

आयकर अपीलीय अधिकरण, विशाखापटणम पीठ, विशाखापटणम

**IN THE INCOME TAX APPELLATE TRIBUNAL,
VISA KHAPATNAM BENCH, VISA KHAPATNAM**

श्री वी. दुर्गा राव, न्यायिक सदस्य एवं
श्री डि.एस. सुन्दर सिंह, लेखा सदस्य के समक्ष

**BEFORE SHRI V. DURGA RAO, JUDICIAL MEMBER &
SHRI D.S. SUNDER SINGH, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A.Nos.80-82 /Viz/2018

(निर्धारण वर्ष/ Assessment Years: 2012-13 to 2014-15 respectively)

M/s Omcon Reign Forest Projects
S.No.180, Opp.Toyoto
Show Room
Paradesi Palem Village
Madhurawada
Visakhapatnam

Vs. Principal Commissioner of
Income Tax-1
Visakhapatnam

[PAN :AACF05604]

(अपीलार्थी/ Appellant)

(प्रत्यर्थी/ Respondent)

अपीलार्थी की ओर से/ Appellant by
प्रत्यर्थी की ओर से/ Respondent by

: Shri C.Subrahmanyam, AR
: Shri D.K.Sonowal, CIT DR

सुनवाई की तारीख / Date of Hearing

: 30.11.2018

घोषणा की तारीख/Date of Pronouncement

: 12.12.2018

आदेश /ORDER

PER D.S. SUNDER SINGH, Accountant Member:

These appeals are filed by the assessee against the order of the Principal Commissioner of Income Tax (Pr.CIT)-1, Visakhapatnam vide F.No.Pr.CIT-1/VSP/263/2017-18 dated 29.01.2018 for the Assessment Years (A.Ys) 2008-09 to 2010-11 u/s 263 of Income Tax Act, 1961

(hereinafter called as 'Act'). Since the grounds raised in these appeals are common, the appeals are clubbed, heard together and a common order is being passed for the sake of convenience as under.

2. The only issue in all these appeals are related to the validity of the direction given by the Pr.CIT to initiate penalty proceedings u/s 271(1)(c) of the Act. In this case, for the A.Ys 2012-13 to 2014-15, no returns of income were filed by the assessee and the Pr.CIT has received the information from service tax authorities indicating the taxable income earned by the assessee for the impugned assessment years. Therefore, the Ld.Pr.CIT has issued a letter dated 10.12.2015 to ascertain status of filing the return of income. In response to the letter issued by the Ld.Pr.CIT, the assessee filed the return of income on 28.03.2016 for all the impugned assessment years with the concerned Assessing Officer (AO). Subsequently, the AO issued notice u/s 148 in response to which the assessee had filed a letter on 28.04.2016 requesting to treat the return of income already filed on 28.03.2016 as a return in response to the notice u/s 148. Since the return filed on 28.03.2016 was invalid, the assessee was asked by the AO to file the e-return, accordingly, the assessee filed the e-return for the A.Ys 2012-13 to 2014-15 as under :

A.Y.	Income Returned (Rs.)
2012-13	56,36,210
2013-14	1,02,89,884
2014-15	8,62,594

2.1. Subsequently, the cases were converted into scrutiny and the notice u/s 143(2) and 142(1) were issued, to the assessee and completed the assessment on total income for the assessment years u/s 143(3) as under :

A.Y.	Income Assessed (Rs.)
2012-13	64,80,410
2013-14	1,22,37,210
2014-15	10,14,700

2.2. Subsequently, the Pr.CIT has taken up the case for revision u/s 263 and observed that the assessment was completed u/s 143(3) but the return was filed subsequent to the date of issue of letter and the notice u/s 148. The Ld.Pr.CIT further observed that though the assessee had taxable income, it did not file the returns of income. The returns were filed only after enquiries were caused by the department and letters were issued, followed by notices. The AO completed the assessment without initiating the penalty proceedings,

though it is a fit case for initiating the penalty proceedings u/s 271(1)(c) of the Act. The Ld.Pr.CIT found that since there was no voluntary return of income and the return was filed in response to notice u/s 148, thus the AO ought to have initiated the penalty proceedings u/s 271(1)(c) of the Act. The Ld.Pr.CIT was of the view that the order passed by the AO u/s 143(3) was erroneous and prejudicial to the interest of the revenue, hence, issued the notice u/s 263 and called for the explanation of the assessee. In response to the notice issued, the assessee filed explanation before the Ld.Pr.CIT stating that the penalty proceedings are not part of assessment proceedings, therefore, giving directions to initiate penalty proceedings u/s 271(1)(c) in revision is beyond the scope of the proceedings u/s 263. The Ld.AR further contended before the Ld.Pr.CIT that non initiation of penalty proceedings u/s 271(1)(c) during the course of assessment proceedings was neither erroneous nor prejudicial to the interest of the revenue. Recording satisfaction for initiation of penalty proceedings is the opinion of the AO and non-initiation of penalty does not give jurisdiction for revision u/s 263. The action of the Ld.Pr.CIT to initiate the penalty would amount to reviewing of the assessment proceedings, but not the revision within the meaning of section 263 of the Act. Therefore, contended that the law has not given power to the Pr.CIT to direct the AO to

initiate penalty proceedings u/s 263 in revision. The Ld.Pr.CIT examined all the facts and circumstances and held that in view of the amended provisions u/s 271(1)(c) of the Act w.e.f. 01.06.2002, the Pr.CIT is empowered to initiate the penalty and to set aside the order passed by the AO for initiating the penalty proceedings u/s 271(1)(c) of the Act. The Ld.Pr.CIT relied on the decision of this Tribunal in the case of U.V.Ramanamurthy Raju, Visakhapatnam in I.T.A. No.27/Viz/2014 dated 21.06.2017. The Ld.Pr.CIT has also taken support from the following decisions and held that conjoint reading of section 263 and 271 of the Act establishes that the Ld.Pr.CIT is empowered to take action u/s 263 for non initiation of penalty proceedings u/s 271(1)(c) in a suitable case.

- (a) CIT Vs. Ashok Constructions [280 ITR 368 (Allahabad High Court)]
- (b) CIT Vs. Surendra Prasad Agarwal [273 ITR 113 (Allahabad High Court)]
- (c) Star Diamond Tools Vs. ITO [1 ITD 696/14 TTJ 59 (ITAT Mumbai)]

2.3. The Ld.Pr.CIT further observed in this case that the assessee has not filed the return of income for the assessment years under consideration, though the assessee had taxable income. The assessee filed the return of income only after issue of letter of enquiry and notice u/s 148, thus, there is no voluntary return and the case needs to be examined for concealment of income. Since, there is prima facie case for considering the concealment of income and the assessment was completed without initiating the penalty proceedings which

ought to have been initiated, the Ld.Pr.CIT held that the order passed by the AO is erroneous and prejudicial to the interest of the revenue and accordingly set aside the assessment and directed the AO to redo the assessment duly initiating penalty proceedings u/s 271(1)(c) of the Act.

3. Aggrieved by the order of the Ld.Pr.CIT, the assessee is in appeal before this Tribunal. During the appeal hearing, the Ld.AR submitted that the AO completed the assessment and did not initiate the penalty proceedings, having satisfied that there is no case for initiation of penalty proceedings u/s 271(1)(c) of the Act either for concealment of income or for furnishing inaccurate particulars. The Ld.Pr.CIT is not permitted to set aside the assessment made u/s 143(3) for non-initiation of penalty proceedings u/s 271(1)(c) of the Act. Non initiation of penalty proceedings does not render the assessment made u/s 143(3) as erroneous and prejudicial to the interest of the revenue, thus there is no case for revision u/s 263. The Ld.AR further submitted that, if the Ld.Pr.CIT, is satisfied regarding the concealment or furnishing inaccurate particulars, then he alone has to initiate the penalty and pass the orders in respect of penalty to be imposed, but cannot direct the AO to initiate the penalty proceedings. The Ld.AR relied on the decision of Hon'ble

High Court of Karnataka in the case of Commissioner of Income Tax & Anr. Vs. Manjunatha Cotton & Ginning Factory [359 ITR 0565] and the decision of Hon'ble High Court of Punjab & Haryana in the case of Commissioner of Income Tax Vs. Rakesh Nain Trivedi [128 DTR 0309 (P&H)]. The Ld.AR strongly assailed that the Pr.CIT is not vested with the powers to direct the AO to initiate the penalty proceedings u/s 271(1)(c) and requested to quash the order passed by the Ld.Pr.CIT u/s 263 of the Act.

4. On the other hand, the Ld.DR supported the orders of the Ld.Pr.CIT and relied on the decision of this Tribunal in the case of U.V.Ramanamurthy Raju (supra).

5. We have heard both the parties and perused the material placed on record. In this case, the assessee is having taxable income for the impugned assessment years as per the details given earlier, in this order but did not file the return of income. For the A.Y. 2012-13, the due date for filing the return of income was 30.09.2012, for the A.Y. 2013-14, it was 30.09.2013 and for the A.Y. 2014-15, the it was 30.09.2014 as submitted by the Ld.DR/AR during the appeal hearing. Though the assessee had taxable income and time allowed u/s 139(1) and 139(4) had expired, the assessee did not file the return of income

for the A.Y. 2012-13, 2013-14 and 2014-15 before the specified dates. The assessee had filed the returns of income manually before the AO after the receipt of the letter issued by the Ld.Pr.CIT, though it is required to be filed electronically. The assessee filed the return of income on 28.03.2016 manually and later valid return was filed electronically on 29.07.2016 after the issue of notices u/s 148. The above facts clearly show that the assessee is in the habit of not filing the return of income and non-payment of the taxes due to the government. Since the assessee has not filed the return of income though it has taxable income, the AO ought to have initiated the penalty proceedings for concealment of income. Since the AO did not initiate the penalty proceedings, the Ld.Pr.CIT has taken up the case for revision u/s 263 and held that non initiation of penalty proceedings, which ought to have been initiated during the assessment proceedings as erroneous and prejudicial to the interest of the revenue. The Ld.Pr.CIT has considered the amended provisions of section 271 w.e.f. 01.06.2002, the provision u/s 263 and rejected the rejected the objections of the Ld.AR challenging the jurisdiction of the Ld.Pr.CIT for giving directions to initiate the penalty u/s 271(1)(c) of the Act. The issue with regard to initiation of penalty proceedings by the Ld.Pr.CIT and directions of the Ld.Pr.CIT to AO to initiate the penalty proceedings was considered by this

Tribunal in the case of U.V.Ramanamurthy Raju (supra) and held that the Pr.CIT is empowered to initiate the penalty proceedings and also empowered to direct the AO to initiate the penalty proceedings u/s 271(1)(c) r.w.s 263 of the Act in revision proceedings u/s 263. For the sake of clarity and convenience, we extract relevant part of the order of this Tribunal in para No.7 which reads as under :

“7. We have heard the rival submissions and perused the materials paced on record In this case the assessment was completed u/s 143(3) r.w.s. 147 of the Act. A survey u/s 133A of the Act was conducted and during the course of survey, evidence was found regarding unexplained investment in the form of deposits made-in-the bank account. Consequently re-assessment was made by the A.O. The A.O. in the re-assessment order did not initiate penalty proceedings u/s 271(1)(c) of the Act. Therefore, the CIT called for the record u/s 263 of the Act and held that though it is a prima facie case for initiation of penalty proceedings, the A.O. has not initiated the penalty proceedings. Therefore, placing the reliance on Allahabad High Court judgment cited (supra) held that omission to initiate penalty proceedings during the course of assessment proceedings renders the assessment order erroneous and prejudicial to the interest of the revenue. Accordingly, the Ld.CIT set aside the order u/s 143 r.w.s. 147 of the Act for the limited purpose of initiating penalty proceedings. We have carefully gone through the provisions of section 263 of the Act which reads as under:

“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 mod/lying the assessment, or cancelling the assessment and directing a fresh assessment.”

8. U/s 263 of the Act, the CIT can call for the record of any proceedings. In the present case, he does so. He called for the record pertaining to the assessment proceedings, examined them and which he is empowered to do. He considered the order of assessment passed therein and found that the provisions of section 271(1)(c) & 273 of the Act have not been invoked. As per the amendment made to the Income, tax Act, the CIT is empowered to initiate penalty u/s 271(1)(c) of the Act. As per section 263 of the Act, the CIT is empowered to pass an order after giving opportunity of being heard to the assessee, such an order as the circumstances of the case justify including an order enhancing or modifying the assessment or cancelling the assessment and directing the fresh assessment. From section u/s 263 of the Act it is clear that the CIT is empowered to enhance, modify or direct the A.O. to re-do the assessment and set aside the assessment order. In this case, the assessing officer has not initiated the penalty proceedings which required to be initiated by him. The CIT has the powers vested under section 271(1)(c) to initiate penalty and consequently the CIT is empowered to get it done through the AO by virtue of powers vested in section 263 of Income tax Act. Accordingly, the CIT has directed the A.O to initiate the penalty proceedings U/s 271(1)(c). The Ld. A.R. relied on the judgement of Hon'ble Gujarat High Court in the case of CIT Vs. Paramanand M Patel 278 17R 0003 (2005) which was rendered before the amendment of section 271 of the Act Section 271 of the Act is amended to include the Principal Commissioner/Commissioner to initiate the penalty proceedings by Finance Act 2002, w.e.f. 01.06.2002. Therefore, subsequent to the amendment of section 271 we are of the considered opinion that the CIT can initiate himself or by exercising power u/s 263 of the Act, direct the assessing officer to initiate the penalty proceedings u/s 271 of the Act. The case law relied upon by the assessee was prior to the amendment of section 271 of the Act. Hon'ble High Court held that CIT was not empowered to record the satisfaction and once he is not empowered to do so on his own, he cannot direct the assessing authority in revision powers. The case on hand is related to the assessment year 2006-07 and subsequent to the amendment. After the amendment, CIT also empowered to initiate the penalty proceedings u/s 271(1)(c) of the Act. Therefore, the case law relied upon by the assessee is not helpful to him. The second case law relied upon by the assessee was the decision of Hon'ble ITAT Ahmedabad 'B' bench in the case of Easy Transportation Software Pvt. Ltd. (supra). The facts of this case were that the assessee has claimed the deduction u/s 10B of the Act, which was withdrawn by the assessee during the assessment proceedings and the AO completed the assessment without initiating penalty u/s 271(1)(c) of the Act. The CIT has interfered by exercising power u/s 263 of the Act and cancelled the assessment order passed u/s 143(3) of the Act and directed the assessing officer to reframe the assessment order after giving opportunity to the assessee. In the said case, the entire assessment was cancelled and set aside the assessment with a direction to the A.O. to reframe the assessment. In the instant case, the CIT has set aside the order u/s 143(3) of the Act only with a limited purpose of initiating penalty proceedings u/s 271(1)(c) of the Act, therefore, the facts of the case relied upon

by the assessee are not applicable to the assessee's case. Hon'ble Allahabad High Court in 275 ITR 113 relied upon by the CIT held that non-initiation of penalty proceedings renders the assessment as erroneous and prejudicial to the interest of the revenue. Similarly, in the case of CIT Vs, Ashok Construction Limited 280 ITR 368 of Allahabad High Court held that non-initiation of penalty u/s 271B of the Act render the order erroneous and prejudicial to the interest of the revenue and upheld the revision u/s 263 of the Act Therefore, we hold that the CIT(A) has rightly exercised the power u/s 263 of the Act and directed the A.O. to initiate penalty proceedings and no interference is called for."

5.1. The Ld.AR relied on the decision of Hon'ble High Court of Karnataka in the case of Commissioner of Income Tax & Anr Vs. Manjunatha Cotton & Ginning Factory cited supra, wherein the question raised before the Hon'ble High Court was as under :

ITA No.2564 and 2565 of 2005.

"Whether the Tribunal was correct in holding that there was no concealment of income and there was no cessation of liability but it was on assessee's agreement, additions have been made and therefore no penalty is attracted, despite there being no evidence to substantiate such a conclusion and consequently recorded a perverse finding?"

ITA No.5020 of 2009

1. *Whether the notice issued under Section 271(1)(c) in the printed form without specifically mentioning whether the proceedings are initiated on the ground of concealment of income or on account of furnishing of inaccurate particulars is valid and legal?*
2. *Whether the proceedings initiated by the Assessing Authority was legal and valid? ITA Nos.5022 and 5023 of 2009*

i) Whether the Tribunal was justified in holding that the basis for initiation of the penalty proceedings is the satisfaction of the Appellate Authority in coming to a conclusion based totally on a different ground other than the ground on which the Assessing Authority had passed the assessment order?

ii) Whether the proceedings initiated by the Assessing Authority was legal and valid?

ITA Nos.5025 and 5026 of 2010

"When the two fact finding authorities have concurrently held that the explanation offered by the assessee is not false, though the assessee has failed to conclusively prove the explanation offered, does a case made out for interference?"


5.2. The question raised before the Hon'ble High Court was not related to the revision u/s 263 for non-initiation of penalty proceedings and the facts are distinguishable and has no application in the assessee's case. Similarly, the Ld.AR relied on the decision of Hon'ble High Court of Punjab & Haryana in the case of Commissioner of Income Tax Vs. Rakesh Nain Trivedi (supra), wherein, the assessment was completed u/s 153A consequent to search conducted u/s 132 of the Act and the AO made certain additions and failed to initiate the penalty proceedings. In the instant case, though there was taxable income, the assessee did not file the return of income continuously for three years and the return was filed only after issue of notice u/s 148 of the Act, where, it is a prima facie case for initiation of penalty proceedings. Therefore, facts of the Hon'ble High Court of Punjab & Haryana also has no application in the case of the assessee. This Tribunal in the case of U.V.Ramanamurthy Raju cited supra on identical facts held that non initiation of penalty proceedings during the assessment proceedings u/s 143(3), where the AO ought to have initiated, is erroneous and prejudicial

to the interest of the revenue and accordingly upheld the order of the CIT. While holding so, this Tribunal has considered the decisions of Hon'ble High Court of Allahabad in the case of CIT Vs. Ashok Constructions (supra) and the decision of Hon'ble High Court of Patna in the case of R.A.Himmat Singhga & Co. Vs. CIT [340 ITR 0253]. The facts of the assessee's case are identical to the decision of this Tribunal in the case of U.V.Ramanamurthy Raju (supra). Therefore, respectfully following the view taken by this Tribunal in the case cited, we do not find any reason to interfere with the order of the Ld.Pr.CIT and the same is upheld.

6. In the result, appeals of the assessee are dismissed.

Order pronounced in the open court on 12th December, 2018.

<p>Sd/- (वी.दुर्गा राव) (V. DURGA RAO)</p>	<p>Sd/- (डि.एस. सुन्दर सिंह) (D.S. SUNDER SINGH)</p>
<p>न्यायिक सदस्य/JUDICIAL MEMBER</p>	<p>लेखा सदस्य/ACCOUNTANT MEMBER</p>
<p>विशाखापटणम /Visakhapatnam</p>	
<p>दिनांक /Dated : 12.12.2018</p>	
<p>L.Rama, SPS</p>	

I.T.A. Nos.80-82/Viz/2018
M/s Omcon Reign Forest Projects, Visakhapatnam 

आदेश की प्रतिलिपि अग्रेषित/Copy of the order forwarded to:-

1. निर्धारिती / The Assessee – Omcon Reign Forest Projects, S.No.180, Opp.Toyoto Show Room, Paradesi Palem Village, Madhurawada, Visakhapatnam
2. राजस्व / The Revenue– Principal Commissioner of Income Tax-1, Visakhapatnam
3. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, विशाखापटणम /DR, ITAT, Visakhapatnam
4. गार्ड फ़ाईल / Guard file

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ITAT, VISAKHAPATNAM