

IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD "A" BENCH
(Conducted Through Virtual Court)
Before: Smt. Annapurna Gupta, Accountant Member
And Ms. Madhumita Roy, Judicial Member

ITA No. 2022/Ahd/2015
Assessment Year 2008-09

Vijay D. Patel, Prop. M/s. Paras Bullion, T-1, Saundarya Apartment Vibhag-2, Bhuyangdev, Ghatlodia, Ahmedabad-380061 PAN: AGQPP0895G (Appellant)	Vs	The CIT-7, Ahmedabad (Respondent)
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Revenue by: Shri Vijaykumar Jaiswal, CIT D.R.
Assessee by: Shri A. C. Shah, A.R.

Date of hearing : 09-12-2021
Date of pronouncement : 27-01-2022

आदेश/ORDER

PER : ANNAPURNA GUPTA, ACCOUNTANT MEMBER:-

The present appeal has been filed by the assessee against the order passed by the Ld. Principal Commissioner of Income Tax-7, Ahmedabad, (in short referred to as PCIT), dated 10-03-2015, in exercise of his revisionary jurisdiction u/s. 263 of the Income Tax Act, 1961(hereinafter referred to as the "Act") and relates to assessment year 2008-09.

2. The appeal was earlier dismissed for non-prosecution vide order dated 01-03-2018 and subsequently recalled on a Miscellaneous Application filed by the assessee in MA No. 359/Ahd/2019 dated 21st Feb, 2020. In consequence thereof, the appeal was fixed for hearing afresh.

2.1 The appeal has been filed delayed by 54 days. An application seeking condonation of delay was filed by the assessee dated 6-7-2015 stating the reason for the delay as being the lapse on the part of the accountant, Shri Dhiraj Patel, who had misplaced the order passed u/s. 263. The said application points out that while the order u/s. 263 dated 10-03-2015 was received on 16-03-2015 and the appeal ought to have been filed by 15-05-2015, but on account of misplacement of the order by the accountant, it came to notice only on 6-07-2015 and immediately thereafter on 8-07-2015, the appeal was filed, thereby resulting in a delay in filing of 54 days. An affidavit of the accountant, Shri Dhiraj Patel, admitting on oath to his lapse as aforestated, was filed before us. Accordingly, it was prayed that there being a reasonable cause for the delay and no negligence on the part of the assessee, the delay be condoned.

2.2 We have noted the contention of the assessee. Considering that the delay is only of 54 days, that too not attributable to the assessee but his accountant who has admitted on oath to the lapse on his part, we find that the assessee has adduced sufficient and reasonable cause for the same. The delay is accordingly condoned.

3. Proceeding to adjudicate the issue before us ,it transpires from the order of the ld. PCIT, that the revisionary power was exercised on the order passed by the Assessing Officer in the case of the assessee in reassessment proceedings,u/s. 147 of the Act.The assessee had failed to file any return originally, but on initiation of re-assessment proceedings, return was filed declaring income of Rs. 33,260,50/- under the head income from other sources. The same was accepted by the AO. Subsequently on perusal of records, the ld. PCIT noted the following errors therein:

a) that while the bank statements filed by the assessee revealed huge cash deposits and withdrawals, no inquiries were made by the Assessing Officer with regard to the same who had simply relied on the assessee's letter dated 12-12-2013.

b) that the interest income of Rs. 33,260,50/- returned by the assessee had not been inquired into both with regard to the details of the deposits or loan on which interest had been earned and also the source of the investments in them.

c) that despite the assessee having disclosed income only in response to notice u/s. 148 of the Act that too after lapse of 4 years, the Assessing Officer has not initiated any penalty proceedings on the assessee u/s. 271(1)(c) of the act for concealment/furnishing inaccurate particulars of income.

3.1 He therefore was of the view that the order passed by the Assessing Officer was erroneous on account of the afore-stated and show cause notice was issued to the assessee u/s. 263 of the Act. Due reply was filed by the assessee and rejecting all the contentions of the assessee the Ld.PCIT held

the order passed by the Assessing Officer u/s. 147 r.w.s. 143(3) of the Act to be erroneous and prejudicial to the interest of the Revenue on the above counts and directed him to reframe assessment after verifying and considering the same. His findings in this regard at para 8 of the order is as under:-

“8. In view of the discussion made in the preceding paragraphs, the assessment order dated 27.12.2013 passed u/s. 147 r.w.s. 143(3) of the Act by the Assessing Officer is considered as erroneous and prejudicial -to interest of revenue Therefore, I set aside the order dated 01.02.2013 passed u/s. 143 (3) of the Act with a direction to the Assessing Officer to reframe the assessment after -

- (i) Making proper verification of source of credits/deposits into bank accounts with respect to source and explanations/evidences and cross-verification of the same.*
- (ii) Making proper verification with respect to the claim- of opening cash balance of Rs.6,10,756/- as per the copy of cash book.*
- (iii) Making proper verification of computation of interest accrued/earned during the year, and whether requisite amount has been disclosed in the return of income.*
- (iv) Considering initiation of penalty proceedings u/s 271(l)(c) of the Act as the assessee filed his return of income and paid the taxes only after issue of and in response to notice u/s 148 of the Act.”*

4. Aggrieved by the same, the assessee has come up in appeal raising the following ground before us:-

“1.The learned CIT has erred in holding that the Order dated 27-12-2013 under Section 147 read with Section 143(3) is erroneous and prejudicial to the interest of revenue under Section 263 since the AO did not initiate the penalty proceeding under Section 271(l)(c) and that the AO did not make sufficient inquiry about the deposits made in the bank account in as much as AO had access to all records of assessee, and after perusing said records, he framed assessment, said assessment could not be re-opened in exercise of revision power under section 263 for making further inquiries [CIT V/s. Amit Corporation 213 Taxman 19 (Guj) (Mag)].”

5. With regard to the issue of non examination by AO of cash deposits and interest earned, the Ld. Counsel for the assessee pointed out that in consequential proceedings the AO had made no addition on this count. He

drew our attention to the order passed u/s 143(3) r.w.s 263 of the Act dated 26/02/2016 placed before us at Paper Book page No.10-11, accepting the returned income.

5.1 With regards to the issue of non initiation of penalty proceedings u/s. 271(1)(c) of the Act, it was contended before us that the Jurisdictional High Court in a number of decisions has held that revisionary powers cannot be exercised for the same. In this regard, our attention was drawn to the decisions of the Hon'ble Gujarat High Court in the case of

- i) CIT vs. Parmanand M. Patel 278 ITR 3 (Gujarat),
- ii) CIT vs. Dr. Suresh G. Shah 289 ITR 110 (Gujarat)

It was pointed out that while these decisions were rendered in the context of the pre amended provisions of section 271(1)© which did not grant power to the CIT to initiate penalty proceedings, but the ITAT Ahmedabad Benches in the case of Easy Transcription and Software Pvt. Ltd. vs. CIT (2017) 88 taxmann.com 772 had held that the ratio laid down by the Hon'ble Gujarat High Court in the case of Parmanad Patel still applied post amendment to the section. Copies of the said orders were placed before us in paper book at pages 12 to 30.

5.2 The Id. Departmental Representative on the other hand countered by relying on the order of the Ld. PCIT, who had placed reliance on the decision of the Hon'ble Allahabad High Court in the case of CIT vs. Associated Contractors Corporation 275 ITR 133, for the proposition that non initiation of penalty proceedings by the Assessing Officer renders the assessment order erroneous for the purposes of exercising revisionary

powers by CIT u/s 263 of the Act. He further contended that subsequent order passed making no additions on the directions made in order passed u/s 263 of the Act is of no relevance for the purposes of determining whether the revision was in accordance with law. That what is to be seen is whether prima facie there has been made out a case of error in the order of the AO causing prejudice to the Revenue.

6. We have heard both the parties and carefully gone through the documents and case laws referred to before us. As stated above, the order passed by the Assessing Officer u/s 147 of the Act has been found by the Ld. PCIT to be erroneous so as to cause prejudice to the revenue on the following counts:-

- (i) Non-verification of the cash deposits in the bank of the assessee
- (ii) Non-verification of the interest income returned by the assessee
- (iii) For not initiating penalty proceedings u/s 271(1)(c) of the Act despite being in the know that the assessee had returned income only when subjected to re-assessment proceedings.

6.1 Vis-à-vis the first two aspects, the ld. counsel for the assessee had nothing to state before us except pointing out that in the consequential order passed by the Assessing Officer, no addition had been made on account of the same. In this regard we are in agreement with the Ld. CIT DR that the fact of no addition made in consequential proceedings is of no relevance for determining whether the power of revision u/s 263 of the Act was validly exercised. What is relevant for the exercise of revisionary power is the existence of twin conditions of there being an error in the order of the AO

and the error causing prejudice to the Revenue. The CIT/PCIT has to prima facie make out a case finding fulfillment of both the aforesaid conditions. This is sufficient to validly assume powers of revision u/s 263 of the Act and take/direct necessary action thereafter. That subsequent to such direction it may be found that no addition is to be made to the income of the assessee but that does not take away the fact that on the basis of material on record the findings of error by the PCIT were un-refutably justifying exercise of revisionary power.

6.2 In the case before us, the lack of inquiry by the AO on the cash transactions in the bank of the assessee and also the interest earned by the assessee ,was the error noted by the PCIT causing prejudice to the Revenue. Ld. Counsel for the assessee has not stated any thing before us controverting this finding of the PCIT. We see no reason therefore to disagree with the PCIT since no inquiry by AO is sufficient to hold the order erroneous. The order of the PCIT on the afore-stated two issues, i.e of non-examination of cash deposits in the bank account of the assessee and the interest income earned by the assessee ,is therefore upheld.

6.3 Now, coming to the aspect of the assessment order being held erroneous for non-initiation of penalty proceedings u/s. 271(1)(c) of the Act, the ld. counsel for the assessee has drawn our attention to the consistent orders of the Jurisdictional High Court, in Parmanand M Patel(supra) and Suresh G Shah(supra), categorically holding that the Commissioner, in exercise of the revisionary power, cannot direct initiation of penalty proceedings to the Assessing Officer u/s. 271(1)(c) of the Act. Further, we

have also gone through the order of the ITAT Ahmedabad Bench in the case of the Easy Transcription and Software Pvt. Ltd. (supra) and we find that in the said decision, the ITAT Ahmedabad Bench had considered the effect of the amendment to section 271(1)(c) of the Act, w.e.f. 01-04-2002,empowering the commissioner also to initiate penalty proceedings which earlier was not there. The decisions of the jurisdictional High Court ,relate to the preamendment period,and the impugned case before us relates to assessment year 2008-09, post amendment, and therefore the said decision is relevant.

6.4 On going through the said decision, we find that the ITAT noted that the decision of the Gujarat High Court as noted above were rendered in the context of pre-amended section 271(1)(c) which did not empower the commissioner to initiate penalty proceedings. Going forward, the ITAT thereafter proceeded to hold that despite the said fact, the judgment of the Jurisdictional High Court still applied post amendment to section 271(1)(c) since the decision was rendered taking into consideration various aspects of the issue besides the fact that the commissioner was not empowered u/s. 271(1)(c) to initiate penalty proceedings at that point of time. The ITAT has noted in the said judgment that the Jurisdictional High Court held the CIT lacked jurisdiction u/s. 263 to cancel assessment for failure of the Assessing Officer to initiate penalty proceedings , for the following reasons:-

(i) Section 271(1)(c) did not empower the CIT to initiate penalty and in the absence of the said power, the CIT could not direct the Assessing Officer to do so in exercise of his powers u/s. 263.

(ii) The satisfaction for the default committed attracting the levy of penalty has to be arrived in the course of any proceedings as per the provision of section 271(1)(c) of the act and proceedings having concluded the direction for initiation of the same could not be given u/s. 263 of the act.

(iii) The satisfaction for levying penalty is to be recorded during the course of any proceedings before the specified authorities as per section 271(1)(c) and the CIT cannot create the proceedings.

(iv) The assessment and penalty proceedings are separate and distinct proceedings and the CIT cannot set aside the assessment order for the sole of initiating penalty proceedings.

6.5 Pointing out the above, the ITAT held that as per the decision of the Jurisdictional High Court, the absence of lack of authority to initiate penalty proceedings by the CIT was not the sole reason for the Hon'ble High Court to hold that the CIT lacked jurisdiction u/s. 263 of the Act and the rest of the reasons still applied post amendment.. The decisions of the jurisdictional High Court were accordingly held to apply post amendment to section 271(1)(c) of the Act. The relevant findings of the order of ITAT in the case of Easy Transcription & Software Pvt. Ltd. vs. Pr. CIT in ITA No.759/Ahd/2015 for Assessment Year 2010-11 is as under (Paragraph nos.13 to 17):-

“13. On perusal of the decision of Hon'ble Gujarat High Court in Parmanand Patel case (pre amended law), we note that basis for holding that the CIT lacks jurisdiction under S. 263 to cancel the assessment for failure of the AO to initiate penalty proceedings were multifold. The propositions emerging therein are broadly summarized as under:

(A) S. 271(1)(c) confers discretionary jurisdiction on the AO or the CIT(Appeals) to initiate penalty proceedings. The provision does not

empower any other authority to exercise discretion. Even while being a superior authority, the administrative CIT is not a designated authority to form satisfaction prior to amendment of S. 271(1)(c) effective from 1-6.2002. The CIT is thus not permitted substitute satisfaction arrived at by AO, in exercise of revisional powers. In the absence of powers conferred to invoke the penalty provision, the CIT could not direct the AO to do so in colourable exercise of powers.

(B) The satisfaction for default committed as stipulated under clause (c) to S. 271(1)(c) has to be arrived at 'in the course of any proceedings' and not subsequent thereto. Thus, the stage of forming satisfaction is before conclusion of the proceedings under the Act.

(C) Section 271(1)(c) requires the specified authority to be satisfied in the course of 'any proceedings' which means any proceedings before any of the authority. The CIT cannot create proceedings.

(D) The assessment and penalty proceedings are separate and distinct proceedings. Therefore, the CIT cannot set aside the assessment order for the sole purpose of initiation of penalty proceedings in exercise of revisional jurisdiction. As a corollary, assessment order can not be set aside to initiate and impose penalty notwithstanding the fact the imposition of penalty is lawful.

14. A reading of later judgment of Gujarat High Court in J P Construction(supra) would show that the Hon'ble Court has remanded the matter only in respect of proposition (A) enumerated above. As a necessary implication, other propositions continue to apply and have not faded into insignificance. Under S. 263, the CIT concerned can examine the record of any proceedings and order passed consequent thereto can be set aside on fulfillment of conditions as stipulated therein. In the instant case, the proceeding and consequent order is assessment order. As noted by jurisdictional High Court, penalty proceedings are separate and distinct. There is no identity between the two. Penalty proceedings can be initiated during the currency of assessment of proceedings till the conclusion of assessment proceedings. Except for a legal bar that penalty proceedings cannot be initiated subsequent to the conclusion of assessment proceedings, there is no other perceptible dependence qua the assessment order. As a sequel thereto, in our considered view, it is not open to CIT to exercise the revisional powers to create a non existent proceedings under S. 263 by holding the assessment proceeding as erroneous in so far as prejudicial to the interest of revenue. Pertinent to say, section 263 creates, defines and regulates the revisional powers of the CIT concerned and is thus a substantive provision. Hence, the strict requirements of a jurisdictional provision can not be compromised. We are alive to the situation that in the absence of the revisional power, the revenue is probably deprived of any remedy to cure the lapse committed by the AO in

appropriate cases. This however, will not alter the position of law spelt in this regard. Howsoever, clear the legislative intent may be, the requirements of a substantive provision cannot be bypassed to give effect to such intent. It is trite that legislative casus omissus cannot be supplied by judicial interpretive process.

15. *The action of CIT under S. 263 is required to be struck down for other reason also. As noted above, arriving at the 'satisfaction' is the foundation of action under S. 271(1)(c) of the Act. Admittedly, the CIT is a designated authority to form satisfaction post amendment. Nevertheless, the impugned 'satisfaction' towards default enumerated in 271(1)(c) is required to be formed not later than the conclusion of proceeding before it i.e. assessment proceeding in the instant case. Thus the designated authorities would become functus officio once the proceedings are concluded. Admittedly, the assessment proceedings were concluded and post facto satisfaction is not permissible. The penalty proceedings being distinct and separate, the assessment per se can alone be reviewed in accordance with law. However, the completed assessment cannot be set aside to enable the subordinate authority to initiate a separate and distinct proceeding in conflict the scope of authority vested under S. 263. The Commissioner in exercise of his revisional powers cannot arrogate to himself a status to surrogate the other authorities and supplant their roles under the Act. The Commissioner is not a substitute of the other statutorily prescribed fora with codified functions dischargeable in terms of the prescribed procedure in the situations comprehended thereby. When read in conjunction with the decision of Parmanand Patel (supra), the language of Section 263 is not capable of and does not admit of a construction to empower the CIT to set aside an assessment order to initiate a distinct penalty proceeding. The legislature, in our view, has allowed this position to be sustained so far except expanding the scope of authority under S. 271(1)(c) to include administrative CIT within its ambit.*

16. *Before we proceed to conclude the issue, we also take note the decision in the case of CIT vs. Surendra Prasad Agrawal 275 ITR 113(All.); Indian Pharmaceuticals (1980) 123 ITR 874(MP); RA Himmatsingka & Co. 340 ITR 253(Pat.); Sara Enterprises (Mad.) 224 ITR 169 etc. referred to and relied upon on behalf of the revenue. In all these cases, it was held that the CIT administration is entitled to invoke S. 263 to cancel the assessment where the penalty was either dropped or the AO omitted to initiate the penalty proceedings. However, in the same vain, we notice that there are many decision in favour of the Assessee on the same subject namely CIT vs. Saraya Distillery 115 ITR 34 (All.); Addl. CIT vs. J.K, D'Costa (1981) 133 ITR 7(Del.) [SLP dismissed against the aforesaid decision] which were referred to and followed in other decisions of Hon'ble Delhi High Court. The Hon'ble Gujarat High Court has taken note of varied decisions of different High Courts while determining the issue in favour of the assessee. The propositions laid down by the Hon'ble Gurarat High Court will prevail over the contrary propositions. We simultaneously take note the decision of Hon'ble Patna High Court in the case of R.A. Himmatsingka & Co. vs. CIT*

(2010) 340 ITR 253 (AY 2004-05) relied upon by revenue wherein it was explained that expression 'proceedings' employed in section 263 is wider than the expression 'assessment'. However, in our view, nothing turns on this. The decision was rendered in a case where the penalty proceedings were duly initiated and later dropped which was subject matter of S. 263. Judicial utterances were made in the context of the case therein.

17. *To sum up, in the light of various propositions culled out from decision of Hon'ble Gujarat High Court in Parmanand Patel (supra) we are disposed to hold that non initiation of penalty proceedings under S. 271(1)(c) while framing assessment is not a good ground for invoking revisional powers conferred under S. 263 of the Act. To reiterate, when proceeded in strict requirement of the provision, the CIT can not, after the conclusion of the assessment proceedings, make up mind or arrive at the required affirmative conclusion towards initiation of penalty proceedings in substitution of the lapse committed by the AO. Section 271(1)(c) read in conjunction with S. 263 of the Act, gives an unmistakable impression that while in the wake of amendment under S. 271(1)(c) w.e.f 1-6-2002, it may be lawful for the administrative CIT to impose penalty, that by itself would not be sufficient to hold that the CIT is entitled to exercise revisional powers by treating the assessment order as erroneous and prejudicial to the interest of revenue. There must exist an order, which is sought to be revised by the Commissioner. If there is no order, question of revising the order does not arise. In the instant case, there is no order in so far as penalty proceedings are concerned. The proceedings in respect of assessment and penalty are different and distinct notwithstanding the precondition that later has to be initiated in the course of former proceedings. Though expression 'assessment' is used in the Act with different meanings in different context, in so far as Section 263 is concerned, it refers to that particular proceeding which is being considered by the Commissioner. It is not possible to expand the scope of assessment proceeding and assessment, which is subject matter of revision, for the purposes of initiating a new and distinct penalty proceedings of onerous nature. Failure of AO to initiate or impose penalty cannot be a factor capable of vitiating the assessment order in any respect. An assessment, in our considered view, cannot be said to be erroneous or prejudicial to the interest of revenue owing to such failure with respect to initiate a distinct proceedings with a view to evaluate imposition of penalty therein. In view of the forgoing discussion, the Pr. CIT/ CIT is not competent to direct the AO to redo the assessment with a view to initiate and levy penalty in respect of erroneous claim of deduction under S. 10B."*

6.6 In view of the above, it is clear that post amendment to section 271(1)(c) w.e.f. 1-4-2002 authorizing the commissioner also initiate penalty u/s 271(1)(c), the CIT still cannot direct the Assessing Officer to initiate

penalty proceedings while exercising his revisionary power u/s. 263 of the act. The decision of the Jurisdictional High Court in the case of CIT vs. Parmanand M. Patel(supra) still holds fort. The order of the PCIT exercising revisionary powers for directing initiation of penalty proceedings is therefore held to be not in accordance with law and is accordingly set aside.

6.7 In view of the above, the exercise of revisionary powers by the Ld. PCIT on account of non-inquiry of the cash deposits in the bank account of the assessee and the interest income earned by the assessee is upheld, while on the aspect of initiation of penalty proceedings is set aside.

7. The appeal of the assessee is therefore partly allowed in above terms.

Order pronounced in the open court on 27-01-2022

Sd/-
(MADHUMITA ROY)
JUDICIAL MEMBER True Copy
Ahmedabad : Dated 27/01/2022

Sd/-
(ANNAPURNA GUPTA)
ACCOUNTANT MEMBER

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
अहमदाबाद