IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "B" NEW DELHI

BEFORE SHRI CHALLA NAGENDRA PRASAD, JUDICIAL MEMBER
AND
DR. B.R.R. KUMAR, ACCOUNTANT MEMBER

आ.अ.सं/.I.T.A Nos.3036 to 3038/Del/2018
निर्धारणवर्ष/Assessment Years: 2009-10 to 2011-12

Suriender Jain, 133-2-F, Pocket-12, Sector-24, Rohini, New Delhi. PAN No.ACYPJ9387K	बनाम **Vs.**	Pr. CIT-13, Room No.901, 9th Floor, E-2 Block, Pratyaksh Kar Bhawan, Minto Road, New Delhi.
अपीलार्थी **Appellant**		प्रत्यर्थी/**Respondent**

Assessee by	**Shri K Sampath, Advocate & Shri V Rajkumar, Advocate**
Revenue by	**Shri Asish Chandra Mohanty, CIT DR**

सुनवाईकीतारीख/ Date of hearing:	26.12.2023
उद्घोषणाकीतारीख/Pronouncement on	12.03.2024

आदेश /O R D E R

PER C.N. PRASAD, J.M.

These three appeals are filed by the assessee against the common order of Ld. Pr. CIT, Delhi-13 dated 05.03.2018 for the assessment years 2009-10, 2010-11 & 2011-12. Assessee in all these appeals raised the following common grounds: -

1. *"That in the facts and circumstances of the case the impugned order as passed by the Ld. Pr. CIT, Delhi-3 (hereinafter referred to as Ld. PCIT) is bad and against the law as such the same is based on surmises and conjunctures.*

2. *That in the facts and circumstances of the case assessment order dated 30.03.2016 as passed by the Ld. Predecessor AO is neither prejudicial no erroneous to the interest of Revenue as the Ld. Predecessor AO had rightly not initiated the penalty proceedings u/s 271(1)(c) of the Act as the income during the year under consideration was completed on estimated basis u/s 44AD of the Income Tax Act and it is well established under the law that no penalty can be imposed upon an assessee if the income is computed on estimation.*

3. *That in the facts and circumstances of the case the Ld. PCIT wrongly applied the judicial precedent in the case of MAK Data Pvt. Ltd. (2013) 358 ITR 593 (SC) which is distinguishable to the facts and circumstances attracted to the instant case of the Appellant/Assessee.*

4. *That in the facts and circumstances of the case the Ld. PCIT completely ignored from its consideration the binding judicial precedents of the Hon'ble High Court of Delhi in the case of CIT Vs. Sudershan Talkies (1993) 200 ITR 153 Delhi and other judicial precedents wherein it has been held by the Hon'ble Judicial Authorities that the penalty proceedings u/s 271(1)(c) of the Act are independent and separate so the direction of the Ld. PCIT is illegal and without jurisdiction liable to be quashed."*

2. The only issue in all the three appeals is whether the Ld. PCIT is justified in holding that the orders passed by the Assessing Officer u/s 143(3) r.w.s. 147 of the Act for the assessment years 2009-10, 2010-11 & 2011-12 are erroneous in so far as it is prejudicial to the interest of the Revenue as the AO did not initiate the penalty u/s 271(1)(c) of the Act.

3. We have heard rival submissions and perused the orders of the authorities below and the decisions relied on. The issue as to whether the Ld. PCIT is justified in holding that the assessment order is erroneous and prejudicial to the interest of the Revenue for non-initiation of penalty u/s 271(1)(c) has been considered by the Jurisdictional High Court in the case of Addl. CIT Vs. Precision Metal Works & Othrs. (156 ITR 693) and the Hon'ble High Court held that the Commissioner in the proceedings u/s 263 cannot direct Income Tax Officer to initiate penalty proceedings u/s 273 or 271(1)(c) of the Act. While holding so the Hon'ble High Court observed as under:

> *"Turning now to the case of penalty which is covered by the second question, the Tribunal held that the matter was outside the jurisdiction of the Commissioner. On this part of the case, the decision of this court in Addl. CIT Vs. Achal Kumar Jain [1983] 142 ITR 606, has been referred to us in which it was held that the Commissioner is not justified in setting aside the assessment order to direct initiation of penalty proceedings. Following the same, we answer the second question in favour of the assessee and against the Department, but leave the parties to bear their own costs in all the three references."*

4. We also find that the Jurisdictional High Court in the case of Addl. CIT Vs. J K D'costa (133 ITR 7) has been taken a similar view. The Hon'ble High Court held that an assessment cannot be said to be erroneous or prejudicial to the interest of Revenue because of

the failure of ITO to record his opinion on leviability of penalty in the assessment order. The Hon'ble High Court further held as under:

> *"Section 263 of the I. T. Act, 1961, refers to a particular proceeding that is being considered by the Commissioner and it is not possible, when the Commissioner is dealing with the assessment proceedings and the assessment order, to expand the scope of these proceedings which are being sought to be revised by the Commissioner. Proceedings for the levy of a penalty whether under s. 271(1)(a) or s. 273(b) are proceedings independent of and separate from the assessment proceedings. There is no identity between the two. 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 course of the proceedings for assessment. 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.*
>
> *The mere fact that there is some minor omission or mistake in the assessment order cannot justify the action of the Commissioner in setting aside the whole of the assessment order. Such a wholesale cancellation of the assessment with a direction to make a fresh assessment is called for only in cases where there is something totally or basically wrong with the assessment which is not capable of being remedied by amendments to the assessment order itself. Where the Commissioner comes to the conclusion that there is a defect in the assessment order in so far as the question of the levy of interest was not considered by the ITO, all that the Commissioner has to do is to direct the Income-tax Officer to consider the question on merits*

and in accordance with law after giving the assessee an opportunity of being heard. It is not further necessary for him, nor would the circumstances of the case justify, that the whole assessment should be set aside. Setting aside of the assessment wholesale will have far reaching consequences under the Act and the jurisdiction under s. 263 should not be extended so as to result in such far reaching consequences except where the circumstances call for such a remedial action.

In passing the assessment order for the assessment year 1965-66 the Income-tax Officer had failed to charge interest for delayed filing of the return and for failure to pay advance tax. Similarly, for the assessment year 1966-67, he had not charged interest for delayed, filing of the return. Nor did he mention anything for either year regarding the initiation of penalty proceedings under s. 271(1)(a) for the delayed filing of the return, or for the assessment year 1965-66 regarding the initiation of penalty proceedings under s. 273(b) for the failure to pay advance tax. The Commissioner revised the assessments under s. 263 and, holding that the failure to charge interest for both the years under s. 139 and under s. 217 for the assessment year 1965-66 and to initiate penalty proceedings under s. 271(1)(a) for both the years and under s. 273(b) for 1966-67 were prejudicial to the revenue, set aside the assessments and directed the Income-tax Officer to make fresh assessment orders. On appeal, the Tribunal upheld only that portion of the order of the Commissioner relating to interest and held that he could not pass an order relating to penalty while revising the assessment orders under s. 263 and, further, that the Commissioner ought not to have set aside the assessment orders; and modified his order by stating that he will merely direct the Income-tax Officer to consider the question of levy of interest on the merits. On a reference at the instance of the Department:

> *Held, affirming the decision of the Tribunal, (i) that the Commissioner, while revising an assessment order, could not pass orders relating to penalties;"*

5. Similar view has been taken by the Hon'ble Jurisdictional High Court in the following cases: -

1. *P C Puri Vs. CIT (151 ITR 584);*
2. *Addl. CIT Vs. Sudarshan Talkies (200 ITR 153);*
3. *Addl. CIT Vs. Achal Kumar Jain (142 ITR 606);*
4. *CIT Vs. Nehal Chand Rekhyan (242 ITR 45).*

6. Thus, respectfully following the above decisions, we quash the order of the Ld. PCIT dated 05.03.2018 for the assessment years 2009-10 to 2011-12 in holding that the assessment orders passed u/s 143(3) r.w.s. 147 of the Act are erroneous in so far as it is prejudicial to the interest of the Revenue for non-initiating the penalty proceedings u/s 271(1)(c) of the Act.

7. In the result, appeals of the assessee are allowed.

Order pronounced in the open court on 12/03/2024

Sd/-	**Sd/-**
(DR. BRR KUMAR)	**(C.N. PRASAD)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated: 12/03/2024

**Kavita Arora, Sr. P.S.*

Copy of order sent to- Assessee/AO/Pr. CIT/ CIT (A)/ ITAT (DR)/Guard file of ITAT.

By order

Assistant Registrar, ITAT: Delhi Benches-Delhi