together and are being disposed of by this consolidated order for the sake of convenience. The only issue raised in the present bunch of appeals is against levy of penalty under section 271(1)(c) of the Act. However, we first take up the appeals in ITA Nos.725/PUN/2015 to 728/PUN/2015, relating to assessment year 2005-06 to 2008-09. In order to adjudicate the issue, we are

making reference to the facts and issue in ITA No.725/PUN/2015, relating to assessment year 2005-06.

3. The assessee in ITA No.725/PUN/2015, relating to assessment year 2005-06 has raised the following grounds of appeal:-

(Without prejudice to each other)

1. On the facts and circumstances of the case and in law the Ld. CIT(A) was not justified in confirming the penalty levied by the A.O. under S. 271(1)(c) of the Act of Rs.88,638/- without applying mind to the written submissions submitted. The penalty levied and confirmed by Ld. CIT(A) is not sustainable in law. It be quashed and set aside.

2. On the facts and circumstances of the case and in law no concealment of income nor furnishing of any particulars of income is coming out of the Return of income filed and hence the Expln. 1 to S. 271(1)(c) becomes inapplicable. No penalty u/s 271(1)(c) under any of its limb is leviable. The penalty levied by the A.O. and confirmed by Ld. CIT(A) is illegal and without jurisdiction. It be quashed and set aside.

3. On the facts and circumstances of the case and in law the penalty levied u/s 271(1)(c) is also not justified where assessed income and returned income was the same. The penalty levied by A.O. and confirmed by Ld. CIT(A) being unsustainable and quashed and set aside.

4. The appellant craves to leave, add/amend or alter any of the above grounds of appeal.

4. The assessee has raised the additional grounds of appeal, which read as under:-

Additional Ground:

1. On facts and circumstances prevailing in case and as per provisions of law, it be held that, the penalty levied is not according to the provisions of the section 271(1)(c) of the Income-tax Act, 1961 and is against the scheme of law and should be deleted. Just and Proper relief granted to me in this respect.

2. On facts and circumstances prevailing in the case and as per provisions of law, it be held that, the penalty levied depending upon the assessment framed u/s 147 r. w.s 143(3) of the act which was in itself without following the law and the provisions of Income-Tax Act, 1961, though not appealed, deserves to be deleted. Just and proper relief be granted to me in this respect.

> *3. Without prejudice to other grounds raised, on facts and circumstances prevailing in the case, it be held that, the penalty amount should be proportionately restricted to the undisclosed income unearthed by the department only and not on the amount offered by assessee voluntarily Just and proper relief granted to me in this respect.*

5. The assessee by way of additional grounds of appeal has raised the preliminary issue of jurisdiction of the Assessing Officer in invoking provisions of section 271(1)(c) of the Act.

6. Briefly, in the facts of the case, the assessee had originally filed the return of income declaring total income of ₹ 9,76,430/- which included agricultural income of ₹ 7,30,000/-. The said return of income was processed under section 143(1) of the Act on 25.09.2006. The Assessing Officer received a letter from the DDIT of Investigation Unit-I(3), Pune that the assessee had unaccounted income which was applied for the payment of premiums for various insurance policies. Accordingly, notice under section 148 of the Act was served upon the assessee on 29.03.2012 after recording the reasons for reopening the assessment. The case was selected for scrutiny. In response to the notice issued under section 148 of the Act, the assessee declared additional income of ₹ 3,40,000/-. The Assessing Officer noted that total premium paid for various years was ₹ 1.74 crores. Smt. Shakuntala Jagtap and her son i.e. assessee before us had withdrawn sum of ₹ 36 lakhs from two LIC policies and re-invested in six policies of ₹ 6 lakhs each. The Assessing Officer noted that sum of ₹ 1.38 crores was paid in cash out of unaccounted income premium. Regarding the source of ₹ 1.38 crores, Smt. Shakuntala Jagtap stated that the same was out of her undisclosed income and she admitted to pay the taxes on the same. In view thereof, sum of ₹ 3,40,000/- was added in the hands of assessee and penalty proceedings under section 271(1)(c) of the Act were initiated for concealment of

income. The order levying penalty under section 271(1)(c) of the Act was passed by the Assessing Officer rejecting the explanation of assessee as to non-levy of penalty for concealment. The Assessing Officer was of the view that the additional income was offered only after the issue of notice under section 148 of the Act and hence, there was no basis in the plea of assessee that it had voluntarily disclosed the income. In view thereof, the assessee was held to have willfully concealed the particulars of income to evade the tax and accordingly, penalty of ₹ 88,638/- was levied for concealment of income. Similarly, penalty proceedings were initiated and levied for assessment years 2006-07 to 2008-09 in the hands of assessee at ₹ 4,51,433/- for assessment year 2006-07, ₹ 8,63,349/- for assessment year 2007-08 and ₹ 12,60,454/- for assessment year 2008-09.

7. The CIT(A) upheld the levy of penalty under section 271(1)(c) of the Act.

8. The assessee is in appeal against the order of CIT(A).

9. The learned Authorized Representative for the assessee filed tabulated details of total income offered in the original return of income and the total income offered in the revised return of income. He pointed out that subsequent to the filing of original return of income, notice under section 148 of the Act was served upon the assessee as is mentioned in the assessment order on 29.03.2012. However, the reasons were recorded on 30.03.2012 and the approval was also received on 30.03.2012 and thereafter, assessment was completed under section 143(3) r.w.s. 147 of the Act. He also pointed out that in the case of Tushar R. Jagtap for assessment years 2007-08 and 2008-09, no

reasons were recorded for reopening the assessment. He then, referred to the income assessed in the hands of assessee under section 143(3) r.w.s. 147 of the Act, wherein the income offered by the assessee in the revised return of income was accepted as such. In the first instance, he challenged 148 proceedings, where no reasons were recorded. He pointed out that investigation was made in December, 2009 and on 10.02.2010, revised returns of income were filed. On 29.03.2012 / 30.03.2012 re-assessment proceedings were initiated and the income returned in the revised returns of income were accepted. He referred to the Paper Book and pointed out that in respect of assessment year 2005-06, copy of form for recording reasons for initiating proceedings under section 148 of the Act and for obtaining the approval of the Addl. / Joint CIT, Range 4, Pune is attached, which is dated 30.03.2012. The same was received by the Joint CIT on 30.03.2012. He then referred to the approval granted by the Joint CIT, which was given on 30.03.2012. He stressed that there was no independent application of mind by the JCIT and hence automatic approval granted was not correct. In this regard, he pointed out that in column No.7, the Assessing Officer had mentioned that the provisions of section 147 [Explanation 2(c)] of the Act were referred. Our attention was drawn to Explanation 2 (c), which provides that there is already assessment being made. However, in the case of assessee after revised return of income, there was no intimation sent under section 143(1) of the Act and only notice under section 148 of the Act was issued. Hence, it was case of non-application of mind, so the proceedings initiated under section 148 of the Act were wrong. Then, he pointed out that notice under section 148 of the Act was served upon the assessee on 30.03.2012, whereas the assessment order talks of service on 29.03.2012. Similarly, for assessment year 2006-07 in assessee's own case, approval form is placed at page 65, which is similarly filled

and the approval is also dated 30.03.2012. The said approval was sought on 30.03.2012 itself. In respect of assessment years 2007-08 and 2008-09, he pointed out that though information was sought under RTI but the assessee has not received any copy of reasons recorded for reopening of assessment and notice under section 148 of the Act was issued on 29.03.2012.

10. The learned Authorized Representative for the assessee first placed reliance on the ratio laid down by the Hon'ble Supreme Court in CIT Vs. S. Goyanka Lime & Chemical Ltd. (2015) 64 taxmann.com 313 (SC), wherein the order of the Hon'ble High Court of Madhya Pradesh in CIT Vs. S. Goyanka Lime & Chemicals Ltd. (2015) 56 taxmann.com 390 (MP) was upheld and Special Leave Petition dismissed, wherein the Hon'ble High Court had held that where JCIT recorded satisfaction in mechanical manner and without application of mind to accord sanction for issuing notice under section 148 of the Act, reopening of assessment was invalid. He further referred to the order of the Hon'ble High Court, wherein also similarly as in the case of assessee, the JCIT had only recorded *"Yes, I am satisfied".* The learned Authorized Representative for the assessee further pointed out that in view of the assessment being invalid, no penalty proceedings could be initiated against the assessee. In this regard, he placed reliance on the decision of the Hon'ble Bombay High Court in CIT Vs. Lalitkumar Bardia (2017) 84 taxmann.com 213 (Bom), wherein it has been held that if the order has been passed without jurisdiction, then the same goes to the root of the issue and needs to be addressed first. He further placed reliance on the decision of Lucknow Bench of Tribunal in DCIT Vs. B.J.D. Paper Products (2011) 134 ITD 552 (Lucknow Trib) and pointed out that the facts of said case were identical to the facts of present case and during penalty proceedings, the

validity of reopening of assessment was challenged and penalty was held to be not leviable. He further placed reliance on the ratio laid down by the Mumbai Bench of Tribunal in Valiant Glass Works Pvt. Ltd. Vs. ACIT in ITA No.1612/Mum/2013, relating to assessment year 2002-03, order dated 27.07.2016 for the proposition that whether the jurisdiction or the legality of proceedings could be agitated in subsequent proceedings or even in collateral proceedings.

11. Coming to the merits of levy of penalty, he further pointed out that where the assessee had offered additional income after survey, there could not be any concealment or non disclosure as the offered income has been accepted in the hands of assessee and penalty was not leviable on the said income offered. Reliance was placed on the ratio laid down by the Hon'ble High Court of Delhi in CIT Vs. SAS Pharmaceuticals (2011) 335 ITR 259 (Del) and also on the Pune Bench of Tribunal in the case of Shri Anand Suresh Jain Vs. DCIT in ITA No.353/PUN/2015 and in Shri Suresh N. Jain Vs. DCIT in ITA No.354/PUN/2015, both relating to assessment year 2006-07, order dated 13.01.2017. He also placed reliance on the ratio laid down in the following decisions:-

- *i) Ravi Sud Vs. ACIT (2015) 39 ITR (Trib) 356 (Mumbai)*
- *ii) Muninaga Reddy Vs. ACIT (2013) 37 taxmann.com 440 (Bangalore – Trib)*
- *iii) Vasavi Shelters Vs. ITO (2013) 141 ITD 590 (Bangalore)*

12. The learned Departmental Representative for the Revenue on the other hand, pointed out that the assessee is precluded from challenging the validity of assessment proceedings during penalty proceedings. In this regard, he placed reliance on the ratio laid down by the Hon'ble High Court of Karnataka in (1) CIT

(2) ITO Vs. M/s. Manjunatha Cotton and Ginning Factory in ITA No.2564 of 2005, judgment dated 13.12.2012 with special reference to para 62. He further pointed out that similar proposition has been laid down by the Hon'ble High Court of Jammu & Kashmir in CIT Vs. The Hotel Highland Park (2000) 246 ITR 130 (J&K). Another reliance placed upon by the learned Departmental Representative for the Revenue was on the ratio laid down by the Chandigarh Bench of Tribunal in Dewan Engg. Work Vs. DCIT in ITA No.963/Chd/2011, relating to assessment year 1991-92, order dated 26.02.2014. He then pointed out that the additional ground of appeal raised by the assessee would not stand.

13. Coming to the date of initiation of re-assessment proceedings, he pointed out that the date mentioned in assessment order of 29.03.2012 was a typographical error. In this regard, the learned Departmental Representative for the Revenue filed Paper Book and pointed out that in the case of assessee for assessment year 2005-06, reasons were recorded on 30.03.2012 and the same were approved on 30.03.2012 itself by the JCIT and the notice issued under section 148 of the Act on 30.03.2012 was served upon the assessee on the said date itself. Similarly, for assessment year 2006-07, reasons were recorded on 30.03.2012, approved on 30.03.2012 by the JCIT and notice under section 148 of the Act was issued on 30.03.2012 and served upon the assessee on the same date.

14. Coming to the proceedings for assessment year 2007-08, the learned Departmental Representative for the Revenue stressed that the reasons were recorded online on 29.03.2012 and no approval was required from the JCIT in this regard and notice under section 148 of the Act was issued on 29.03.2012

and served upon the assessee on 29.03.2012. Similar position was for assessment year 2008-09. The learned Departmental Representative for the Revenue was directed to file copies of reasons recorded for reopening the assessment. The learned Authorized Representative for the assessee here strongly objected and pointed out that no reasons were available on record and if even they were recorded online, since they were not signed, they were not valid reasons for re-assessment. For this, he placed reliance on the ratio laid down by the Mumbai Bench of Tribunal in ACIT Vs. Blue Star Ltd. (2015) 61 taxmann.com 248 (Mumbai – Trib.). It may be pointed out herein itself that till the date of passing order, the learned Departmental Representative for the Revenue has failed to file the copies of reasons recorded online. In respect of merits of the addition, the learned Departmental Representative for the Revenue pointed out that in the case of Shri Anand Suresh Jain Vs. DCIT (supra), the return of income was filed within time allowed and hence, no merit in the plea of assessee. He further placed reliance on the ratio laid down by the Hon'ble High Court of Madras in N. Ranjit Vs. CIT (2013) 35 taxmann.com 555 (Mad).

15. In the case of Smt. Vaishali Tushar Jagtap, the facts are same and the assessment order talks of service of notice under section 148 of the Act upon the assessee on 29.03.2012. The learned Departmental Representative for the Revenue in this regard points out that for assessment years 2005-06 and 2006-07, reasons were recorded on 30.03.2012, the approval from JCIT was received on 30.03.2012 and the notice under section 148 of the Act was issued on 30.03.2012 itself. For assessment years 2007-08 and 2008-09, the learned Authorized Representative for the assessee pointed out that no reasons were recorded and the same were not available on record and notice under section

148 of the Act was served upon the assessee on 29.03.2012. The learned Departmental Representative for the Revenue has filed separate Paper Book for assessment year 2007-08, in which there is an acknowledgement which is signed by the assessee on 29.03.2012 and upon notice issued under section 148 of the Act, there is service on 30.03.2012 which is separately signed. Similar is the position for assessment year 2008-09.

16. In the case of Smt. Shakuntala R. Jagtap, where the facts are same and the assessment order talks of service upon the assessee of notice under section 148 of the Act on 29.03.2012 for assessment year 2006-07. The reasons were recorded for reopening the assessment on 30.03.2012 and approval was granted on 30.03.2012 and the notice was issued and served upon the assessee on 30.03.2012 itself. For assessment years 2007-08 and 2008-09, no reasons were available on record and the notice was issued and served upon the assessee on 29.03.2012 itself. For assessment year 2009-10, the original return of income was filed and there was time for issue of notice under section 143(2) of the Act. The learned Authorized Representative for the assessee in this regard pointed out that an error had crept in the order of Assessing Officer, which talks of acknowledgement dated 10.02.2010 for the year under consideration, under which income declared is ₹ 11,04,240/-. However, the said acknowledgement is in respect of assessment year 2008-09. The assessee for assessment year 2009-10 had originally filed the return of income on 15.02.2010 declaring total income of Rs.16,27,480/-; the return of income filed by the assessee was accepted as such and there was no addition in the hands of assessee. So, no question of any concealment of income and no question of levy of penalty in this

regard. He stressed that time limit for taking up the case for scrutiny for issue of notice under section 143(2) of the Act had not passed.

17. We have heard the rival contentions and perused the record. The issue arising in the present appeal is against levy of penalty for concealment of income under section 271(1)(c) of the Act. The case of assessee before us is that originally for all the years under consideration, it had furnished the return of income in time. Subsequently, the Assessing Officer received certain information from the DDIT of Investigation Wing. The assessee filed revised return of income offering additional income in its hands in the respective years which are in appeal before us. Thereafter, the Assessing Officer has recorded reasons for reopening the assessment and issued notice under section 148 of the Act. The assessment order talks about the issue of notice under section 148 of the Act and its service on 29.03.2012 upon the assessee. The assessment was completed in the case of assessee by accepting revised income offered by the assessee. However, penalty proceedings were initiated for concealment of income in respect of additional income offered. The assessee before us has challenged the assessment proceedings being invalid on the ground of recording of reasons for reopening the assessment under section 147 of the Act and its approval thereafter by the JCIT, Pune and issue of notice under section 148 of the Act and its service upon the assessee. The first plea raised by the assessee was that where notice under section 148 of the Act has been served upon the assessee on 29.03.2012 itself and where the reasons have been recorded on 30.03.2012, its approval received on 30.03.2012, hence proceedings for re-assessment are invalid for want of proper jurisdiction. Another linked issue which has been raised by the assessee before us is that for some of the years in the

case of assessee which are in appeal before us, the reasons recorded for reopening are not available on record and have not been made available by the learned Departmental Representative for the Revenue during appellate proceedings also and hence, service of notice under section 148 of the Act and in the absence of the reasons recorded for reopening, assessment is bad in law. He further pointed out that in any case where the reasons have been recorded by the Assessing Officer for non application of mind by the JCIT, Pune granting approval to the reasons recorded, the initiation of re-assessment proceedings were bad in law and hence, no merit in initiation of penalty proceedings against the assessee. There are also instances i.e. in the case of Smt. Shankuntala R. Jagtap for assessment year 2009-10, where the time limit for issue of notice under section 143(2) of the Act had not expired and hence, reopening of assessment under section 147 / 148 of the Act was challenged by the assessee. On merits, the case of assessee is that where no addition has been made in its hands and the income offered in the return of income though revised was accepted, it is not case of concealment of income and hence, no penalty to be levied under section 271(1)(c) of the Act. The learned Departmental Representative for the Revenue however, has strongly opposed the case of assessee and has stressed that the validity of assessment proceedings cannot be challenged while deciding the issue of levy of penalty under section 271(1)(c) of the Act. The second aspect which has been put forward by the learned Departmental Representative for the Revenue is that though in the assessment order, the date for service of notice under section 148 of the Act is mentioned at 29.03.2012, however, there was a typographical error in the same as in most of the cases reasons were recorded, approved, notice issued and served upon the assessee on 30.03.2012 itself. This was the position in the case of assessee for

assessment years 2005-06 and 2006-07. In respect of assessment years 2007-08 and 2008-09, the case of Revenue was that the reasons were recorded online as from 2012, digital platform was used for this purpose. However, the learned Departmental Representative for the Revenue has failed to file the copies of reasons recorded online to initiate re-assessment proceedings in assessment years 2007-08 and 2008-09 in the case of Shri Tushar R. Jagtap, Smt. Vaishali T. Jagtap and Smt. Shankuntala R. Jagtap. However, he fairly admitted that reasons for these years i.e. assessment years 2007-08 and 2008-09 were recorded on 29.03.2012, notice was issued on 29.03.2012 and was served upon the assessee on 29.03.2012. In respect of assessment year 2009-10 in the case of Smt. Shankuntala R. Jagtap, the learned Departmental Representative for the Revenue has failed to meet the case of assessee that there is first factual error recorded in the assessment order i.e. reference is made to the return of income filed for assessment year 2008-09 and also where the time limit for issue of notice under section 143(2) of the Act had not expired, then no proceedings could be initiated under section 148 of the Act.

18. First, we take up the issue whether the assessee during penalty proceedings could raise objections against assessment completed in the hands of assessee i.e. can the assessee challenge the jurisdiction of Assessing Officer in completing assessment which has been accepted by it, while pursuing its case of non-levy of penalty for concealment under section 271(1)(c) of the Act. We proceed to first take into consideration various judicial propositions laid down on the issue, which has been relied upon by both the learned Authorized Representatives before us.

19. The learned Authorized Representative for the assessee has relied on the decision of the Hon'ble Bombay High Court in CIT Vs. Lalitkumar Bardia (supra), wherein it has been held that mere participation in proceedings or acquiescence would not confer jurisdiction. Reliance was placed on the ratio laid down by the Apex Court in Kanwar Singh Saini Vs. High Court of Delhi (2012) 4 SCC 307, wherein it was observed as under:-

> *"18. It is settled position in law that mere participation in proceedings or acquiescence will not confer jurisdiction. The Apex Court in Kanwar Singh Saini (supra) made observations, which are apposite to the issue at hand and which read as under:-*
>
> > *"22. There can be no dispute regarding the settled legal proposition that conferment of jurisdiction is a legislative function and it can neither be conferred with the consent of the parties nor by a superior court, and if the court passes order/decree having no jurisdiction over the matter, it would amount to a nullity as the matter goes to the roots of the cause. Such as issue can be raised at any belated stage of the proceedings including in appeal or execution. The finding of a court or tribunal becomes irrelevant and unenforceable/inexecutable once the forum is found to have no jurisdiction. Acquiescence of a party equally should not be permitted to defeat the legislative animation. The court cannot derive jurisdiction apart from the statute."*

20. Similar proposition has been laid down by the Mumbai Bench of Tribunal in Valiant Glass Works Pvt. Ltd. Vs. ACIT (supra).

21. The Lucknow Bench of Tribunal in DCIT Vs. B.J.D. Paper Products (supra) on similar issue of validity of reopening of assessment being challenged by the assessee, while deciding penalty proceedings, held that the said issue was a pure question of law not involving investigation into the facts, therefore the same is to be considered. The Lucknow Bench of Tribunal held that it was open to the assessee to raise question of validity of assessment in appeal against levy of penalty proceedings. The learned Departmental Representative for the Revenue in the said case had relied on the ratio laid down by the Hon'ble High Court of Jammu & Kashmir in CIT Vs. The Hotel Highland Park (supra). In the

appeal before us also, reliance has been placed on the said decision of the Hon'ble High Court of Jammu & Kashmir in CIT Vs. The Hotel Highland Park (supra). The Lucknow Bench of Tribunal relied on the decision of jurisdictional Hon'ble High Court of Allahabad in the case of Jai Dayal Pyare Lal v. CIT [1972] UPTC 596, wherein it was held that new plea which was not taken in the regular assessment proceedings could be taken in the penalty proceedings. Further, reference was made to the decision of the Hon'ble Supreme Court in National Thermal Power Co. Ltd. Vs. CIT (1998) 229 ITR 383 (SC) which was relied upon by the Delhi Bench of Tribunal to observe that it was open to the assessee to set up / raise question of validity of assessment in the appeal against levy of penalty. The Lucknow Bench of Tribunal applying the ratio laid down by the jurisdictional Allahabad High Court in Jai Dayal Pyare Lal Vs. CIT (supra) held that the said ratio is to be applied in preference to the decision of the Hon'ble High Court of Jammu & Kashmir in CIT Vs. The Hotel Highland Park (supra) relied upon by the learned Departmental Representative for the Revenue. The relevant findings of the Tribunal are as under:-

> *"8.1 Now the question before us is that as to whether the assessee can raise question of validity of assessment in appeal against levy of penalty. The learned Departmental Representative relied on the decision of Hon'ble Jammu & Kashmir High Court in the case of Hotel Highland Park (supra) wherein the Hon'ble Court has held (headnote) as under :*
>
>> *"Penalty proceedings and assessment proceedings are two separate proceedings. An appeal is provided in s. 246 of the Act both against the order of assessment and the order of penalty. Any person objecting to any penalty imposed by the AO under s. 271 may appeal to the AAC under cl. (o) of s. 246(1) (as it stood at the material time). There is a separate provision in cl. (e) of s. 246(1) for appeal against an order of assessment under ss. 143(3) and 147. "Appeal against an order of reassessment or recomputation under s. 147 or 150 is provided in cl. (e) of s. 246(1). If an order of assessment or reassessment is not challenged, it becomes final and cannot be challenged in an appeal against an order of penalty. The challenge in such appeal is confined to the imposition of penalty. The scope and ambit of the appeal is restricted, to the order of penalty. The validity of an assessment order which has attained finality, cannot be challenged in such an appeal. The appellate authority cannot*

> *entertain any challenge to the validity of the assessment order in an appeal against the order of penalty."*

8.2 In the above judgment Hon'ble Jammu & Kashmir High Court has categorically held that validity of assessment order cannot be challenged in appeal against order of penalty. However, there is a-direct decision on the point by the jurisdictional High Court in the case of Jai Dayal Pyare Lal (supra) wherein the jurisdictional High Court held, with reference to a new plea taken in the penalty proceedings which was not taken in the regular assessment proceedings, as under :

> *"It is thus clear that regular assessment order is not a final word upon the plea taken therein or which might have been taken at this stage. The assessee is entitled to show cause in penalty proceedings and to establish the above material and relevant facts which may go to effect his liability or the quantum of penalty. He cannot be held to be debarred from taking appropriate plea simply on the ground that such a plea was not taken in the regular assessment proceedings."*

8.3 In the case of Deep Chand Kothari (supra), the Hon'ble Rajasthan High Court held that an order passed by an authority without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon.

8.4 There is a direct-decision on the point rendered by the Tribunal Delhi Bench in the case of Tidewater Marine International Inc. (supra). The Tribunal relying on the decision of the Hon'ble Supreme Court in the case of National Thermal Power Co. Ltd. v. CIT [1998] 229 ITR 383, held that in view of the decision of the Hon'ble Supreme Court, we are of the view that it is open to the assessee to set up/raise the question of validity of assessment in the appeal against the levy of penalty. Since the question of validity of assessment made in the matter is raised, which is a pure question of law and not involving any investigation into the facts as the same are on record, we admit the additional ground raised by the assessee for decisions.

8.5 It is relevant to state that since there is a direct decision of the Hon'ble jurisdictional High Court in the case of Jai Dayal Pyare Lal (supra) on the issue in hand and therefore we are bound to follow the same and therefore in preference to the decision of Hon'ble Jammu & Kashmir High Court relied upon by the learned Departmental Representative, we prefer to follow the decision of the Hon'ble jurisdictional High Court in the case of Jai Dayal Pyare Lal (supra). Furthermore, the decision of the Hon'ble Supreme Court in the case of National Thermal Power Co. Ltd. (supra) can also be relied upon. In the said case, the Hon'ble Supreme Court has observed that:

> *"undoubtedly, the Tribunal has the discretion to allow or not to allow a new ground to be raised. But where the Tribunal is only required to consider the question of law arising from facts which are on record in the assessment proceedings, there is no reason why such a question should not be allowed to be raised when it is necessary to consider that question in order to correctly assess the tax liability of an assessee". In the instant case, the validity of reopening of assessment challenged by the assessee is a pure question of law and not involving investigation into the facts as the same are on record and therefore the same should be considered while deciding the penalty appeal."*

> *8.6 We have already discussed hereinabove that the decision of Hon'ble Rajasthan High Court in the case of Deep Chand Kothari (supra) is also in favour of the assessee and therefore we are of the view that the validity of assessment proceedings can be looked into during the penalty proceedings even though the assessment itself has not been challenged by the assessee. In that view of the matter, we do not see any merit in this submission of the learned Departmental Representative that validity of assessment order cannot be challenged in appeal against the order of penalty."*

22. The learned Departmental Representative for the Revenue on the other hand, placed reliance on the ratio laid down by the Hon'ble High Court of Karnataka in (1) CIT (2) ITO Vs. M/s. Manjunatha Cotton and Ginning Factory (supra), wherein it has been held that penalty proceedings are distinct from assessment proceedings and are independent. It is further held that the assessee is entitled to submit fresh evidence in the course of penalty proceedings. However, the assessee cannot question assessment jurisdiction in penalty proceedings. The jurisdiction under penalty proceedings could only be limited to the issue of penalty. So the validity of assessment or re-assessment in pursuance of which penalty is levied cannot be the subject matter in penalty proceedings. It is not possible to give a finding that re-assessment is invalid in such penalty proceedings.

23. The learned Departmental Representative for the Revenue has also relied on the proposition laid down by the Hon'ble High Court of Jammu & Kashmir in CIT Vs. The Hotel Highland Park (supra), wherein it has been held that if an order of assessment or re-assessment is not challenged, it becomes final and cannot be challenged in an appeal against the order of penalty. The challenge in such appeal is confined to imposition of penalty. The Hon'ble High Court held that *validity of assessment order which has attained finality cannot be challenged in such appeal.*

24. The next reliance by the learned Departmental Representative for the Revenue on the ratio laid down by the Chandigarh Bench of Tribunal in Dewan Engg. Work Vs. DCIT (supra), in which JM is party, wherein it has been held that penalty proceedings are independent from the assessment proceedings and the assessment proceedings could not be agitated during penalty proceedings. Reliance was placed on different decisions including the jurisdictional Hon'ble High Court of Punjab & Haryana and the Tribunal held that penalty proceedings and assessment proceedings were independent and therefore, during the course of penalty proceedings assessment proceedings could not be agitated.

25. However, in view of the ratio laid down by the jurisdictional High Court in CIT Vs. Lalitkumar Bardia (supra) in turn, relying on the ratio laid down by the Apex Court in Kanwar Singh Saini Vs. High Court of Delhi (supra), wherein it has been held that conferment of jurisdiction was a legislative function and the same neither conferred with the consent of parties nor by superior court and where the Court passes an order / decree having no jurisdiction over the matter, it would amount to nullity as the same goes to the roots of the issue. Applying the said principle, we hold that the assessee can challenge the jurisdiction of Assessing Officer in passing the assessment order while challenging levy of penalty under section 271(1)(c) of the Act. In case the re-assessment proceedings have been completed without proper jurisdiction entrusted upon the Assessing Officer, then the consequent penalty proceedings are also affected as basic issue of conferment of jurisdiction upon the Assessing Officer is under challenge. Accordingly, we hold so.

26. The second aspect thus, needs to be seen is whether re-assessment proceedings completed in the case of assessee were as per proper jurisdiction entrusted upon Assessing Officer or not. The Assessing Officer after recording reasons for reopening the assessment had sought approval to the said proposal from JCIT. The issue which needs to be addressed is non application of mind by the JCIT while according approval to the proposal made by the Assessing Officer for reopening the assessment under section 148 of the Act. We have already noted that in some cases, reasons for reopening were recorded on 30.03.2012 and approval was sought from the JCIT on the said date itself, which was granted by the JCIT. The question is whether JCIT had accorded approval in a routine manner.

27. The document to be referred is the copy of form for recording reasons for initiating proceedings under section 148 of the Act and for obtaining approval of the Addl./JCIT, which is dated 30.03.2012. The perusal of copy filed by the Revenue reflects that JCIT has approved the same by holding *"Yes, I am satisfied; proposal for reopening of case herein approved. Sd/-, dated 30.03.2012.* The notice under section 148 of the Act is dated 30.03.2012 and is served upon the assessee on 30.03.2012 itself. The first aspect is whether there is any independent application of mind by the JCIT. The perusal of said form reflects that in column No.7, it is recorded that provisions of section 147 [Explanation 2(c)] of the Act are application. Explanation 2(c) under section 147 of the Act talks of where assessment has been made but the income chargeable to tax had been under-assessed or excessive relief has been given. In the facts and circumstances of the present case, where re-assessment proceedings were initiated under section 148 of the Act against additional income offered by the

assessee in the revised return of income, there was no assessment under section 143(1) of the Act itself. Hence, mention of Explanation 2(c) is incorrect. The JCIT had approved the same in an automatic fashion. We hold that in such circumstances, where the satisfaction had been recorded by the JCIT in mechanical manner and without application of mind for according his sanction for issuing notice under section 148 of the Act, reopening of assessment under section 147 / 148 of the Act is invalid.

28. Further, the second connected aspect is that after approval being granted, notice issued under section 148 of the Act and service upon assessee on 30.03.2012. It may be pointed out herein itself that in all the assessment orders for different assessment years in the case of different assessees, there is mention of service of notice under section 148 of the Act on 29.03.2012. We may keep the said fact on the side since the Revenue has furnished on record the evidences of recording of reasons, seeking of approval, approval being granted and the issue of notice under section 148 of the Act and its service upon the assessee. We may start with the fact that for assessment years 2005-06 and 2006-07, the said reasons were recorded on 30.03.2012, approval was sought and granted on 30.03.2012; and notice under section 148 of the Act was issued on 30.03.2012 and served upon the assessee on 30.03.2012. The approval having been granted in a routine manner and in view of the ratio down by the Hon'ble High Court of Madhya Pradesh in CIT Vs. S. Goyanka Lime & Chemicals Ltd. (supra), where SLP has been dismissed by the Hon'ble Supreme Court, we hold that in the absence of any independent application of mind by the JCIT, the approval so granted is in a routine manner and the reopening of assessment under section 147 / 148 of the Act was thus, invalid and assessment completed

under section 143(3) r.w.s. 147 of the Act does not stand. Accordingly, consequent penalty proceedings initiated and completed against the assessee under section 271(1)(c) of the Act are without jurisdiction and held to be invalid and bad in law.

29. In the case of Shri Tushar R. Jagtap relating to assessment years 2005-06 and 2006-07, in the case of Smt. Vaishali T. Jagtap for assessment years 2005-06 and 2006-07 and in the case of Smt.Shankuntala R. Jagtap for assessment year 2006-07, the above proposition is applied as in all the cases reasons were recorded on 30.03.2012, approval sought and notice issued and served on 30.03.2012. Hence, we hold that where assessment proceedings initiated are bad in law, consequent notice issued under section 271(1)(c) of the Act is without jurisdiction and hence, the order passed levying penalty under section 271(1)(c) of the Act is both invalid and bad in law.

30. Now, coming to assessment years 2007-08 and 2008-09 in the case of Shri Shri Tushar R. Jagtap, Smt. Vaishali T. Jagtap and Smt.Shankuntala R. Jagtap, though the assessment has been completed under section 143(3) r.w.s. 148 of the Act in all these cases, the assessee claims that no reasons were recorded as no such reasons were available on record and / or had been served upon the assessee. Further, the claim of learned Departmental Representative for the Revenue was that the reasons were recorded online but he has failed to file the copies of same and in the absence of it, we hold that reopening of assessment was invalid. Another point to be noted is that in all these years, assessment was allegedly reopened on 29.03.2012. However, in the absence of any reasons being recorded, merely issue of notice under section 148 of the Act

and its service upon the assessee and even the participation of assessee in assessment proceedings does not confer jurisdiction upon the Assessing Officer and since this issue goes to the root of cause i.e. whether the Assessing Officer has jurisdiction to complete assessment or not, then the same can be questioned during penalty proceedings. Accordingly, we hold that where the Assessing Officer had no jurisdiction to issue notice under section 148 of the Act, consequent re-assessment proceedings completed in the case of assessee were without any basis and is invalid and bad in law. The consequent penalty proceedings under section 271(1)(c) of the Act initiated and completed against the assessee also thus, fails.

31. The last appeal relating to assessment year 2009-10 is in the case of Smt. Shankuntala R. Jagtap, wherein the assessee had furnished return of income on 15.02.2010. The Assessing Officer has made an error in considering the return of income filed for assessment year 2008-09 as relating to assessment year 2009-10. The time limit for issue of notice under section 143(2) of the Act had not expired. Without going into the legality of the said issue, we hold that in the absence of any reasons recorded for reopening the assessment and the same being not available on record, notice issued under section 148 of the Act dated 29.03.2012 and served upon the assessee on 29.03.2012 is invalid. Consequent assessment framed under section 143(3) r.w.s. 148 of the Act is thus, also bad in law. Hence, the penalty proceedings initiated in the case are without any basis and the same are quashed. Accordingly, we hold that penalty orders passed by the Assessing Officer for different assessment years in the case of different assessees before us are without any jurisdiction and the same are quashed.

32. In view of our deciding the jurisdictional issue of levy of penalty under section 271(1)(c) of the Act in favour of assessee, we are not adjudicating the issue on merits. Accordingly, we direct the Assessing Officer to delete penalty levied under section 271(1)(c) of the Act in the hands of respective assessees in respect of all the assessment years. The grounds of appeal raised by the assessee are thus, allowed.

33. In the result, all the appeals of assessee are allowed.

Order pronounced on this 9th day of February, 2018.

Sd/-	Sd/-
(ANIL CHATURVEDI)	**(SUSHMA CHOWLA)**
लेखा सदस्य / ACCOUNTANT MEMBER	**न्यायिक सदस्य / JUDICIAL MEMBER**

पुणे / Pune; दिनांक Dated : 9th February, 2018.
GCVSR

<u>आदेश की प्रतिलिपि अग्रेषित/Copy of the Order is forwarded to</u> :

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. आयकर आयुक्त (अपील) / The CIT(A)-4, Pune
4. The Pr.CIT-3, Pune
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे "बी" / DR 'B', ITAT, Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

वरिष्ठ निजी सचिव / Sr. Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune