

IN THE INCOME TAX APPELLATE TRIBUNAL  
PUNE BENCH "A", PUNE

BEFORE SHRI R. K. PANDA, VICE PRESIDENT  
AND  
SHRI VINAY BHAMORE, JUDICIAL MEMBER

आयकर अपील सं. / ITA No.1023/PUN/2024  
निर्धारण वर्ष / Assessment Year: 2020-21

Hasmukh Hirji Gada, 1073, Bhosale Mystiqa, Plot No.425, Flat No.203, Gokhale Road, Om Super Market, Shivaji Nagar, Pune- 411002. PAN : ADXPS3533L	Vs.	PCIT (Central), Pune.
Appellant		Respondent

Assessee by : Shri Neelesh Khandelwal  
Revenue by : Shri Keyur Patel  
Date of hearing : 02.09.2024  
Date of pronouncement : 07.11.2024

**आदेश / ORDER**

**PER VINAY BHAMORE, JM:**

This appeal filed by the assessee is directed against the order dated 11.03.2024 passed by LD. PCIT (Central), Pune for the assessment year 2020-21.

2. The appellant has raised the following grounds of appeal :-

"1. On the facts and circumstances prevailing in the case and as per provisions of law it be held that the order passed by the Principal Commissioner of Income Tax under Section 263 for initiating the penalty under section 271AAC of the Act is without jurisdiction and hence is improper, unwarranted, unjustified and contrary to the provisions of law and facts prevailing in the case. The order passed u/s. 263 be set aside. The Appellant be granted just and proper relief in this respect.

2. *On the facts and circumstances prevailing in the case and as per provisions of law it be held that the Principal Commissioner of Income Tax ought to have considered the judgement of the Honorable Jurisdictional Pune Tribunal while passing order under Section 263 for initiating the penalty under section 271AAC of the Act. It be held that the order passed is against the provisions of the law. The order passed u/s. 263 be set-aside. The Appellant be granted just and proper relief in this respect.*
3. *On facts and circumstances prevailing in the case and as per provisions and scheme of the Act, it is prayed that it be held that the Appellant deserves to be awarded costs and appropriate directions may be issued in this regard.*
4. *The Appellant craves leave to alter, add, amend, modify, rectify, delete, raise any grounds of appeal at the time of hearing.”*

3. The facts of the case, in brief, are that the assessee is an individual e-filed his return of income on 31.12.2020 declaring total income of Rs.1,43,24,720/-. A search and seizure action u/s 132 of the IT Act was carried out at his residential premises during 04-11-2019 to 05-11-2019. During the course of search action, cash of Rs.9,61,21,400/- was found from the premises of the assessee & the assessee failed to furnish any satisfactory explanation regarding source of cash of Rs.9,54,97,018/- out of the total cash found. Accordingly, the Assessing Officer made addition of Rs.9,54,97,018/- u/s 69A and completed the assessment u/s 143(3) of the IT Act on a total income of Rs.10,98,21,738/- as against the income of Rs.1,43,24,720/- returned by the assessee.

The Assessing Officer charged interest u/s 234A/234B/234C/234D as applicable and also issued penalty notice u/s 271AAB(1A) of the IT Act. Subsequently On perusal of the above assessment order and records, it was found by Ld. PCIT (Central), Pune, that the addition regarding unexplained cash of Rs.9,54,97,018/- was made u/s 69A of the IT Act and the same was taxed as per the provisions of section 115BBE of the IT Act, but the Assessing Officer failed to initiate penalty proceedings u/s 271AAC of the IT Act. In view of the above, a show cause notice u/s 263 of the IT Act was issued to the assessee stating that the Assessing Officer failed to initiate the penalty proceedings u/s 271AAC of the IT Act and therefore, assessment order u/s 143(3) dated 29.09.2021 passed by the AO for assessment year 2020-21 appears to be erroneous in so far as it is prejudicial to the interest of the revenue. In response to the above statutory notice issued u/s 263 of the IT Act, the assessee furnished his reply contending that penalty proceedings cannot be initiated at the instance of higher authorities and relied on various Judgements / decisions passed by various Hon'ble High Courts and Tribunals. Being unsatisfied with the reply of the assessee, ld. PCIT (Central), Pune, vide order dated 11-03-2024, held that since penalty proceedings was not initiated

the assessment order dated 29.09.2021 passed u/s 143(3) of the IT Act is erroneous in so far as it is prejudicial to the interest of the revenue. Accordingly, he set-aside the assessment order dated 29.09.2021 passed u/s 143(3) to the file of the Assessing Officer for fresh assessment and initiation of penalty proceedings under correct provisions as applicable to the facts of the case.

4. Being aggrieved with the above order passed u/s 263 of the IT Act by ld. PCIT (Central), Pune, the assessee is in appeal before this Tribunal.

5. Ld. AR submitted before us that the order passed by ld. PCIT (Central), Pune u/s 263 of the IT Act is not correct. It was submitted by ld. Counsel of the assessee that initiation of penalty proceedings u/s 271AAC of the IT Act are discretionary and based upon the satisfaction of the Assessing Officer. Such penalty proceedings cannot be initiated at the instance of the higher authorities. It was accordingly submitted that exercising revisional jurisdiction u/s 263 of the IT Act for non-initiation of penalty proceedings u/s 271AAC of the IT Act is against the provisions of the IT Act. It was also submitted that non-initiation of such penalty proceedings cannot render the assessment order erroneous or prejudicial to the interest of the revenue. In support of above

contention, ld. Counsel for the assessee relied on the following judgements/decisions :-

- (i) M/s. B.S. Engineering Works Pvt. Ltd. vs. PCIT (ITA No.249/PUN/2020) (Pune Tribunal).
- (ii) Shri Jayesh V. Sheth vs. CIT (ITA No.3920/MUM/2017) (Mumbai Tribunal).
- (iii) ACIT vs. J. K. D's Costs (9 Taxman 88) (Delhi High Court).
- (iv) CIT vs. Rakesh Nain Trivedi (80 taxmann.com 238) (Punjab & Haryana High Court).

6. Accordingly, ld. AR requested before the Bench to set-aside the impugned order passed by ld. PCIT (Central), Pune.

7. Ld. DR appearing for the Revenue heavily relied on the order passed by ld. PCIT (Central), Pune and requested to confirm the same.

8. We have heard ld. Counsels from both the sides and perused the material available on record. We find that ld. PCIT (Central), Pune in his order has relied on following judgements passed by Hon'ble Courts such as :-

- (i) CIT vs. Surendra Prasad Agrawal, 275 ITR 113 (All.).

- (ii) Addl.CIT vs. Indian Pharmaceuticals, 123 ITR 874 (MP).
- (iii) Addl.CIT vs. Kantilal Jain, 125 ITR 373 (MP).
- (iv) Jyoti Ranjan Roy, vs. PCIT, ITA No.1015/Kol/2017.
- (v) CIT vs. Ashok Construction Company, 280 ITR 368 (All).
- (vi) CIT vs. Associated Contractors Corpn. 275 ITR 123 (All).

9. On the other hand Ld. Counsel of the assessee also relied on various judgements / decisions (cited supra) in support of his contention that initiation of penalty proceedings u/s 271AAC of the IT Act are discretionary and based upon the satisfaction of the Assessing Officer and such penalty proceedings cannot be initiated at the instance of the higher authorities. We therefore find that there are divergent views of different Hon'ble High Courts. In such kind of situation, we get support from a decision passed by a Co-ordinate Bench of this Tribunal in the case of Shri Jayesh V. Sheth vs. CIT (ITA No.3920/MUM/2017 (Mumbai Tribunal) wherein direction given in proceedings 263 of the IT Act was set-aside by following Judgements of Honourable Delhi, Gujrat,

Gauhati, Calcutta & Punjab & Haryana High Courts. The Tribunal observed as under :-

*“6. .... The Assessing Officer did not initiate penalty proceedings u/s. 271(1)(c) of the Act at the disallowance/addition made in the Assessment Orders. According to the Learned Commissioner of Income Tax the Assessing Officer should have initiated penalty proceedings us. 271(1)(c) of the Act and since he has not initiate penalty proceedings he held that the omission on the part of the Assessing Officer to initiate penalty proceedings during the course of assessment has rendered Assessment Orders erroneous and prejudicial to the interest of Revenue. Thus the Learned Commissioner of Income Tax directed the Assessing Officer to pass a fresh Assessment Order. The issue before us now to be decided is whether the Learned Commissioner of Income Tax has power u/s 263 of the Act to direct the Assessing Officer to initiate the penalty proceedings u/s. 271(1)(c) of the Act. We find similar issue has come up in the case of Dharmanandan Diamonds Pvt. Ltd v ACIT in ITA No. 1624/Mum/2014 dated 23.03.2017 and the Coordinate Bench following decision of the Hon'ble Gujarat High Court in the case of CIT v Paramanand M Patel [278 ITR 3) and the Hon'ble Punjab and Haryana High Court in the case of CIT v. Subhash Kumar Jain [335 ITR 364] set aside the order of the Learned Commissioner of Income Tax passed u/s 263 of the Act in directing the Assessing Officer to initiate penalty proceedings u/s. 271(1)(c) of the Act observing as under:-*

*"4. We have heard the rival submissions, perused the orders of the authorities below. The question to be addressed in this appeal is whether the Ld. Commissioner has power u/s 263 of the Act to direct the Assessing Officer to initiate penalty proceedings u/s 271(1)(c) of the Act. The Ld. Commissioner passed order u/s 263 holding that the omission on the part of the Assessing Officer to initiate penalty proceedings during the course of assessment has rendered the assessment order erroneous and prejudicial to the interest of the revenue. He placed reliance on the decision of Allahabad High Court in the case of CIT Vs. Surendra Prasad Agarwal [275 ITR 113). The Allahabad High Court held that omission of the Assessing Officer to initiate penalty proceedings in the course of assessment, rendered assessment order erroneous and prejudicial to the interest of the revenue and Ld. Commissioner has jurisdiction to revise such an order u/s 263 of the Act. However, we find that this decision of the Allahabad High Court has been considered and dissented by the Gujarat High*

*Court in the case of CIT Vs. Paramanand M Patel (supra) and held that the Ld Commissioner cannot set aside the assessment and direct the Assessing Officer to initiate penalty proceedings. Similar view has been taken by the Punjab and Haryana High Court in the case of CIT Vs. Subash Kumar Jain (supra). There are divergent views of the High Courts on the subject. Therefore, following the order of the Hon'ble Supreme Court in the case of CIT Vs. Vegetable Products [82 ITR 1). when two views are possible, the view in favour of the Assessee is to be followed. Therefore, respectfully following the decision of the Gujarat High Court in the case of CIT Vs Paramanand Patel (supra) and the decision of Punjab & Haryana High Court in the case of CIT Vs. Subash Kumar Jain (supra) we set aside the order of the Commissioner passed u/s 263 in directing the Assessing Officer to initiate penalty proceedings u/s 271(1)(c) of the Act."*

7. *In the case of CIT v. Rakesh Nain Trivedi (supra) the Hon'ble Punjab and Haryana High Court concluded that where the Commissioner of Income Tax finds that the Assessing Officer had not initiated penalty proceedings u/s 271(1)(c) of the Act in the Assessment Order he cannot direct the Assessing Officer to initiate penalty proceedings u/s. 271(1)(c) of the Act in exercising of revisional power u/s 263 of the Act. The Hon'ble High Court held 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 Section 263 of the Act hold the order of the Assessing Officer to be erroneous and prejudicial to the interest of the revenue where the AO had failed to initiate penalty proceedings while completing assessment under Section 153A of the Act.*

6. *It may be noticed that the said issue is no longer res integra. This Court in Commissioner of Income Tax v. 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), Addl. 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's Costa's case (supra).*

*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.”*

*8. Thus, respectfully following the above decisions we set aside the orders passed u/s. 263 of the Act by the Learned Commissioner of Income Tax for the Assessment Years 2010-11, 2011-12 and 2012-13 which are under consideration before us.”*

10. From the perusal of the above decision, we find that Hon’ble Delhi, Rajasthan, Calcutta, Gauhati & Punjab & Haryana High Courts are in favour of the assessee and Hon’ble Madhya Pradesh and Hon’ble Allahabad High Courts are against the assessee. No decision of the Jurisdictional High Court on this issue was brought in our knowledge by either of the party. We find the Co-ordinate Bench of this Tribunal after following the judgements of Hon’ble Delhi, Rajasthan, Calcutta, Gauhati & Punjab & Haryana High Courts has set-aside the order passed u/s 263 of the IT Act giving direction to initiate penalty proceedings. Accordingly respectfully following the decision passed in the case of Shri Jayesh V. Sheth vs. CIT, ITA No 3920/MUM/2017, we are of the considered opinion that in the instant case the direction given by Id. PCIT

(Central), Pune u/s 263 of the IT Act to initiate penalty proceedings in the case of the assessee are not justified. Accordingly, the impugned order u/s 263 of the IT Act passed by Id. PCIT (Central), Pune is set-aside.

11. In the result, the appeal filed by the assessee is allowed.

Order pronounced on this 07<sup>th</sup> day of November, 2024.

Sd/-  
**(R. K. PANDA)**  
**VICE PRESIDENT**

Sd/-  
**(VINAY BHAMORE)**  
**JUDICIAL MEMBER**

पुणे / Pune; दिनांक / Dated : 07<sup>th</sup> November, 2024.

*Sujeet*

**आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The PCIT (Central), Pune.
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "A" बेंच, पुणे / DR, ITAT, "A" Bench, Pune.
5. गार्ड फ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

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Senior Private Secretary  
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune.