आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES,"A" JAIPUR

डा॰ एस. सीतालक्ष्मी,न्यायिक सदस्य एवं श्री राठोड कमलेश जयन्तभाई, लेखा सदस्य के समक्ष
BEFORE: DR. S. SEETHALAKSHMI, JM & SHRI RATHOD KAMLESH JAYANTBHAI, AM

आयकर अपील सं./ITA No. 263/JPR/2023
निर्धारण वर्ष/Assessment Year : 2018-19

M/s. Eternal Heart Care Centre & Research Institute Pvt. Ltd. 3A, Jagatpura Road, Near Jawahar Circle, Jaipur- 302 017	बनाम Vs.	Pr. CIT Jaipur -2
स्थायीलेखा सं./जीआईआर सं./PAN/GIR No.: AACCE 0560 A		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओरसे/Assesseeby : Shri Yogesh Parwal, CA &
Shri P.C. Parwal, CA
राजस्व की ओरसे/Revenue by: Shri James Kurian, CIT-DR

सुनवाई की तारीख/Date of Hearing : 08/06/2023
उदघोषणा की तारीख/Date of Pronouncement: 06 /09/2023

आदेश/ORDER

PER: DR. S. SEETHALAKSHMI, J.M.

This is an appeal filed by the assessee against order of the ld. Pr. CIT, Jaipur-2 dated 31-03-2023 for the assessment year 2018-19 in the matter of Section 263 of the Act wherein the assessee has raised the following grounds of appeal.

> ''1. The ld. PCIT has erred on facts and in law in holding that the assessment order passed u/s 143(2) dated 24-02-2021 is erroneous and prejudicial to the interest of revenue as no disallowance u/s 14A read with rule 8D(2), of the Act has been made by incorrectly holding that the assessee has not offered any interest income on investment in mutual funds

whereas assessee has offered interest income from mutual funds at Rs.41,47,667/- and it has not earned any exempt income.

2. The ld. PCIT has erred on facts and in law in holding that the assessment order passed u/s 143(2) dated 24-02-2021 is erroneous and prejudicial to the interest of revenue as assessee has made international transactions with the associate enterprises which have not been reported in audit report Form 3CEB for which assessee is liable for penalty u/s 271AAA of the Act but the AO failed to initiate and levy such penalty ignoring that initiating or non-initiating of penalty is prerogative of the AO with which the ld. PCIT cannot interfere with and not considering the explanation of assessee in correct perspective on this issue.''

2.1 Brief facts of the case are that the assessee is running a multi-specialty hospital. It filed the return on 03.10.2018 at Nil income. The case of the assessee was selected for complete scrutiny with one of the reason being 'investments'. The assessee filed reply to the AO on 07.10.2019 submitting that the company has parked surplus funds into mutual funds and the closing balance of investment was Rs 6,76,30,720. Further, by issue of notice under section 142(1) of the Act dated 09.12.2020, the AO has enquired the following:

"a. Details of investments of Rs. 6,76,30,720/- in mutual funds, of Rs. 6,93,67,396/- as balance with banks and Rs. 48,45,862/- in short term loans and advances to others, in following format:

The assessee furnished the reply providing script wise details of mutual funds, opening balance, transaction during the year, closing balance, income earned etc. to the AO. The AO also enquired on the loans and borrowing and details regarding the same were furnished by the assessee during the assessment proceedings. The AO

completed the assessment u/s 143(3) at returned income stating the following in the assessment order:

> *"3. In compliance of notice under section 142(1) of the Income Tax Act, 1961, the assessee filed the requisitioned details documents electronically.*
>
> *4. On the basis of material available on record and the explanation of the assessee on the issue, the total income of the assessee is hereby computed at Nil which also includes total income of the assessee as computed in processing"*

2.2 The ld. PCIT on examination of the details/ record available before her issued show cause notice u/s 263 dt. 28.02.2023 **(PB 1-3)** stating that one of the basic reasons of scrutiny was heavy investment in mutual funds which would result in exempted income but neither the assessee has offered any disallowance suo moto nor the AO has made any disallowance u/s 14A of the Act. The assessee vide reply dt. 13.03.2023 **(PB 1-6)**, 25.03.2023 **(PB 44-45)** & 27.03.2023 **(PB 46-47)** submitted that all these investment in mutual funds are short term investment and whatever income earned on these investments have been offered to tax. Further, no exempt income has been earned on investments in mutual funds purchased during the year and remained with the assessee as on the last date of the financial year and therefore the provision of section 14A read with rule 8D is not applicable. The Ld. PCIT, however, held that amount invested in mutual funds as on

31.03.2018 is Rs.6,76,30,720/-. The interest cost incurred is Rs.22,27,80,548/-. Thus, interest-bearing funds have been invested in mutual funds to earn exempt income but assessee has not made any disallowance on this account. The contention of assessee that interest income has been offered for tax is not substantiated by facts. A perusal of accounts shows that an amount of Rs.81,87,161/- has been shown as interest income which includes interest income from mutual funds amounting to Rs.41,47,667/- only. On going through the details/ interest ledger it is noticed that the assessee has shown interest from 2 Mutual funds namely SBI Ultra Short-Term debt fund and HDFC Arbitrage Fund. However, the details of investment in Mutual Fund (Rs.6,76,30,720/-) shows that only an amount of Rs.30,720/- is shown as investment in SBI Ultra short-term debt fund. Thus, the investment in MF i.e. Rs.6.76 cr. no interest has been accrued/earned and offered by the assessee which substantiates the fact that investment in mutual funds (except Rs.30,720/-) has not resulted in earning of interest income. In other words, no income has been offered from the mutual funds Rs.6.76 Cr. appearing in the statement filed by the assessee and these would yield exempt income as majority of these MFs have investment portfolio of equity shares. All these facts suggest that provisions of section 14A are applicable in the instant case. The CBDT vide Circular No 5/2014 dated 11.2.2014 has specifically clarified that irrespective of the fact of non-earning or less earning of exempted

income in any year, provisions of section 14A read with rule 8D are applicable in case the assessee has made investments in such assets which would result in exempted income. In order to make the intention of the legislation clear, the clarification issued vide Circular No 5/2014 has also been brought in the statute vide Finance Act 2022. Since the AO has not considered this issue while completing the assessment, the assessment order passed u/s 143(3) dated 24.02.2021 is erroneous and prejudicial to the interest of revenue and is set aside to be redone afresh.

2.3 During the course of hearing, the ld. AR of the assessee submitted that the assessee had furnished the complete details of investments made in the mutual funds during the assessment proceedings and the income earned therefrom has been offered to tax and the assessee has not earned any exempt income on remaining investment. Thus, there was no occasion for the AO to examine the applicability of Section 14A as the same was clearly not application in the said case nor the ld PCIT under the guise of Section 263 can hold the order of AO as erroneous and prejudicial to the interest of Revenue when Section 14A is not applicable on the issue. Hence, on this issue the order passed by the ld. PCIT is bad in law. However, for the sake of convenience, the written submissions of the assessee as well as case laws cited therein are as under:-

''At the outset it is submitted that the Ld. PCIT has neither appreciated the facts nor the legal position on the issue of investment made in the mutual funds. In fact the notice issued u/s 263 without appreciating the financial statement is erroneous in itself. The total investment in mutual funds as on 31.03.2018 stood at Rs.6,76,30,720/-. Out of it, Rs.30,720/- is income accrued on SBI Ultra Short Term Debt Fund which is offered for tax but since it is not received the same is shown as outstanding. The balance investment in mutual funds made during the year is Rs.6.76 crore is as per the following details:-

Name of Mutual Fund	Date of investment	Opening balance	Purchase during the year	Closing Balance	Paper Book Pg
L&T India Value Fund	29.01.2018	-	1,00,00,000	1,00,00,000	29
Kotak Balance Fund	20.06.2017	-	50,00,000	50,00,000	30
	19.07.2017		25,00,000	25,00,000	
	28.08.2017	-	25,00,000	25,00,000	
Aditya Birla SL Balance Advantage Fund	01.03.2018	-	39,00,000	39,00,000	31
	20.03.2018	-	1,00,00,000	1,00,00,000	
Mahindra MF Dhan Sanchay Yojna	20.06.2017	-	50,00,000	50,00,000	32
	19.09.2017	-	50,00,000	50,00,000	
	20.11.2017	-	25,00,000	25,00,000	
Mahindra Unnati Emerging Business Yojana	18.01.2018	-	1,00,00,000	1,00,00,000	33
SBI Balance Fund	19.09.2017	-	12,00,000	12,00,000	34
SBI Magnum Multi Cap Fund	01.01.2018	-	1,00,00,000	1,00,00,000	35
Total			**6,76,00,000**	**6,76,00,000**	

On these investments in mutual funds assessee has not earned any income during the year. Section 14A of the Act is not applicable if no exempt income has been earned during the year under consideration. Reliance in this connection is placed on the following cases:-

PCIT Vs. Oil Industry Development Board (2019) 262 Taxman 102 (SC)

The High Court upheld Tribunal's order that in absence of any exempt income, disallowance under section 14A of the Act of any amount was not permissible, SLP filed against said decision was dismissed.

CIT Vs. Chettinad Logistics (P.) Ltd. (2018) 257 Taxman 2 (SC)

SLP dismissed against High Court ruling that section 14A cannot be invoked where no exempt income was earned by assessee in relevant assessment year.

Cheminvest Limited Vs. CIT 378 ITR 33 (Delhi) (HC)

The High Court held that no disallowance under section 14A can be made in a year in which no exempt income had been earned or received by the appellant. The expression 'does not form part of the total income' in section 14A envisages that there should be an actual receipt of income, which was not includible in the total income for the purpose of disallowing any expenditure incurred in relation to the said income. Thus, section 14A

would not apply if no exempt income was received or receivable during the relevant previous year.

PCIT Vs. Oil Industry Development Board (2022) 115 CCH 245 (Delhi) (HC)
Relevant extracts of the decision are as under:-

"4. This Court is of the view that the present case is covered by the Division Bench judgment in Cheminvest Ltd. vs. CIT, [2015] 61 Taxmann.com 118 (Delhi), wherein it has been held that the expression 'does not form part of the total income' in Section 14A of the Act means that there should be an actual receipt of income which is not includible in the total income, during the relevant previous year for the purpose of disallowing any expenditure incurred in relation to the said income. In other words, Section 14A will not apply if no exempt income is received or receivable during the relevant previous year.

5. Furthermore, this Court in Pr. Commissioner of Income Tax (Central)-2 Vs. M/s Era Infrastructure (India) Ltd., [2022] 141 taxmann.com 289 (Del) has dealt with the issue of amendment made by the Finance Act, 2022 to Section 14A of the Act. The relevant portion of the said judgment is reproduced hereinbelow:

"8. Consequently, this Court is of the view that the amendment of Section 14A, which is "for removal of doubts " cannot be presumed to be retrospective even where such language is used, if it alters or changes the law as it earlier stood."

6. Accordingly, this Court is of the view that no substantial question of law arises for consideration in the present appeal. Accordingly, the same is dismissed."

PCIT Vs. Era Infrastructure (India) Ltd (2022) 448 ITR 674 (Del.) (HC)
Expenditure incurred in relation to income not includible in total income. ITAT relying on decision of Delhi High Court in PCIT vs. IL & FS Energy Development Company Ltd., wherein it has been held that no disallowance under Section 14A can be made if assessee had not earned any exempt income deleted disallowance made by Assessing Officer under Rule 8D read with Section 14A. Further, amendment made by Finance Act 2022 is prospective in nature.

PCIT Vs. Kohinoor Project Pvt. Ltd. (2021) 276 Taxman 180 (Bom) (HC)
Section 14A would not apply if no exempt income was received or was receivable during relevant previous year.

CIT Vs. Visual Graphics Computing Services India Pvt. Ltd. (2020) 195 DTR 397 (Mad.) (HC)
Section 14A cannot be invoked when no exempt income was earned by the assessee in the relevant year

PCIT Vs. Wockhardt Hospitals Ltd (2020) 192 DTR 289 (Bom) (HC)
Assessee had not earned any exempt income during the assessment year under consideration nor it had claimed any expenditure against any taxfree income, AO was not justified in making the disallowance by invoking s. 14A r/w rule 8D.

M/s O S Motors Pvt Ltd vs PCIT ITA No. 54/Jodh/2022 order dated 16 January 2023:
Relevant extracts of the decision are as under:

"10. We heard the parties on this issue. The undisputed fact is that the assessee did not earn any exempt income during the year under consideration. When there is no exempt income, the question of making any disallowance u/s 14A shall not arise, as held by Hon'ble Delhi High Court in the case of Era Infrastructure (India) Ltd (2022)(141 taxmann.com 289)(Delhi). Hence, the question as to whether any disallowance u/s 14A could be made when there is no exempt income, becomes a debatable issue. It is well settled proposition of law that the revision proceedings u/s 263 could not be initiated on debatable issues. Accordingly, we set aside the order passed by Ld PCIT on this issue."

Thus, Hon'ble Supreme Court, High Courts and Tribunals have held that no disallowance u/s 14A can be made if no exempt income has been earned. In the instant case also, the assessee has not earned any exempt income and therefore no disallowance u/s 14A can be made.

2. Further, Circular No.5 of 2014 issued by the CBDT on 11 February 2014 is not applicable. The various courts including the Supreme Court has clarified the above position that in order to attract disallowance u/s 14A of the Act it is necessary that exempt income has to be earned by the assessee during the previous year. Thus, the circular issued by CBDT cannot be relied upon. This has specifically been clarified by **Delhi High Court in case of PCIT vs. IL & FS Energy Development Company Ltd. (2017) 399 ITR 0483** wherein the High Court held as under:-

18. The CBDT Circular upon which extensive reliance is placed by Mr. Hossain does not refer to Rule 8D (1) of the Rules at all but only refers to the word "includible" occurring in the title to Rule 8D as well as the title to Section 14A. The Circular concludes that it is not necessary that exempt income should necessarily be included in a particular year's income for the disallowance to be triggered.

19. In the considered view of the Court, this will be a truncated reading of Section 14 A and Rule 8D particularly when Rule 8D (1) uses the expression 'such previous year'. Further, it does not account for the concept of 'real income'. It does not note that under Section 5 of the Act, the question of taxation of 'notional income' does not arise. *As explained in Commissioner of Income Tax v. Walfort Share and Stock Brokers Pvt. Ltd [2010] 326 ITR 1 (SC), the mandate of Section 14A of the Act is to curb the practice of claiming deduction of expenses incurred in relation to exempt income being taxable income and at the same time avail of the tax incentives by way of exemption of exempt income without making any apportionment of expenses incurred in relation to exempt income. Consequently, the Court is not persuaded that in view of the Circular of the CBDT dated 11th May 2014, the decision of this Court in Cheminvest Ltd. (supra) requires reconsideration.*

…..

24. For all of the aforementioned reasons, this Court is of the view that the CBDT Circular dated 11th May 2014 cannot override the expressed provisions of Section 14A read with Rule 8D."

> In view of above, when assessee has furnished the complete details of investment made in the mutual funds in course of assessment proceedings, the income earned therefrom has been offered for tax and it has not earned any exempt income on remaining investment, there was no occasion for the AO to examine the applicability of section 14A as the same was clearly not application in the said case and nor the Ld. PCIT under the guise of section 263 can hold the order of AO as erroneous and prejudicial to the interest of revenue when section 14A is not applicable on the assessee. Hence on this issue the order passed by PCIT is illegal & bad in law."

2.4 On the other hand, the ld. DR supported the order of the ld.PCIT.

2.5 We have heard the rival contentions, perused the material available on record and the orders of the revenue authorities and the citations relied on by both the parties. The short issue in this ground is whether the ld. Pr. CIT was justified in invoking jurisdiction under section 263 of the I.T. Act, 1961 and thereby directing to make disallowance of expenses under section 14A of the Act read with Rule 8D of IT Rules, 1962 on investment of Rs.6,76,00,00/- made in the mutual funds even when the assessee has not earned any exempt income during the year under consideration with reference to investment in such mutual funds. We note that the case of the Assessee was selected for complete scrutiny where one of the reasons was investments/advances/loans'. Further the AO in notice u/s 142(1) dt. 09.12.2020 in course of assessment proceedings enquired about details of investments of Rs.6,76,30,720/- in mutual funds, of Rs.6,93,67,396/- as balance with banks and Rs.48,45,862/- in short term loans and advances to others by calling the details in the specified format. The assessee, in response to notices issued, furnished script wise details of mutual funds, opening balance, transaction

during the year, closing balance, income earned etc. to the AO. The AO considered the information filed by the assessee and the same is evident from the assessment order wherein the AO has mentioned in para 3 & 4 as under:

"3. In compliance of notice under section 142(1) of the Income Tax Act, 1961, the assessee filed the requisitioned details documents electronically.

4. On the basis of material available on record and the explanation of the assessee on the issue, the total income of the assessee is hereby computed at Nil which also includes total income of the assessee as computed in processing"

Thus, the AO has considered the information filed by the assessee and arrived at conclusion that in the absence of exempt income, no disallowance is warranted under section 14A of the Act. The view of the AO is duly supported by the decisions of Hon'ble High Courts and Tribunals relied upon by the assessee (supra). SLP filed by the revenue in this regard against the decisions of Hon'ble High Courts have been dismissed by the Hon'ble Supreme Court of India in the cases PCIT vs. Oil Industry Development Board (2019) 262 Taxman 102 (SC) and CIT vs. Chettinad Logistics Pvt. Ltd. (2018) 257 Taxman 2 (SC) as relied upon by the ld. A/R of the assessee in the detailed submission. This position was duly taken into consideration by the AO while passing the assessment order, which is evidently clear from the assessment order itself, as reproduced herein above and the order passed by the AO is not warranted revision. From the above discussion, in our considered opinion, the assessment order cannot be regarded as erroneous,

or being prejudicial to the interests of the Revenue more so when no exempt income has been earned to attract any disallowance u/s 14A of the Act. Thus, we are of the view the ld. PCIT has erred in invoking the provisions of Section 263 of the IT Act and in passing the impugned order. Accordingly, we find merit in the grievance raised by the assessee, accordingly we hold that the ld. PCIT is not justified in directing the AO to make addition under section 14A of the IT Act, 1961. Hence, the Ground No. 1 of the assessee is allowed.

3.1 Apropos Ground NO. 2 of the assessee, it is noted that Ld. PCIT vide show cause notice dt. 28.02.2023 issued u/s 263 **(PB 1-3)** observed that assessee has made following international transactions with the associate enterprises which have not been reported in the audit report in Form 3CEB:-

> (a) Receipt of unsecured loan of Rs.357.95 lacs from two associate persons Dr. Shamim Sharma and Manju Sharma (refer related party transactions in the Balance Sheet)
>
> (b) Payment of interest of Rs.300 lacs on CCD to the associate concern M/s Stock Investment Ltd., Mauritius (Form 15CA available in 26AS)
>
> © Other expenses of Rs.89,89,363/- disclosed in payment liable to TDS u/s 195 of the Act in clause 34(a) tax audit report Form 3CD.

Accordingly, the Ld. PCIT observed that the assessee is liable for penalty u/s 271AA of the Act which is 2% of unreported transactions (i.e. 2% of Rs.7,47,84,363/- = Rs.14,95,687/-) but the FAO has failed to initiate and levy such

penalty. The assessee vide reply dt. 13.03.2013 **(PB 6-13)**, 20.03.2023 **(PB 37-38)** & 25.03.2023 **(PB 39-45)** submitted that the loan taken from Smt. Manju Sharma is outside the scope of international transaction as she is resident of India. M/s Stock Investment Ltd., Jagat Narula & Johnson Health LLC to whom interest & other expenses has been paid is not the associate enterprises as defined in section 92A of the Act. So far as loan of Rs.12,55,000/- taken from Dr. Shamim Sharma & interest payment of Rs.7,42,793/- is concerned, same has not been reported in Form 3CEB under bonafide belief that these transactions are routed through NRO account of Dr. Shamim Sharma, hence not reportable. The assessee further submitted that section 263 of the Act does not give any power to PCIT to impose his satisfaction over the satisfaction of AO as to whether the penalty proceedings are to be initiated or not. For this purpose it relied on various case laws. The Ld. PCIT, however, held that filing/reporting of Form 3CEB is mandatory if company is engaged in international and specified domestic transactions with any associated enterprise. In the present case the assessee has not reported the complete parties in the Form 3CEB and hence the provisions of section 271AA are attracted in this case. The assessee has himself admitted that amount related to Dr Shamim Sharma was omitted to be reported in audit report in Form 3CEB. Since the criteria for scrutiny was investment/ advances/loans the AO should have verified this aspect and not accepted the details in the routine and perfunctory manner without application of mind to the

information available on record. Hence the assessment order passed u/s 143(3) dated 24.02.2021 is erroneous and prejudicial to the interest of revenue and is set aside to be redone afresh.

3.2 During the course of hearing, the ld. AR of the assessee argued that the order passed u/s 263 of the Act by the ld. PCIT holding the order of the AO is erroneous and prejudicial to the interest of revenue is illegal and bad in law and thus the same is required to be quashed for which the ld. AR of the assessee filed following detailed written submission.

> ''1. It is submitted that section 271AA of the Act specifically provides that if any person in respect of international transaction or specified domestic transaction fails to keep and maintain the required information or fails to report such transaction, the AO or CIT(A) may direct that such person shall pay the penalty. Thus, the prerogative to initiate or not to initiate the penalty proceedings lies with AO or CIT(A). Section 263 of the Act does not give any power to PCIT to impose his satisfaction over the satisfaction of AO as to whether the penalty proceedings are to be initiated or not. Where the Commissioner finds while examining the records of an assessment order that AO has not initiated penalty proceedings, he cannot direct initiation of penalty proceedings because penalty proceedings are not part of assessment proceedings. Therefore, the Commissioner cannot pass an order u/s 263 pertaining to penalty. In this connection, reliance is placed on the following cases:-
>
> **CIT Vs. Rakesh Nain Trivedi (2016) 128 DTR 309 (P&H) (HC)**
> In this decision after considering the decisions of various High Courts, both in favour and against the assessee, it was held that CIT cannot direct the AO u/s 263 of the Act to initiate the penalty proceedings. The relevant Para 5 to 8 of the order is reproduced as under:-
>
> *5. After hearing learned counsel for the parties, we find the issue that arises for consideration of this Court in this appeal is could the CIT in exercise of power under s. 263 of the Act hold the order of the AO to be erroneous and prejudicial to the interest of the Revenue where the AO had failed to initiate penalty proceedings while completing assessment under s. 153A of the Act.*

6. It may be noticed that the said issue is no longer res integra. This Court in CIT vs. Subhash Kumar Jain (supra) agreeing with the view of High Courts of Delhi in Addl. CIT vs. J.K. D'Costa (supra), CIT vs. Sudershan Talkies (1993) 112 CTR (Del) 165: (1993) 201 ITR 289 (Del) and CIT vs. Nihal Chand Rekyan (1999) 156 CTR (Del) 59 : (2000) 242 ITR 45 (Del), Rajasthan in CIT vs. Keshrimal Parasmal (1985) 48 CTR (Raj) 61 : (1986) 157 ITR 484 (Raj), Calcutta in CIT vs. Linotype & Machinery Ltd. (1991) 192 ITR 337 (Cal) and Gauhati in Surendra Prasad Singh & Ors. vs. CIT (1988) 71 CTR (Gau) 125 : (1988) 173 ITR 510 (Gau) whereas dissenting with the diametrically opposite approach of Madhya Pradesh High Court in Addl. CIT vs. Indian Pharmaceuticals (1980) 123 ITR 874 (MP), Addll. CIT vs. Kantilal Jain (1980) 125 ITR 373 (MP) and Addl. CWT vs. Nathoolal Balaram (1980) 125 ITR 596 (MP) ***had concluded that where the CIT finds that the AO had not initiated penalty proceedings under s. 271(1)(c) of the Act in the assessment order, he cannot direct the AO to initiate penalty proceedings under s. 271(1)(c) of the Act in exercise of revisional power under s. 263 of the Act.*** *The relevant observations recorded therein read thus:*

9. Now adverting to the second limb, it may be noticed that the Delhi High Court in judgment reported in Addl. CIT vs. J.K. D'Costa (1981) 25 CTR (Del) 224 : (1982) 133 ITR 7 (Del) has held that the CIT cannot pass an order under s. 263 of the Act pertaining to imposition of penalty where the assessment order under s. 143(3) is silent in that respect. The relevant observations recorded are :

'It is well established that proceedings for the levy of a penalty whether under s. 271(1)(a) or under s. 273(b) are proceedings independent of and separate from the assessment proceedings. Though the expression "assessment" is used in the Act with different meanings in different contexts, so far as s. 263 is concerned, it refers to a particular proceeding that is being considered by the CIT and it is not possible when the CIT is dealing with the assessment proceedings and the assessment order to expand the scope of these proceedings and to view the penalty proceedings also as part of the proceedings which are being sought to be revised by the CIT. There is no identity between the assessment proceedings and the penalty proceedings; the latter are separate proceedings, that may, in some cases, follow as a consequence of the assessment proceedings. As the Tribunal has pointed out, though it is usual for the ITO to record in the assessment order that penalty proceedings are being initiated, this is more a matter of convenience than of legal requirement. All that the law requires, so far as the penalty proceedings are concerned, is that they should be initiated in the Court of the proceedings for assessment. It is sufficient if there is some record somewhere, even apart from the assessment order itself, that the ITO has recorded his satisfaction that the assessed is guilty of concealment or other default for which penalty action is called for. Indeed, in certain cases it is possible for the ITO to issue a penalty notice or initiate penalty proceedings even

long before the assessment is completed though the actual penalty order cannot be passed until the assessment finalised. ***We, therefore, agree with the view taken by the Tribunal that the penalty proceedings do not form part of the assessment proceedings and that the failure of the ITO to record in the assessment order his satisfaction or the lack of it in regard to the leviability of penalty cannot be said to be a factor vitiating the assessment order in any respect. An assessment cannot be said to be erroneous or prejudicial to the interest of the Revenue because of the failure of the ITO to record his opinion about the leviability of penalty in the case****.'*

10. Special leave petition against the said decision was dismissed by the apex Court [(1984) 147 ITR (St) 1]

The same view was reiterated by the Delhi High Court in CIT vs. Sudershan Talkies (1993) 112 CTR (Del) 165: (1993) 201 ITR 289 (Del) and followed in CIT vs. Nihal Chand Rekyan (1999) 156 CTR (Del) 59 : (2000) 242 ITR 45 (Del). ***The Rajasthan High Court in CIT vs. Keshrimal Parasmal (1985) 48 CTR (Raj) 61 : (1986) 157 ITR 484 (Raj)****, Gauhati High Court in Surendra Prasad Singh & Ors. vs. CIT (1988) 71 CTR (Gau) 125 : (1988) 173 ITR 510 (Gau) and Calcutta High Court in CIT vs. Linotype & Machinery Ltd. (1991) 192 ITR 337 (Cal) have followed the judgment of Delhi High Court in J.K. D'Costa's (1981) 25 CTR (Del) 224 : (1982) 133 ITR 7 (Del) case.*

11. However, Madhya Pradesh High Court in Addl. CIT vs. Indian Pharmaceuticals (1980) 123 ITR 874 (MP) which has been followed by the same High Court in Addl. CIT vs. Kantilal Jain (1980) 125 ITR 373 (MP) and Addl. CWT vs. Nathoolal Balaram (1980) 125 ITR 596 (MP) has adopted diametrically opposite approach.

12. We are in agreement with the view taken by the High Courts of Delhi, Rajasthan, Calcutta and Gauhati, and express our inability to subscribe to the view of Madhya Pradesh High Court.

13. Accordingly, it is held that the initiation of proceedings under s. 263 was not justified. The Tribunal was right in holding that after examining the record of the assessment in exercise of powers under s. 263, where the CIT finds that the AO had not initiated penalty proceedings, he cannot direct the AO to initiate penalty proceedings under s. 271(1)(c) of the Act."

7. In view of the above, equally we are unable to subscribe to the view adopted by Allahabad High Court in Surendra Prasad Aggarwal's case (supra) where judgment of Madhya Pradesh High Court in Indian Pharmaceuticals' case (supra) noticed hereinbefore has been concurred with.

8. Accordingly, it is held that the initiation of proceedings under s. 263 of the Act was not justified and we uphold the order of the Tribunal cancelling the revisional order passed by the CIT."

CIT Vs. Keshrimal Parasmal (1986) 157 ITR 484 (Raj.) (HC)

CIT in revision is not entitled to set aside the assessment order on the ground of non-mention of initiation of penalty proceedings. Also, he cannot direct the ITO to make fresh assessment to initiate penalty proceedings. Thus, the order of Tribunal cancelling CIT's order u/s 263 whereby the CIT set aside the assessment order to be made de novo for initiation of penalty proceedings is justified.

Harish Jain Vs. PCIT (2023) 221 DTR 241 (Jaipur) (Trib.)

Sec. 263 cannot be invoked to correct each and every type of mistake or error committed by the AO. Revisional jurisdiction of the Principal CIT starts only after the conclusion of assessment proceedings resulting into assessment order. Therefore, it is not open to the Principal CIT to exercise the revisional powers to create a non-existent proceeding. Hence, no proceedings u/s 263 could be invoked to correct the section under which the penalty can be levied by the AO. There must exist some order which is sought to be revised by the Principal CIT. If there is no order, question of revising the order does not arise. In the instant case, though the AO recorded his finding in the order for initiation of penalty u/s 271(1)(c), he issued the notice u/s 271AAB(1A). Admittedly there is no order in so far as penalty proceedings are concerned. Once there is no order, there is no question of its being erroneous or prejudicial to the interests of Revenue. Whether the AO has not initiated penalty proceedings at all or it is a case of wrong initiation of penalty, in both the situations the Principal CIT has got no jurisdiction at all because no order has been passed by the AO till the examination by the Principal CIT u/s 263. Principal CIT cannot find fault in the proceedings alone.

Easy Transcription & Software (P) Ltd. Vs. CIT (2017) 156 DTR 265 (Ahmedabad) (Trib.)

Once the assessment is concluded, the CIT becomes functus officio as regards initiation of penalty u/s 271(1)(c). Non initiation of penalty proceedings u/s 271(1)(c) while framing assessment is not a good ground for invoking revisional powers u/s 263. Section 271(1)(c) read in conjunction with sec. 263 given an unmistakable impression that while in the wake of amendment u/s 271(1)(c) w.e.f. 01.06.2002, 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. CIT is not competent to direct

the AO to redo the assessment with a view to initiate and levy penalty u/s 271(1)(c) in respect of erroneous claim of deduction u/s 10B.

In view of above, order passed u/s 263 holding that the order passed by AO is erroneous and prejudicial to the interest of revenue is illegal & bad in law and the same be quashed.''

3.3 On the other hand, the ld. DR supported the order of the ld. PCIT.

3.4 We have heard the rival contentions, perused the material available on record and the orders of the revenue authorities and the citations relied on by both the parties. The short issue in this ground is whether the Ld. PCIT can hold the order of AO erroneous and prejudicial to the interest of revenue where the AO has not initiated penalty proceedings u/s 271AAA of the Act. We are of the considered view that section 263 of the Act does not give any power to PCIT to impose his satisfaction over the satisfaction of AO as to whether the penalty proceedings are to be initiated or not. Where the Commissioner finds while examining the records of an assessment order that AO has not initiated penalty proceedings, he cannot direct initiation of penalty proceedings because penalty proceedings are not part of assessment proceedings. This has been so held by various High Courts including jurisdiction High Courts and coordinate bench of ITAT, Jaipur bench referred (supra). For ready reference, the law pronounced by ITAT Jaipur Bench in the case of Harish Jain vs PCIT (supra) at para 24 to 26 of this order is reproduced as under:-

‘’24. Now the mute question before us is that whether the PCIT can correct the mistake of non-initiation or incorrect initiation of penalty under provisions of section 263 of the Act or not. For this we have gone through the competing contentions raised by both the parties before us. Before us revenue has relied upon certain judgements as listed here in above, we have considered all these judgements and found that all the decisions relied upon by the revenue are on different provisions of the act and provisions of section 292BB is for the AO but not at the help of the PCIT in the proceeding u/s. 263 and it is for the assessing officer to be considered before the proceeding before him. Against the submission of applicable judgement placed on record by the ld. AR of the assessee, ld. DR did not pinpointed any controverting judgements against the various direct and binding judgment presented for service in this case. The bench also noted that the pre-requisites to the exercise of jurisdiction by the Commissioner u/s 263, is that the order of the Assessing Officer is established to be erroneous in so far as it is prejudicial to the interest of the Revenue. The Commissioner has to be satisfied of twin conditions, namely (i) The order of the Assessing Officer sought to be revised is erroneous; and (ii) it is prejudicial to the interests of the Revenue. If any one of them is absent i.e. if the assessment order is not erroneous but it is prejudicial to the Revenue, Sec.263 cannot be invoked. This provision cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer; it is only when an order is erroneous as also prejudicial to revenue’s interest, that the provision will be attracted. An incorrect assumption of the fact or an incorrect application of law will satisfy the requirement of the order being erroneous. The phrase 'prejudicial to the interest of the revenue' has to be read in conjunction with an erroneous order passed by the AO. Every loss of Revenue as a consequence of the order of the AO cannot be treated as prejudicial to the interest of the Revenue. The revisional jurisdiction of the PCIT starts only after the conclusion of assessment proceedings, resulting into assessment order, therefore, as a sequel thereto, it is not open to PCIT to exercise the revisional powers to create a non-existent proceeding under S. 263 by holding the assessment proceeding as erroneous in so far as prejudicial to the interest of revenue. The provision of section 263 regulates the revisional powers of the PCIT hence, the strict fulfillment of the requirements of a jurisdictional provision cannot be compromised. On the issue the CBDT in its circular No. 09/DV/2016(Departmental view) dated 26.04.2016 (DPB 26-27) is also of this view that a mere mention of the penalty in the assessment order is of no value. The notice is to be issued by the competent officer who is powered under the act. The only proceeding and consequent order, is the assessment order and not the penalty proceedings because the same were not existing hence no proceedings u/s 263 could be invoked to correct the section under which the penalty can be levied or not by the AO. There must exist some order, which is sought to be revised by the PCIT.If there is no order, question of revising the order does not arise. He cannot pass an order u/s 263 to pass an order, where there is none. In the instant case, admittedly there is no order in so far as penalty proceedings are concerned. If there is no order, there is no question of its being erroneous or pre-

judicial as submitted there are other provision such as 147, 154, 292BB or filling an appeal etc.It may be clarified whether the AO has initiated penalty proceedings at all or it is a case of wrong initiation of penalty, in both the situations the PCIT has got no jurisdiction at all because no order has been passed by the AO till the examination by the PCIT u/s 263 in the proceedings under examination. The PCIT cannot find fault in the mere proceedings alone but passing of an order in those proceedings, is a condition precedent. Therefore, non-initiation of/wrong initiation of penalty proceedings cannot be much emphasized or stressed upon because there is no order at all in those proceedings hence there cannot be any question of finding any error/prejudice therein u/s 263.There is one more reason why the PCIT should not be permitted to invoke revisional powers for initiation of penalty proceedings. Sec. 271(1) specifically empowers the AO or the appellate authority to record satisfaction. It is well-settled that once an appeal has been preferred against an order of assessment the entire assessment is open before the appellate authority. The appellate authority is entitled to do all that the AO could have done. The powers of the appellate authority are co-extensive and co-terminus with the powers of the AO. It is equally well-settled that the PCIT cannot exercise revisional jurisdiction qua proceedings before an appellate authority. The order of assessment does not have any independent existence and stands merged with the order of the appellate authority. Hence, to read s. 263 as being applicable only in case of an AO for the purposes of initiation and levy of penalty and not being applicable to the appellate authority, cannot be the legislative intent. To the contrary, the inherent indication under s. 271(1) makes it clear that the Pr. CIT / CIT does not have any powers to direct either of the authorities, the AO or the appellate authority, to initiate and levy penalty. The section requires the AO or the appellate authority to be satisfied in the course of 'any proceedings'. This means, any proceedings before either of the specified authority. The Pr. CIT / CIT cannot create proceedings. If he is not permitted to direct the appellate authority (and this is an accepted position) he cannot be permitted to substitute jurisdiction/powers of only the AO by his satisfaction by creating proceedings where none exist—assessment having already been completed. The identical issue is directly covered by the binding decision in case of CIT vs KeshrimalParasmal [1986] 27 Taxmann 447 (Raj) (DPB 1-3), holding that:

5. On the other hand, Mr. R. Balia, the learned counsel appearing for the assessee, has stoutly opposed the submission and urged that no referable question of law arises out of the order of the Tribunal dated 26-11-1982, for the special leave petition by the department against the judgment in *J.K. D'Costa's* case (*supra*) was dismissed by the Supreme Court in *CIT* v. *J.K. D'Costa* [Special Leave Petition (Civil) Nos. 11391 and 11392 of 1981 dated 2-3-1984]. In [1984] 147 ITR (St.) 1, it is stated as under :

"*Revision : Commissioner in revision in assessment order whether can direct initiation of penalty proceedings.* - Their Lordships P.N. Bhagwati and A.N. Sen,

JJ. dismissed, as not being a fit case in which the question arising in the special leave petition should be decided, a special leave petition by the department against the judgment dated 27-4-1981 of the Delhi High Court in IT Reference No. 82 of 1974, reported in 133 ITR 7, whereby the High Court, on a reference, held that the Commissioner in a *suo motu* revision under section 263 of the Income-tax Act, 1961, of an assessment proceeding, was not entitled to set aside the assessment order on the ground that there was no mention of initiation of penalty proceedings in the assessment order, and to direct the ITO to make fresh assessment and to initiate penalty proceedings : *CIT* v. *J.K. Da Costa* : Special Leave Petition (Civil) Nos. 11391-11392 of 1981."

Thus, the position boils down to this that the view taken in *J.K. D'Costa's* case (*supra*) has been confirmed by the Supreme Court and according to *J.K. D'Costa's* case (*supra*) the Commissioner is not entitled to set aside the assessment order passed by the ITO on the ground that there was no mention of initiation of penalty proceedings in the assessment order and the Commissioner in the proceedings under section 263 cannot direct the ITO to make fresh assessment to initiate penalty proceedings.

As the position stands concluded and settled by the Supreme Court, the question which is now sought to be referred by the Commissioner cannot be said to be a substantial question of law arising out of the Tribunal's order. It is only a question of academic nature.

6. In this view of the matter, it cannot be said that the decision of the Tribunal rejecting the reference application by its order dated 12-8-1983 is incorrect.

7. For the reasons aforesaid, no referable question of law arises out of the order dated 26-11-1982 of the Tribunal.

8. The reference application under section 256(2) filed by the Commissioner is, therefore, dismissed.

25. Relying on the above jurisdictional high court decision this bench respectfully followed the said findings in the case Smt.RekhaShekawat V Pr. CIT (2022) in ITA NO. 7/JP/2021, Suresh Kumar Dapkara v. PCIT (Central), Jaipur in ITA No. 141/JP/2022 and in the recent decision in the case of DheerajSinghSisodiya v. PCIT (Central),Jaipur in ITA no. 132/JP/2022 dated 10.08.22(Para 7 DPB II 39-50), and the facts of both the cases are almost similar to the facts in present case and the relied upon finding is as under :

7. We have heard the rival contentions, perused the material available on record, assessment order and impugned order and the case laws cited before us. Admittedly, the AO has initiated penalty proceedings u/s 271 AAB(1A) with the observations that the amount of investment made by the assessee for purchase of motorcycle in cash i.e. Rs.1,25,000/- is added to his total income treated as unexplained investment u/s 69 and tax is charged as per provisions of section 115BBE of the I.T. Act. The assessee has offered Rs.1,25,000/- for taxation during search proceedings in statement u/s 132(4), however, the assessee has not included Rs.1,25,000/- in the return filed u/s 153A, therefore, penalty proceedings u/s 271AAB(1A) is initiated accordingly. The Ld. AR argued that the AO has taken conscious decision to initiate the penalty proceedings u/s 271AAB(1A) of the Act. It may be noted that both u/s 271(1)(c) and u/s 271AAB it is the AO who is to satisfy himself whether on the additions made, penalty proceedings is required to be initiated or not and also the section under which it is to be initiated. The mandate under section 263 of the Act do not give any power to CIT to impose his satisfaction over the satisfaction of AO as to whether the penalty proceedings are to initiated or not and if initiated under which section/clause. In our view, on examination of assessment record, the PCIT cannot direct initiation of penalty proceedings because penalty proceedings are not part of assessment proceedings. Thus, the PCIT's revisionary decision relating to non-initiation/incorrect initiation of penalty which without holding that assessment order passed by the AO as erroneous and prejudicial to the interest of revenue is vague and bad in law.

26. Being consistent, as there is no contrary finding serviced before us by the revenue we are of the considered view that the invocation of provision of 263 to correct the section under which the penalty is leviable or not is beyond the power vested under section 263 of the Act, when there are other options available with the ld. AO. Therefore, the appeal of the assessee is allowed in the light of the facts, circumstances and decisions relied upon. ''

Hence, on this issue, the Bench finds that the order of AO cannot be held to be erroneous and prejudicial to the interest of revenue. Hence, the Ground No. 2 of the assessee is allowed.

4.0 In the result, appeal filed by the assessee is allowed

Order pronounced in the open court on 06/09/2023.

Sd/-	Sd/-
(राठोड कमलेशजयन्तभाई)	(डॉ.एस.सीतालक्ष्मी)
(RATHOD KAMLESH JAYANTBHAI)	(Dr. S. Seethalakshmi)
लेखा सदस्य / Accountant Member	न्यायिकसदस्य / Judicial Member

जयपुर / Jaipur
दिनांक / Dated:- 06/09/2023
*Mishra
आदेश की प्रतिलिपिअग्रेशित / Copy of the order forwarded to:

1. The Appellant- M/s. Eternal Heart Care Centre & Research Institute Pvt. Ltd. Jaipur.
2. प्रत्यर्थी / The Respondent- The ld. PCIT, Jaipur-2, Jaipur.
3. आयकरआयुक्त / The ld CIT
4. विभागीय प्रतिनिधि, आयकरअपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
5. गार्डफाईल / Guard File (ITA No. 263/JPR/2023)

आदेशानुसार / By order,

सहायकपंजीकार / Asstt. Registrar