

आयकर अपीलीय अधिकरण, हैदराबाद पीठ
IN THE INCOME TAX APPELLATE TRIBUNAL
Hyderabad 'A' Bench, Hyderabad

Before Shri Laliet Kumar, Judicial Member
And
Shri Manjunatha, G. Accountant Member

आ.अपी.सं / **ITA Nos.114 to 116/Hyd/2024**
(निर्धारण वर्ष/Assessment Years: 2017-18 to 2019-2020)

Skill Promoters (P) Ltd Hyderabad PAN:AAWCS1257Q (Appellant)	Vs.	Asstt. C. I. T. Central Circle 2(3) Hyderabad (Respondent)
निर्धारिती द्वारा/Assessee by: Shri P. Murali Moha Rao, Ca		
राजस्व द्वारा/Revenue by: Smt. TH Vijaya Lakshmi, CIT(DR)		
सुनवाई की तारीख/Date of hearing: 27/06/2024		
घोषणा की तारीख/Pronouncement: 03/07/2024		

आदेश/ORDER

Per Manjunatha, G. A.M

These three appeals filed by the assessee are directed against separate, but identical orders passed by the learned Pr. CIT, Central, Hyderabad dated 5.1.2024 and pertains to Asst. Years 2017-18, 2018-19 and 2019-20 respectively. Since facts are identical and issues are common, for the sake of convenience, these appeals were heard together and are being disposed off, by this consolidated order.

2. The assessee has, more or less raised common grounds of appeal for all the A.Ys. Therefore, for the sake of brevity, the grounds of appeal filed for the A.Y 2017-18 are reproduced are as under:

1	The order passed u/s 263 of the Act by the Ld. PCIT(Central) dated 05.01.2024 is erroneous both on facts and in law to the extent it is prejudicial to the interest of the appellant.
2	The Ld. Pr. CIT erred in holding that the Assessment order passed by the AO u/s 143(3) r.w.s. 153A on 26-09-2021 and the order of approval u/s 153D of the Act dated 24-09-2021 issued by the Addl. CIT, Central Range-2, Hyderabad are erroneous and prejudicial to the interests of revenue.
3	The Ld. Pr. CIT erred in setting-aside the assessment to the file of the AO and Addl. CIT, Central Range-2, Hyderabad for the limited purpose of recording satisfaction with regard to non-compliance with the provisions of Section 269SS of the Act.
4.	<p>a) The Ld. CIT(A) ought to have appreciated that the assessment proceedings and penalty proceedings are two independent proceedings, that penalty proceedings cannot form part of the assessment proceedings and that the failure of the AO to record his satisfaction regarding the leviability of penalty cannot be considered as erroneous and prejudicial to the interests of revenue.</p> <p>b) The Ld. Pr. CIT ought to have appreciated that an assessment order for a particular Asst. year cannot be said to be erroneous or prejudicial to interests of the revenue because of the failure of the AO to record his opinion/ satisfaction about the leviability of penalty u/s 271D or 271E of the IT Act, 1961 for that Asst. year.</p>

	<p>c) The Ld. Pr. CIT ought to have appreciated that if he is dealing with an assessment order, he cannot expand his powers u/s 263 of the Act to deal with penalty proceedings when they are not before him.</p> <p>d) The Ld. Pr. CIT has erred in holding that if the AO fails to initiate or record his satisfaction for initiation of penalty proceedings during the course of assessment proceedings it would be a case where the Assessment order can be said to be erroneous and prejudicial to the interests of the Revenue.</p>
5	<p>a) The Ld. Pr. CIT has grossly erred in passing the revisionary order without satisfying the twin conditions that the order should be both erroneous and prejudicial to the interest of the revenue.</p> <p>b) The Ld. Pr. CIT grossly erred in relying on the decision of Supreme Court in the case of CIT vs Jai Laxmi Rice Mills, Ambala City in Civil Appeal No. 1457/2008 which is distinguishable on facts.</p> <p>c) The Ld. Pr. CIT ought to have appreciated that the Supreme Court in the case of Jai Laxmi Rice Mills, Ambala City set aside the penalty order passed u/s 271E of the Act on the ground that no satisfaction had been recorded by the AO and that the Supreme Court did not set aside the very Assessment order in that case.</p>

6	Without prejudice to the other grounds, the order of the Pr. CIT passed u/s 263 of the Act dated 05-01-2024 is invalid and illegal in view of the order of ITAT, 'B' Bench, Hyderabad in the assessee's own case for the AYs 2014-15 to 2020-21 in ITA Nos. 622 to 630 & 677 to 681 & 686 to 688/Hyd/2022 dated 31-10-2023 wherein the Hon'ble ITAT directed the AO to adopt the profit rate of 15% on the impugned unaccounted receipts by observing, among other things, that the money receipts includes registration charges, cost of additional services, etc.
7	The assessee may add, alter, or modify or substitute any other points to the grounds of appeal at any time before or at the time of hearing of the appeal.

3. Facts of the case, in brief, are that the assessee is a private limited company, filed its return of income for the A.Y 2017-18 on 19.10.2017, for the A.Y 2018-19 on 24.10.2018 and for the A.Y 2019-20 on 30.09.2020. A search & seizure operation u/s 132 of the Income tax Act, 1961 was conducted in the case of the assessee on 22.10.2019. Consequent to the search, notice u/s 153A of the Act was issued and in response, the assessee has filed return of income for all the 3 A.Ys. Thereafter, assessment was completed u/s 143(3) r.w.s. 153A on 26.09.2021 after obtaining approval u/s 153D of the I.T. Act, 1961 from the Addl. CIT, Central Range-2, Hyderabad.

4. The case has been subsequently taken up for revision proceedings u/s 263 of the I.T. Act by the learned Principal CIT (Central) Hyderabad. Accordingly, a show cause notice dated

5.10.2023 was issued to the assessee. In the said show cause notice, the learned PCIT observed that the assessments for the A.Y 2017-18 to 2019-20 were completed u/s 143(3) r.w.s. 153A on 26.09.2021 and during the course of assesment proceedings, the Assessing Officer, on the basis of information available and also on the basis of seized material noted that the assessee company had received sale consideration, in cash, over and above the sale value as per registered sale deed and the same was not accounted for in the books of account of the company for all the 3 A.Ys. The Assessing Officer after considering the income admitted by the assessee towards cash consideration, has made further addition as undisclosed income of the assessee towards sale consideration received in cash over and above the sale consideration in the order passed u/s 143(3) r.w.s. 153A dated 26.09.2021. The learned PCIT further noted that although the Assessing Officer has made addition towards cash consideration received over and above consideration as per registered sale deed and said transactions is in contravention of section 269SS of the I.T. Act, 1961, but failed to record satisfaction with regard to the non-compliance of section 269SS for initiating penal provisions u/s 271D of the I.T. Act, 1961, which renders the assessment order to be erroneous insofar as it is prejudicial to interest of the revenue. Therefore, called upon the assessee to explain as to why the assessment order passed by the Assessing Officer u/s 153A dated 26.09.2021 shall not be revised by exercising the powers u/s 263 of the I.T. Act, 1961. In response, the assessee submitted

that the assessment order passed by the Assessing Officer u/s 143(3) r.w.s. 153A dated 26.09.2021 is neither erroneous nor prejudicial to the interest of the Revenue, because the Assessing Officer has considered the issue of cash consideration received in cash, over and above the consideration as per the registered sale deed and also made addition as undisclosed income of the assessee for all the 3 A.Ys. The Assessing Officer having treated the receipts as income of the assessee, chosen to not consider said receipt as loan or deposit for the purpose of section 269SS r.w.s 271D of the I.T. Act, 1961, and therefore, question of recording satisfaction for initiation of penal provisions u/s 271D does not arise. The assessee further contended that said transaction may be treated as loan or deposit or income. The having treated said transaction as loan, has adopted one possible view and thus, unless view taken by the Assessing Officer is not sustainable in law, the learned PCIT cannot invoke his jurisdiction u/s 263 of the I.T. Act. Since the Assessing Officer has taken one of the possible view and the view taken by the Assessing Officer may not be acceptable to the learned PCIT is not a reason for invoking the provisions of section 263 of the I.T. Act, 1961.

5. The learned PCIT after considering relevant submissions and also taking note of the relevant provisions of the Act observed that, the assessment order passed by the Assessing Officer is erroneous in so far as it is prejudicial to the interest of

the Revenue because the Assessing Officer has failed to record satisfaction for initiating penalty proceedings u/s 271D of the Act, even though the cash consideration received over and above sale consideration as per the registered sale deed is in violation of the principles of section 269SS of the I.T. Act, 1961, which attracts penal provisions u/s 271D of the Act. The learned PCIT has discussed the issue in the light of decision of Hon'ble Supreme Court, in the case of CIT vs Jai Laxmi Rice Mills Amabala City reported in (2015) 379 ITR 521 (S.C) where it has been held that non recording of the satisfaction during the course of assessment proceedings is fatal and consequently, the penalty proceedings cannot be sustained and thus by considering the ratio laid down by the Hon'ble Supreme Court held that non-recording of the satisfaction by the Assessing Officer during the course of assesment proceedings for initiating penalty proceedings u/s 271D renders the assessment order to be erroneous and prejudicial to the interest of the Revenue. Therefore, set aside the assessment order passed by the Assessing Officer and consequent order passed by the Addl. CIT Range-2 (Central) Hyderabad u/s 153D of the Act for the limited purpose of recording satisfaction with regard to the non-compliance of the provisions of section 269SS of the I.T. Act, 1961.

6. Aggrieved with such order of the learned Pr. CIT, the assessee is in appeal before the Tribunal.

7. The learned Counsel for the assessee Sri. P. Murali Mohan Rao, CA, submitted that the learned PCIT erred in assuming jurisdiction u/s 263 of the I.T. Act, 1961 by wrongly and incorrectly holding that the Assessing Officer failed to initiate penalty proceedings u/s 271D of the Act for violation referred to u/s 269SS of the I.T. Act, 1961. The learned Counsel for the assessee referring to the assessment order passed by the Assessing Officer submitted that the Assessing Officer while completing the assessment treated the alleged cash receipts as income of the assessee for all the 3 AYs. Therefore, once Assessing Officer has treated the receipts as income of the assessee, then the same cannot be considered as loan/deposits for the purpose of section 269SS of the Act and consequently the Assessing Officer decided to not initiate penalty proceedings u/s 271D of the I.T. Act, 1961. The learned Counsel for the assessee referring to the CBDT Circular No.9/16 dated 26.04.2016 submitted that the CBDT accepted the decision of the Hon'ble Kerala High Court in the case of Gruhalakshmi Vision vs. Addl. CIT, Range-1 Kozhikode 1 vide order dated 7.8.2015 in ITA Nos.83 & 86 of 2014 on the issue of initiation of penalty proceedings u/s 271D and he directed the Assessing Officer to not record satisfaction on their own but refer the case to the Range Head regarding any violation of the provisions of section 269SS of the I.T. Act, 1961 as the case may be in the case of assesment proceedings. The range head while issuing the penalty notice shall discuss/complete the proceedings within the limitation prescribed u/s 275(1)(c) of the

Act. Further, this issue is covered by the decision of the Coordinate Bench of the Tribunal in the case of Goverdhan Naidu vs. DCIT in ITA No.593 to 597/Hyd/2015 wherein it was held that the failure of the Assessing Officer to initiate proceedings u/s 271D for violation of section 269SS could not be considered as an error calling for revision u/s 263 of the I.T. Act, 1961. Therefore, he submitted that the learned PCIT erred in setting aside the assessment order u/s 263 of the I.T. Act, 1961. In this regard, he relied upon the following judicial precedents:

- i) ITAT Jaipur Bench in the case of Harish Jain vs. PCIT (ITA No.214 to 216/JP/2022)
- ii) ITAT Jaipur Bench in the case of Dheeraj Singh Sisodiya vs. PCIT (ITA No.132/JP/2022)
- iii) ITAT Hyderabad Benches in the case of Sri Aditya Homes (P) Ltd in ITA Nos.230 and 2312/Hyd/2023
- iv) Hon'ble Rajasthan High Court in the case of CIT vs. Keshrimal Parasmal (1986) 27 Taxmann 447.
- v) Hon'ble Punjab & Haryana High Court in the case of CIT vs. Rakesh Nain Trivedi (2017) 80 Taxmann.com 238
- vi) ITAT Hyderabad Benches in the case of Sunil Kumar Ahuja vs. DCIT (Ita Nos.501, 502/Hyd/2023)

8. The learned DR, on the other hand, supporting the order of the learned PCIT submitted that the Hon'ble Supreme Court in the case of CIT vs Jai Laxmi Rice Mills Amabala City

(Supra) has considered the issue of recording satisfaction for initiating penalty proceedings u/s 271E of the I.T. Act, 1961 and in the said case it was held that, non-recording of satisfaction during the assessment proceedings is fatal and consequently, the order passed by the Officer under the said section deserves to be set aside. The learned PCIT by following the ratio laid down by the Hon'ble Supreme Court in the above case in light of the assessment order passed by the Assessing Officer has brought out clear facts to the effect that the Assessing Officer has failed to record satisfaction for initiation of penalty proceedings u/s 271D of the I.T. Act, 1961 even though he has noticed violation u/s 269SS of the I.T. Act, 1961 and thus opined that the assessment order passed by the Assessing Officer is erroneous in so far as it is prejudicial to the interest of the Revenue and thus, the order of the learned PCIT should be upheld.

9. We have heard both parties, perused the material available on record and gone through the orders of the authorities below. The fact with regard to the impugned dispute is that in the assessment order passed u/s 143(3) r.w.s. 153A dated 26.09.2021, the Assessing Officer on the basis of incriminating material found during the course of search has assessed the consideration received in cash over and above the consideration as per registered sale deed as undisclosed income of the assessee for all the 3 A.Ys. The assessee challenged the addition made by the Assessing Officer towards undisclosed income being alleged

cash consideration received over and above the consideration as per the registered sale deed, before the appellate authorities and the ITAT Hyderabad Bench, vide order dated 31.10.2023 has considered the issue and after considering the relevant fact has directed the Assessing Officer to consider unaccounted receipts of Rs.68.17 crores as business receipts of the assessee and adopt 15% profit on such receipts. In other words, cash consideration received by the assessee over and above the sale consideration as per the registered sale deed has been treated as income of the assessee for all the 3 AYs by the Assessing Officer and the same has been upheld by the Tribunal with certain modification. Therefore, it is necessary to examine the correctness of order passed by the PCIT, in light of the above facts.

10. The learned PCIT has power to set aside the assessment order by exercising his powers u/s 263 of the I.T. Act, 1961, in case the assessment order passed by the Assessing Officer is erroneous in so far as it is prejudicial to the interest of the Revenue. The assessment order passed by the Assessing Officer can be said to be erroneous in so far as it is prejudicial to the interest of the Revenue, in case the Assessing Officer passed the assessment order without considering the relevant fact in light of applicable provisions of the Act. Unless the learned PCIT makes out a case that the assessment order passed by the Assessing Officer is erroneous in so far as it is prejudicial to the interest of the Revenue with reasons, he cannot invoke jurisdictional powers

to set aside the assessment order. In the present case, the learned PCIT observes that non recording of satisfaction for initiating penalty u/s 271D of the Act for violation referred to u/s 269SS of the Act is erroneous in so far it is prejudicial to the interest of the Revenue. First of all, the penal provisions u/s 271D of the Act shall be imposed by the Jt. Commissioner of Income Tax in case a reference is received by the Assessing Officer with regard to the violation referred to u/s 269SS or 269T of the I.T. Act, 1961. The CBDT has accepted the legal principles laid down by the Hon'ble Kerala High Court in the case of Gruhalakshmi Vision vs. Addl. CIT (Supra) where substantial question before the Hon'ble High Court was whether proceedings for levy of penalty or initiation with the passing of the order of the assessment by the Assessing Officer or whether said proceedings have commenced with the issuance of the notice by the Jt. Commissioner. The Hon'ble High Court after considering the statutory provisions which deals with penalty for violation referred to u/s 269SS and 269T of the I.T. Act, 1961 held that only the Jt. Commissioner can initiate penalty proceedings and such initiation could not have been done by the Assessing Officer. The above judgment has been accepted by the Department and issued a circular No.9/16 dated 26.04.2016 and directed the Assessing Officer to refer the cases of violations u/s 269SS and 269T to the Range Head and the Range Head will issue the penalty notice and shall dispose of/complete proceedings within the limitation prescribed u/s 275(1)(c) of the I.T. Act, 1961. From the above, it is

undisputedly clear that the penalty proceedings u/s 271D shall be initiated by the Jt. Commissioner, but not the Assessing Officer and such proceedings can be initiated after recording satisfaction as required under the law by the authority which is competent to initiate such proceedings. Therefore, in our considered view, the reasons given by the learned PCIT to set aside the assessment order on the ground that non recording of satisfaction by the Assessing Officer during the assessment proceedings renders the assessment order to be erroneous and prejudicial to the interest of the Revenue is incorrect and devoid of merit and this principle is further supported by the decision of the ITAT Hyderabad Bench in the case of Govardhan Naidu vs. DCIT in ITA Nos. 593 to 597/ Hyd/2015 wherein it was held as under:

“8. As regards the second mistake allegedly pointed out by the Ld. CIT in the orders passed by the A.O. under section 143 read with section 153A for all the five years under consideration in not initiating penalty proceedings under section 271D/271E for the violation of the provisions of section 269SS and 269T, it is observed that this issue is squarely covered in favour of the assessee by the decision of Kolkata Bench of this Tribunal in the case of M. Dhara & Brothers vs. CIT-XVI, Kolkata (supra) wherein it was held by the Tribunal by following the decision of Hon'ble Calcutta High Court in the case of CIT vs. Linotype & Machinery Ltd., (supra) that the failure of the A.O. to initiate proceedings under section 271D for violation of section 269SS could not be considered as an error calling for revision under section 263. We therefore, find merit in the contention of the Ld. Counsel for the assessee that there were no errors in the orders passed by the A.O. under section 143(3) read with section 153A of the Act for all the five years under consideration which were prejudicial to the interests of the Revenue calling for revision by the Ld. CIT(A) under section 263. Accordingly, the impugned common order passed by the Ld. CIT under section 263 for all the five years under consideration is set aside restoring back the orders passed by the A.O. under section 143(3) read with section 153A.

11. Having said so, let us come back to another aspect of the issue. Admittedly, the Assessing Officer assessed unaccounted cash receipts as per seized documents as undisclosed income of the assessee and the same has been reached to the Tribunal and the ITAT Hyderabad Bench finally estimated profit on unaccounted business receipts. In other words, the alleged cash receipt considered by the learned PCIT for the purpose of section 269SS r.w.s. 271D has been treated as income of the assessee and the same is subject matter of appeal before the learned CIT (A) and the Tribunal. Once a particular receipt has been treated as income of the assessee, then the same receipt cannot be treated as loan or deposit for the purpose of section 269SS of the I.T. Act, 1961. Therefore, if we look at the issue on this point also, in our considered view, non-recording of satisfaction by the Assessing Officer or non-initiation of penalty u/s 271D of the Act for violation referred to u/s 269SS of the I.T. Act, 1961 is one of the possible view taken by the Assessing Officer because there are divergent views on this issue, therefore, when two views are possible on one issue, and the Assessing Officer has taken one of the possible view, in such cases, the learned PCIT, cannot revise assessment order u/s 263 of the I.T. Act, 1961, unless view taken by the AO is unsustainable in law. Therefore, on this count also, the order passed by the PCIT u/s 263 is not sustainable.

12. Further, as per provision of section 263, Explanation 1(c) where any order referred to in sub-section (1) of section 263

of the I.T. Act, 1961 and passed by the Assessing Officer, is the subject matter of any appeal, the powers of the learned PCIT under this sub section shall extend and shall be deemed always to have extended to such matters as had not been considered and decide in such appeal. In other words, if any issue is the subject matter of appeal before the learned CIT (A), then the said issue cannot be considered by the learned PCIT in revision proceedings. In the present case, the addition made by the Assessing Officer towards cash receipts is a subject matter of appeal before the learned CIT (A). The learned CIT (A) having considered the issue of addition made by the Assessing Officer towards cash consideration as income of the assessee, but not initiated any penalty proceedings u/s 271D of the I.T. Act, 1961. In other words, in our considered view, the issue of violation referred to u/s 263SS of the Act, was within the knowledge of the CIT(A), however, the appellate authority, has affirmed the view taken by the AO and assessed said cash receipts as income of the assessee, but does not consider said cash receipts as loan or deposit for the purpose of section 269SS of the Act. Therefore, in our considered view, the learned CIT(A) has considered the issue of cash receipts in light of provisions of section 269SS r.w.s. 271D of the Act and thus, the said issue cannot be a subject matter of revision powers of the learned PCIT u/s 263 of the I.T. Act, 1961. Therefore, on this ground also, assuming jurisdiction by the learned PCIT is incorrect and devoid of any merit.

13. As regards the case law relied upon by the learned DR and considered by the learned PCIT in the case of CIT vs. Jai Lakshmi Rice Mills Ambala City (Supra), in our view, in the above case, the question before the Hon'ble Supreme Court was in pursuant to set aside assessment proceedings, whether the Assessing Officer is required to record satisfaction regarding initiation of penalty proceedings u/s 271E of the I.T. Act, 1961. Under those facts, the Hon'ble Supreme Court held that where the Assessing Officer passed a fresh assessment order wherein no satisfaction was recorded for initiating penalty proceedings u/s 271E, the impugned penalty order passed under the said section deserves to be set aside. Further, in the above case, the Hon'ble Supreme Court does not consider the issue of erroneous order passed by the Assessing Officer which is prejudicial to the interest of the Revenue in light of non-recording of satisfaction by the Assessing Officer. Therefore, in our considered view, the decision relied upon by the learned DR cannot be applied to the facts of the present case.

14. In this view of the matter and considering the facts and circumstances of the case, we are of the considered view that the learned PCIT erred in set aside the order passed by the Assessing Officer u/s 143(3) r.w.s. 153A dated 26.09.2021 for A.Ys 2017-18, 2018-19 and 2019-2020 respectively. Thus, we set aside the order passed by the learned PCIT u/s 263 of the I.T. Act,

1961 and restore the assessment order passed by the Assessing Officer u/s 143(3) r.w.s. 153A dated 26.09.2021 for all the 3 AYs.

15. In the result, appeals filed by the assessee for all the 3 A.Ys are allowed.

Order pronounced in the Open Court on 3rd July, 2024.

Sd/- (LALIET KUMAR) JUDICIAL MEMBER	Sd/- (MANJUNATHA, G.) ACCOUNTANT MEMBER
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Hyderabad, dated 3rd July, 2024

Vinodan/sps

Copy to:

S.No	Addresses
1	Skill Promoters (P) Ltd C/o P Murali & Co. CAs, 6-3-655/2/3 Somajiguda, Hyderabad 500082
2	ACIT, Central Circle 2(3) Hyderabad
3	Pr. CIT -CENTRAL, Hyderabad
4	DR, ITAT Hyderabad Benches
5	Guard File

By Order