

आयकर अपीलीय अधिकरण, रायपुर न्यायपीठ, रायपुर
IN THE INCOME TAX APPELLATE TRIBUNAL RAIPUR BENCH, RAIPUR
श्री रविश सूद, न्यायिक सदस्य एवं श्री अरुण खोड़पिया, लेखा सदस्य के समक्ष ।
BEFORE SHRI RAVISH SOOD, JM & SHRI ARUN KHODPIA, AM

आयकर अपील सं. / ITA No: 212/RPR/2024

(निर्धारण वर्ष Assessment Year: 2017-18)

Shri Vijay Kumar Patel, Fafadih Chowk, Timber Market, Raipur-492001 (C.G.)	v s	Principal Commissioner of Income Tax- Raipur-1, Chhattisgarh
PAN: AEOPP8115R		
(अपीलार्थी/Appellant)	.	(प्रत्यर्थी / Respondent)
निर्धारिती की ओर से /Assessee by	:	Shri Sakshi Gopal Aggarwal, CA
राजस्व की ओर से /Revenue by	:	Shri S. L. Anuragi, CIT-DR
सुनवाई की तारीख / Date of Hearing	:	23.12.2024
घोषणा की तारीख/Date of Pronouncement	:	08.01.2025

आदेश / ORDER

Per Arun Khodpia, AM:

The captioned appeal is filed by the assessee against the order of Pr. Commissioner of Income Tax, Raipur -1 u/s 263 of the Income Tax Act, 1961 dated 13.03.2024, for the Assessment Year 2017-18, which in turn arises from the order passed by Assessing Officer, NFAC, Delhi, u/s 147 r.w.s. 144B of the Act, dated 26.03.2022.

2. The grounds of appeal raised by the assessee are as under:

1. That on the fact and circumstances of the case of appellant the assessment order u/s 147 r.w.s. 144B dt. 26.03.2022 was in itself had been passed by the Id. Assessing officer without assumption of jurisdiction and was therefore invalid and non-est in the eyes of law. Therefore, the learned Principal Commissioner of Income-tax, Raipur-1, revising such non-est order had exceeded his jurisdiction u/s 263 of IT Act.
2. That the learned Principal Commissioner of Income-tax, Raipur-1, failed to appreciate that the first appeal of the appellant against addition made in the assessment order on impugned issue, i.e. treating credit sale as unexplained cash credit u/s 68, was pending before the Commissioner (Appeals) NFAC and therefore the order u/s 147 r.w.s. 144B could not be revised u/s 263 of the Act.
3. That the learned Principal Commissioner of Income-tax Raipur-1, erred in law as well as on the facts of the case in assuming jurisdiction u/s 263 of the Act by wrongly and incorrectly holding that the AO instead of initiating penalty proceeding u/s 271AAC initiated the penalty proceedings u/s 271(1)(c) of the Act, hence, the assessment order passed by the AO on dated 26.03.2022 u/s 147 r.w.s. 144B, erroneous and prejudicial to the interest of revenue. The very assumption of jurisdiction is contrary to the provisions of law and facts on record. Hence, the proceedings so initiated u/s 263 of the Act and the impugned order dated 13.03.2024 deserves to be quashed.
4. That on the facts and circumstances of the case and in law, the learned Principal Commissioner of Income-tax, Raipur-1, erred in exercising jurisdiction u/s 263 by setting aside the assessment order u/s 147 r.w.s 144B on the plea that assessing officer had failed to make proper enquiry in detail while framing the assessment u/s 147 r.w.s. 144B of the Act.
5. That on the facts and circumstances of the case and in law, the order passed by the learned Principal Commissioner of Income-tax, Raipur-1, u/s 263 of the IT Act setting aside the assessment framed u/s 147 r.w.s. 144B of the Act as erroneous and prejudicial to the interest of the revenue is without jurisdiction, bad in law and void ab-initio.
6. That, assessee reserves the right to add, amend, alter or withdraw any ground/grounds of appeal at the time of hearing.

3. Further, the assessee has raised an additional ground during the appellate proceedings before us, same is culled out as under:

BEFORE THE HON'BLE INCOME TAX APPELLATE TRIBUNAL
RAIPUR BENCH/RAIPUR

In the case of

Shri Vijay Kumar Patel Fafadih Chowk, Timber Market, Fafadih, Raipur- 492001	***	Appellant
Vs		
The Principal Commissioner Of Income Tax, Raipur-1	***	Respondent

Appeal No. : ITA 212/RPR/2024

Assessment Year : 2017-18

Date of Hearing : 13/12/2024

Application for admitting additional grounds of appeal

Most respectfully Sheweth :-

1. The above referred appeal preferred by the assessee is fixed for hearing before your honours' on 13/12/2024.
2. That your honour, the appellant prays for raising additional ground of appeal before your honours' as under :-

Additional Ground of Appeal

“Without prejudice to the grounds taken in Form no. 36, in the facts and in law, assessment order passed u/s 143(3) rws 147 rws 144B dt. 26/03/2022 by Learned Assessing Officer, NFAC is illegal and bad in law, as it ought to have been passed u/s 144 of the Income Tax Act, 1961, in the absence of a valid return of income filed by the assessee in response to notice u/s 148 of Income Tax Act, and therefore such assessment order is unsustainable in law and liable to be quashed. And consequentially, the Learned PCIT, Raipur-1 revising such non-est order had exceeded his jurisdiction u/s 263 of IT Act.”

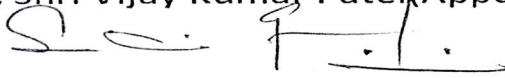
That your honours, it is most humbly prayed that since the issue relating to jurisdiction goes to the root of the matter and is purely legal issue and all the relevant facts are already on record. Therefore, it is most humbly requested that that the appellant may kindly be allowed to raise and argue above ground as additional grounds of appeal

For such Act of Kindness, the appellant shall ever pray.

Thanking you,

Yours sincerely,

For, Shri Vijay Kumar Patel (Appellant)



(Sakshi Gopal Agrawal)
Counsel for Appellant

Place :- Raipur

Date :- 13/12/2024

4. Brief facts of the case are that the assessee has filed his original return of income electronically on 08.09.2017, declaring total income at Rs. 7,22,490/-. There was credible information available with the Department that the assessee has taken entry of Rs. 5,00,000/- from bogus concern namely Ankit Trading Co., Pandri, Raipur. Accordingly, the case was re-opened with the approval of competent authority. The assessment of the above case for the A. Y. 2017-18 was completed u/s 147 r.w.s. 144B of the Income Tax Act, 1961 on 26.03.2022 determining the income of the assessee at Rs. 12,22,490/-. The AO has made addition Rs. 5,00,000/- treating as unexplained cash credit u/s. 68 of the I. T. Act and penalty u/s 271(1)(c) was initiated.

4.1 Subsequently, it is noticed by the Ld. PCIT that, as per assessment order, Ld. AO had made an addition of Rs. 5,00,000/- was made u/s 68 of the I. T. Act,

accordingly, this amount was required to be taxed at special rate as per the provisions of section 115BBEE of the I. T. Act. However, it is found that the amount was erroneously taxed at normal rate. It was also observed that penalty proceeding was inadvertently initiated u/s 271(1)(c) of the Act. It is noted that penalty u/s 271 (1)(c) of the Act, was not applicable for the Asstt. Year 2017-18. Ld. PCIT further observed that, it is a well-known fact that from the Asstt. Year 2017-18 onwards in cases where income determined includes any income referred to in section, 68, 69, 69A, 69B, 69C and 69D for any previous year, the assessee shall pay by way of penalty, in addition to tax payable under section 115BBE, a sum computed at a rate of 10% of the tax payable under clause (i) of sub section (1) of section 115BBE. In other words, penalty u/s 271AAC is applicable in this case instead of penalty u/s 271(1)(c) of the Income Tax Act, 1961. As such, the assessment order passed by the Assessing Officer was held to be erroneous in so far as it is prejudicial to the interest of Revenue.

5. Considering the facts narrated in the foregoing paras which have emanated from the case record, Ld. PCIT observed that the order passed u/s 147 r.w.s. 144B of the Income Tax Act, 1961 vide order dated 26.03.2022 is erroneous in so far as it is prejudicial to the interests of revenue, in the light of section 263 of the Income Tax Act, 1961. As per Ld. PCIT, since the issues discussed supra

have not been properly verified by the AO while passing the assessment order by conducting proper enquiries.

6. In view of the above facts, a show cause e-notice u/s 263 dated 09.10.2023 was issued to the assessee, incorporating the above facts, asking to furnish his reply in support of his claim.

7. Subsequently, in response to the aforesaid show cause notice, the assessee furnished a reply before the Ld. Pr. CIT on 28.11.2023, stating that as per *doctrine of merger*, it is well settled law that when the impugned addition is subject matter of appeal, then Ld. Pr. CIT cannot exercise his revision power u/s 263 of the Income Tax Act for the same matter. Assessee placed his reliance in the decision of ITAT, Rajkot in case of R M Tradelink vs. PCIT, submitting that in the said case, it has been held that once the proceedings are before Ld. CIT(A) in respect of certain issues, then the same issue again cannot be re-agitated by taking recourse to proceedings u/s 263 of the Act.

8. The response of the assessee was considered by PCIT but had not found convincing to accept the same. Ld. PCIT perceived that the addition in the case of assessee, was made u/s 68 of the Act, penalty was not initiated u/s 271(1)(c) of the Act, whereas the case is related to AY 2017-18, therefore, the penalty provisions of section 271AAC are applicable. Accordingly, the assessment order

dated 26.03.2022, is erroneous in so far as it is prejudicial to the interest of revenue, therefore, the same is set aside to the Ld. AO for fresh adjudication.

9. Aggrieved with the aforesaid order by the Pr. CIT, assessee preferred an appeal before the ITAT, which is under consideration in the present case.

10. Ground no. 1 & Additional Ground dated 12.12.2024

10.1 At the outset, Ld. Authorized Representative, Shri Sakshi Gopal Aggarwal, CA (in short "Ld. AR"), denoting ground no. 1 & additional ground, has assailed the validity of order passed by the Pr. CIT, Raipur-1, u/s 263 of the Act dated 13.03.2024, *inter alia*, for the reason that the Assessment order passed by the Ld. AO u/s 147 r.w.s. 144B of the Act dated 26.03.202, *dehors* issuance of notice u/s 143(2) of the Act, dated 26.03.2022 was itself invalid, therefore, such invalid order could not have been subjected to revision u/s 263 of the Act. For verification of this factual aspect, Ld. CIT-DR, Shri S. L. Anuragi was directed to produce the assessment record along with a report of the Ld. AO. In response, a report of Ld. AO dated 03.09.2024 was furnished by the Ld. CIT-DR. Further, it is noticed that the assessee had not e-verified the return filed u/s 148, therefore, the same remain invalid / Pending for verification, therefore, a question cropped up that, whether a notice u/s 143(2) can be generated through ITBA portal in a case wherein the

return filed u/s 148 was not e-verified by the assessee, to which it was submitted by the Ld. CIT-DR that a notice u/s 143(2) cannot be generated / issued by the Ld. AO through the ITBA portal, if the returned filed by the assessee is pending for verification.

10.2 In rebuttal, it was the submission by Ld. AR on behalf of the assessee that the Ld. AO has acted upon the return filed by the assessee, therefore, in absence of issuance of notice u/s 143(2), the assessment completed would be an invalid assessment. Ld. AR further come up with an alternative plea, referring the additional ground raised on 12.12.2024, that if the return filed by the assessee is to be taken as a invalid return / no return then without prejudice to the grounds taken by the assessee in form 36, the assessment framed ought to have been passed u/s 144 of the Income Tax Act, and not u/s 143(3) r.w.s. 147 r.w.s. 144B of the Act, therefore, such assessment order is unsustainable in law and liable to be quashed, consequently, the order of Pr. CIT u/s 263 passed on such a non-est order had exceeded his jurisdiction u/s 263 of the I T Act.

10.3 Contradicting the aforesaid contentions by the assessee, Ld. CIT-DR requested for some time to obtain report from the concerned AO on this aspect. In rebuttal, accordingly, a report dated 17.12.2024 by the Ld. AO is submitted, the same is culled out for the sake of clarity and completeness of facts.

BC
19/12/24

Govt. of India : Ministry of Finance : Deptt. Of Revenue
OFFICE OF THE COMMISSIONER OF INCOME TAX(DR)(ITAT)
 B & C Wing, 5th Floor, Central Secretariat Building, Sector-24,
 Atal Nagar, Naya Raipur (CG)
 e-mail: raipur.addlcit.itat@incometax.gov.in

F. No. CIT-ITAT/RPR/REPORT/2024-25

Dated: 19/12/2024

To
 The Assistant Registrar,
 Income Tax Appellate Tribunal,
 Raipur.

P.O.H. 23/12/24

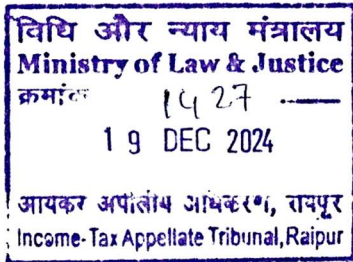
DB

Sir,

**Sub: Submission of report of A.O. on Additional Ground of
 appeal raised by the assessee in the case of Shri Vijay
 Kumar Patel, ITA-212/RPR/2024 – AY 2017-18 -- reg.**

Kindly find enclosed herewith copy of report of A.O. in duplicate
 on Additional Ground of appeal raised by the assessee in the case of
 Shri Vijay Kumar Patel, ITA-212/RPR/2024 for AY 2017-18 with a
 request to kindly place on record of the Hon'ble Bench.

Encl.: As above.



(S. L. Anuragi)

Commissioner of Income Tax(DR)
 ITAT, Raipur

GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)
OFFICE OF THE INCOME TAX OFFICER - 3(1)
AAYAKAR BHAWAN, CIVIL LINES, RAIPUR - 492001

F. No. ITO-3(1)/Rpr/Vijay Ku Patel/2024-25/

Dated: 17.12.2024

To,

The Commissioner of Income Tax (DR)
ITAT, Raipur

Sir,

Sub: Calling for report in the case of Vijay Kumar Patel in ITA No. 212/RPR/2024 for A.Y. 2017-18- Reg.

Kindly refer to your letter F. No. CIT-ITAT/RPR/Vijay/2023-24 dated 12.12.2024 on the subject above wherein you directed the undersigned to offer the report on the addition ground raised by the assessee.

2. In this regard, it is submitted that on going through the additional ground raised, it is observed that the assessee has contended that the assessment order passed u/s 147 r.w.s. 144B of the Act dated 26.03.2022 by the FAO is illegal and bad in law as it was to be passed u/s 144 of the Act in absence of valid return of income filed by the assessee in response to notice u/s 148 of the Act. Further, the assessee has also contended that the Pr. CIT-I, Raipur revising such no-est order has exceeded his jurisdiction u/s 263 of the Act.

3. The contention raised by the assessee in the additional ground regarding the passing of assessment order u/s 147 r.w.s. 144B of the Act instead of 144 of the Act in absence of valid return of income filed by the assessee in response to notice u/s 148 of the Act is not tenable. On perusal of the CPC portal, it is observed that the assessee has filed the return of income in response to notice u/s 148 of the Act, however, the same was not verified by him due to which the return of income filed by him is reflecting as "Pending for verification". As the return of income was not verified by the assessee for the reasons best known to him, therefore, notice u/s 143(2) cannot be generated/issued by the AO through the ITBA portal. Thus, it is default on the part of the assessee as the return of income should have been verified by him. Further, section 144 of the Act states that order u/s 144 of the Act can be passed if either of the three conditions

provided in section 144 of the Act is fulfilled. Firstly, if any person fails to make the return required under sub-section (1) of section 139 and has not made a return or a revised return under sub-section (4) or sub-section (5) of that section. Secondly, if any person fails to comply with all the terms of a notice issued under sub-section (1) of section 142 or fails to comply with a direction issued under sub-section (2A) of that section. Thirdly, if any person having made a return, fails to comply with all the terms of a notice issued under sub-section (2) of section 143. The section 144 of the Act is reproduced below for kind reference:

"144. (1) If any person –

(a) fails to make the return required under sub-section (1) of section 139 and has not made a return or a revised return under sub-section (4) or sub-section (5) of that section, or

(b) fails to comply with all the terms of a notice issued under sub-section (1) of section 142 or fails to comply with a direction issued under sub-section (2A) of that section, or

(c) having made a return, fails to comply with all the terms of a notice issued under sub-section (2) of section 143,

the Assessing Officer, after taking into account all relevant material which the Assessing Officer has gathered, shall, after giving the assessee an opportunity of being heard, make the assessment of the total income or loss to the best of his judgment and determine the sum payable by the assessee on the basis of such assessment:

It is fact on the record that none of the above clauses relating to section 144 of the Act applies in the case of the assessee for the following reason:

- i) The assessee has furnished the return of income as required u/s 139(1) of the Act on 08.09.2017 and therefore clause (a) of section 144 of the Act does not apply.
- ii) The assessee has responded to the notices issued to him u/s 142(1) of the Act during the assessment proceedings and therefore clause (b) of section 144 of the Act does not apply.
- iii) Since, notice u/s 143(2) of the Act could not be issued for the reason stated in para (3) above and therefore clause (c) of section 144 of the Act does not apply.

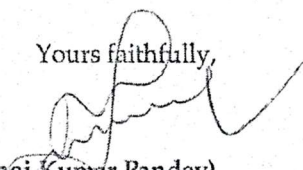
From the above, it is clear that the case of the assessee does not fall in either of the three conditions [(a), (b), (c)] mentioned in section 144 of the Act, therefore, the AO has rightly passed the assessment order u/s 147 r.w.s. 144B of the Act and the objection raised by the assessee is not tenable.

4. Further, the assessee has contended that the Pr. CIT-1, Raipur revising such no-est order has exceeded his jurisdiction u/s 263 of the Act. In this regard, it is submitted that as per section 263 of the Act the PCIT may call for and examine the record of any proceeding under the I.T. Act, 1961, and if he considers that any order passed therein by the Assessing Officer is erroneous in so far as it is prejudicial to the interests of the revenue. In the instant case, the Pr. CIT-1, Raipur after making detailed discussion and after providing opportunity of being heard to the assessee has passed the order u/s 263 of the Act dated 13.03.2024. Therefore, the order u/s 263 of the Act was passed by the Pr. CIT-1, Raipur in accordance with the provisions of the I.T. Act, 1961.

5. In view of the above facts and the conditions laid down in section 144 of the Act, the contention of the assessee raised in the additional ground before the Hon'ble ITAT is not maintainable.

Submitted for your kind consideration.

Yours faithfully,


(Manoj Kumar Pandey)
Income Tax Officer -3(1)
Raipur

10.4 We have considered the rival submissions, perused the material available on record and case laws relied upon by the parties. While deliberating upon the aforesaid issue, the controversies to be addressed by us are, (i) whether notice u/s 143(2) can be issued in absence of a valid return filed by the assessee. Under the settled position of law, as per provisions of section 143(2), where a return has been furnished u/s 139 or in response to notice

under subsection (1) of section 142, the Assessing Officer, if considered it necessary or to expedient to ensure that the assessee has not under stated the income or has not computed excessive loss or has not under paid the tax in any manner, shall serve on assessee a notice requiring him either to attend or to produce or cause to be produced any evidence before the Ld. AO on which the assessee may rely in support of the return. Accordingly, for issuance of notice u/s 143(2), there is a precondition that there should be a return u/s 139 or in response to notice u/s 142(1). In the present case, the return filed by the assessee in response to u/s 148, on which the provisions of Income Tax Act shall apply, as if such return was a return required to be furnished u/s 139 of the Act, consequently, the return shall be treated as a valid return if the same is filed in accordance with the prescribed provisions of section 139. To understand and interpret that whether the returned filed by the assessee in response to notice u/s 148 shall be treated as a valid return, we have to go through the provisions of section 139, wherein it is mandatory under clause (b) of sub section (1) of section 139 that *being a person other than a company or a firm, if his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the maximum amount which is not chargeable to income-tax, on or before the due date, furnish a return of his income or the income of such other person during the previous year, in the prescribed form and **verified in the prescribed***

manner and setting forth such other particulars as may be prescribed. In present case, the return u/s 148/ 139 was filed on 16.08.2021 vide acknowledgment no. 184646510240721, however, the same was not e-verified by the assessee in the manner prescribed, within the stipulated time of 120 days. This fact was confronted to the Ld. AR, which was conceded by him in acceptance of the fact that the return of income filed by the assessee dated 16.08.2021 was never e-verified by the assessee. It is to be further noted that, if the e-verification is pending after filing of the ITR, the ITR so filed will not be processed until it is completed. This means that even though the return might have submitted, the Income Tax Department will not recognize it as a return unless it's verified within the specified timeline. In view of such mandatory provisions of law, we find substance in the contention of the revenue that in absence of a return, which is pending for verification, the notice u/s 143(2) cannot be generated / issued. Considering such facts and circumstances, the dispute raised by the Ld. AR on behalf of the assessee that in absence of a notice u/s 143(2) the assessment framed u/s 147 r.w.s. 144B is at nullity cannot be acceded to, as the Ld. AO was not having the authority / was divested from issuance of notice u/s 143(2) on account of assessee's failure in e-verifying the return, thus, the return filed was an invalid / non-est return as per prescribed provisions of section 139 r.w.s. 148 of the Act.

10.5 Now, we shall be adverting to the 2nd contention raised by the Ld. AR that if the return of income filed by the assessee in response to notice u/s 148 of the I. T. Act is treated to be an invalid / non-est return, the assessment order passed u/s 143(3) r.w.s. 147 r.w.s. 144B dated 26.03.2022 is illegal a bad in law, as the same ought to have been passed u/s 144 of the Income Tax Act, 1961. While deliberating upon this issue, on being queried about the status of the quantum addition u/s 68 in the present case, Ld. AR informed that the same is challenged by the assessee under an appeal and the same is pending before the Ld. CIT(A). In view of such facts, we find that this issue can be raised by the assessee before the First Appellate Authority, who is having powers/ entrusted with duties co-terminus with that of powers and duties of the Ld. AO, therefore, it would be premature to discuss and decide such issues, for which remedy is available to the assessee before the revenue authorities below.

10.6 In view of aforesaid facts, circumstances, and observations, we do not find substance in the contention raised by the Ld. AR, therefore, **ground no. 1** of the present appeal and **additional ground** raised are **dismissed**.

11. Ground no. 2: Regarding initiating the revisionary proceedings u/s 263 by the Ld. PCIT, on an issue pending before the Commissioner of Income Tax (Appeals), NFAC

11.1 On this issue, Ld. AR submitted that as per various judicial pronouncements, the Ld. PCIT was not authorized to invoke or assume jurisdiction to initiate proceedings under the provisions of section 263, when the subject matter is pending before the First Appellate Authority. The case was relied upon by the Ld. AR are as under:

- 1) CIT vs VAM Resorts and Hotels Pvt. Ltd (418 ITR 723) Allahabad High Court
- 2) Smt. Renuka Philips vs ITO (409 ITR 567) Madras High Court
- 3) M/s. Golden Vats Private Limited vs ACIT Central Circle-3(2), Chennai (ITA No. 416/Chny/2023)
- 4) Kathiravan Ananthalakshmi vs ACIT, Central Circle-1, Trichy (ITA No. 340/Chnny/2022)
- 5) R. M. Tradelink vs PCIT (ITA No. 68/RJT/2022- ITAT Rajkot)

11.2 Apropos, aforesaid issue, Ld. AR submitted that while the revision proceedings u/s 263 are initiated and in process, the assessment order u/s 147 r.w.s. 144B was assailed by the assessee before the First Appellate Authority i.e., Ld. CIT(A), NFAC on 13.04.2022. Such facts were duly brought to the knowledge of Ld. PCIT. Ld. AR further submitted that the issue *qua* the addition u/s 68 in treating the sale transaction as bogus was the subject matter of appeal. Ld. AR further argued that, as per *doctrine of merger*, according to settled law the impugned addition which is subject matter of appeal cannot be the basis for exercising the revisionary powers u/s 263 of the I T Act.

Accordingly, revision of assessment u/s 263 in the present case is not sustainable in the eyes of law.

11.3 Ld. CIT-DR on the other hand vehemently supported the order u/s 263 and have submitted to uphold the same.

11.4 We have considered the rival submission, perused the material available on record and case laws relied upon by the Ld. AR. It is an admitted fact in the present case that, while the provisions of section 263 are invoked by the Ld. PCIT by issuing a notice for hearing dated 09.10.2023, an appeal was pending before the Ld. CIT(A), which was instituted by the assessee on 13.04.2022 and yet to be disposed of. It is further brought to our notice that since the appeal before the Ld. CIT(A) challenging the addition u/s 68 is still pending, therefore, the Ld. PCIT has no authority to invoke provisions of section 263, as his powers are barred by provisions of clause (c) to explanation (1) to section 263(1) of the Act. For the sake of contemplation, the provision referred to has been extracted as under:

Section 263(1), explanation 1(c):

where any order referred to in this sub-section and passed by the Assessing Officer had been the subject matter of any appeal filed on or before or after the 1st day of June, 1988, the powers of the [Principal Commissioner or] Commissioner under

this sub-section shall extend and shall be deemed always to have extended to such matters as had not been considered and decided in such appeal.

11.5 The aforesaid explanation is brought into the statute with effect from 01.10.1984 which was further amended by Direct Tax Laws (Amendment) Act, 1987, subsequently, substituted by the Finance Act, 1988 w.e.f. 01.06.1988. The provisions of aforesaid explanation have been taken into consideration by the Hon'ble High Court of Allahabad in the case of **VAM Resorts (supra)**, following the judgment by Hon'ble Madras High Court in the case of **Smt. Renuka Philip (supra)**, wherein after considering the facts of case that the issue which is pending before the Ld. CIT(A) has been taken up as the basis by the Ld. PCIT while invoking the powers u/s 263, therefore, have held as under:

*9. The second limb of argument of counsel for the assessee is that appeal before the CIT(A) was pending, as such, the CIT has no jurisdiction to revise the order, in view of Clause (c) of Explanation-1 to Section 263 of the Act, which provides that when appeal is pending before the Commissioner, the exercise of jurisdiction under Section 263 of the Act is barred. He relied upon the judgment in the case of **Smt. Renuka Philip v. ITO [2019] 101 taxmann.com 119/[2018] 409 ITR 567 (Mad)**, the relevant paragraphs of which are extracted hereunder:*

*'21. With regard to the merits of the case, the learned counsel for the assessee referred to a decision of the Division Bench of this Court in **Dr. P.K. Vasanthi Rangarajan v. CIT [2012] 23 taxmann.com 299/209 Taxman 628 (Mad.)**, wherein, the Hon'ble Division Bench held that there is no inhibition in the assessee claiming the benefit of investment made in four flats thereby gaining the benefit under Section 54F of the Act. The Court took note of the decision in TCA No. 656 of 2005 dated*

04.01.2012. However, we are not examining the merits of the matter at this juncture since, we are only called upon to answer the Substantial Question of Law with regard to the assumption of jurisdiction of the Commissioner under Section 263 of the Act. The power under Section 263 of the Act is not exercisable under certain circumstances. In this regard, we refer to Section 263(1) explanation 1(c), which reads as follows:

"Revision of orders prejudicial to revenue

263(1), (a) to (b)** ** **

(c) Where any order referred to in this sub-section and passed by the Assessing Officer had been the subject matter of any appeal [filed on or before or after the 1st day of June, 1988], the powers of the Commissioner under this Sub-section shall extend and shall be deemed always to have extended to such matters as had not been considered and decided in such appeal."

22. The above explanation makes it clear that when the appeal is pending before the Commissioner, the exercise of jurisdiction under Section 263 of the Act is barred. The Commissioner in the order dated 14.03.2012 states that the appeal pertains to the claim made by the assessee under Section 54 of the Act and it has got nothing to do with the order passed by the Assessing Officer under Section 54F of the Act. The said finding rendered by the Commissioner is wholly unsustainable, since the assessee went on appeal against the re-assessment order dated 31.12.2009 stating that his claim for deduction under Section 54 of the Act should be accepted.'

11.6 Considering the aforesaid peculiar factual aspect, including certain issues *qua* the "records", which have been raised by the assessee, Hon'ble Allahabad High Court have accorded the decision, that the Ld. PCIT had exceeded his powers by referring to Clause (b) of Explanation to Section 263 of the Act, which includes all the

records relating to Section 263 proceedings available at the time of examination by the CIT only, and not in subsequent order or fresh order passed thereafter under Section 263/143(3) of the Act, which could justify the proceedings under Section 263 carried out by the CIT, which should have been taken into consideration in backdrop of the facts before them so as to draw any inference in the present case considering the facts and circumstances. The relevant observations of Allahabad High Court in the case of **VAM resorts (supra)**, are as under:

23. In the present case, the Tribunal rightly arrived at the finding that all the material in regard to land development expenses was before the Assessing Officer who had required the assessee to produce all the documents in relation to the same and after inquiring about the details of contract and the contract executed by assessee, the bill submitted and payment schedule made, the Assessing Officer accepted the books of account and only disallowed Rs.1,20,000/- and added to the income of the assessee, which was also set aside by order of the CIT(A) while exercising the power under Section 263 of the Act CIT did not have any material for invoking the said provision and it merely did the same on suspicion and presumption. The Punjab and Haryana High Court in the case of CIT v. Ram Narain Goel, [\[1997\] 92 Taxman 259/224 ITR 180 \(Punj. & Har.\)](#) held that suspicion however drawn cannot take place on evidence or proof. This case was followed in the case of CIT v. Faqir Chand Chaman Lal, [\[2003\] 133 Taxman 947/262 ITR 295 \(Punj. & Har.\)](#).

24. The argument raised by counsel for the revenue that the Tribunal should have send back the matter to the assessing authority to decide afresh is a fallacy, as the CIT itself on 5.6.2013, while deciding the appeal of the assessee under Section 250 of the Act set aside the assessment order dated 18.11.2010 to the extent of addition of Rs.1,20,000/- made in the assessment proceedings. Further, the appeal before the Tribunal emanated from the order of the Commissioner of Income Tax exercising power under Section 263 of the Act, as such the Tribunal was correct in limiting its scope to decide

whether the exercise of power made by the Commissioner was in consonance with provision of Section 263 and relied upon the decision of Malabar Industrial Co. Ltd. (supra).

25. As, Clause (c) of Explanation 1 to Section 263 of the Act provides that when an appeal is pending before the Commissioner, the exercise of jurisdiction under Section 263 of the Act by CIT is barred. Thus, in the present case, the CIT wrongly exercised jurisdiction under Section 263 of the Act by remanding back the matter to assessing authority on 25.3.2013, while the appeal was decided by CIT (A) on 5.6.2013. Thus, the order passed by the ITAT does not suffer from any irregularity and needs no interference.

26. As far as the word "record" appearing in Clause (b) of Explanation-1 to Section 263 is concerned, it means the record available at the time of examination by the Commissioner of Income Tax and not any material or record available subsequent to his examination or exercise of power under Section 263. Thus, any order passed by the AO in the assessment proceedings after the remand by the CIT cannot be looked upon and the argument made by the counsel for the revenue for relying upon the fresh assessment order made on 7.3.2004 under Section 263/143(3) of the Act cannot be accepted in view of the above provision of law.

27. In the present case, the Tribunal had recorded specific finding of fact that the assessing authority had examined each and every aspect of the case on which the remand order hinges, as such the remand order was not sustainable in the eyes of law.

28. Considering the facts and circumstances of the case, we are of the considered opinion, that the revenue has failed to make any case for interference in the order of the ITAT, as the CIT had proceeded to remand the matter back to the assessing authority while the appeal of the assessee was pending under Section 250 and the power of exercise under Section 263 was barred by Clause (c) to Explanation 1 of

Section 263 of the Act. Further, the remand order by the CIT was based merely on suspicion and presumption.

29. The appeal is devoid of merit and is hereby dismissed. The question of law is, therefore, answered against the revenue and in favour of the assessee.

11.7 After having been considered the aforesaid judgment and the facts involved therein, we observe that the decision granted by Hon'ble High Court was in the backdrop of the facts that the Ld. PCIT had invoked the provisions of section 263 for an issue which was already under consideration before the Ld. CIT(A), NFAC and also the PCIT referred to certain "records", which as per explanation 1(b) of section 263 cannot be considered as records to be acted upon to initiate the proceedings u/s 263.

11.8 In view of such findings, drawing support from the same, we are of the considered view that as per explanation 1(c) to section 263 of the Act, Ld. PCIT can initiate the proceedings *qua* the issues which are not disputed by the assessee, or which are not subject matter of appeal before the Ld. CIT(A) and those issues are not considered and decided in such appeals. We may herein further observe that the powers of Ld. PCIT to invoke the revisionary proceedings u/s 263 are independent of the appellate process. The PCIT can revise an assessment order u/s 263 even if the order is assailed by way of an appeal before the Ld. CIT(A) on certain issues which are not the basis for

revisionary proceedings, the existence of an appeal before the Ld. CIT(A) does not automatically prohibit the Ld. PCIT to exercise the powers of revision u/s 263. The PCIT has the authority as well as responsibility to revise the assessment order if he is of the view that the order passed is erroneous and prejudicial to the interest of revenue. Only in case if the Ld. CIT(A) has already considered and adjudicated on the issue the PCIT cannot revise the order on the same ground.

11.9 Adverting to the facts of the present case, wherein while framing the assessment, an addition was made u/s 68 by the Assessing Officer, however, he lost the sight to invoke the mandatory provisions to apply the special rate of tax u/s 115BBE and have invoked the provisions of section 271(1)(c) for initiating penalty on the assessee. Ld. PCIT after examining the records, which are falling within the meaning of records as per provisions of section 263 explanation 1(b), have revealed that these errors have caused loss of revenue to the department and, therefore, have initiated the revisionary proceedings u/s 263. As per grounds of appeal raised before the Ld. CIT(A) while challenging the quantum addition u/s 68, on perusal of form 35 (page no. 65 to 68 of the APB), we find that the issues i.e., (i) the addition u/s 68 to be taxed at special rate u/s 115BBE and (ii) the applicability of section 271AAC for levy of penalty effective from 01.04.2017, instead of 271(1)(c), which is no more in force for

the year under consideration, are not *inter alia* the issues which are subject matter before the Ld. CIT(A), therefore, respectfully following the aforesaid judicial pronouncements it can be held that, the issues which are not subject matter before the First Appellate Authority, if they are causing any prejudice to the interest of revenue for the errors committed by the Assessing Officers, the same can form the basis for revision by the Ld. PCIT. In terms of aforesaid observations as the issues pending in appeal are different then the issues raised by the Ld. PCIT by invoking the provisions of section 263, therefore, there was no illegality in the proceedings-initiated u/s 263, thus, that the contention raised by the Ld. AR that pendency of an appeal before the First Appellate Authority, precludes the Ld. PCIT to exercise the powers of revision u/s 263 is found to be bereft of substance, we, therefore, are unable to persuade and to concur with such contention raised by the Ld. AR, consequently, **ground no. 2** of the present appeal of the assessee stands **rejected**, in terms of aforesaid discussion.

12. Ground No. 3: Regarding initiation of penalty u/s 271AAC by the Ld. PCIT, which was erroneously initiated by the Assessing Officer u/s 271(1)(c)

12.1 On this issue, Ld. AR submitted that the powers u/s 263 are being exercised by the Ld. PCIT to initiate penalty proceedings on the assessee u/s 271AAC, whereas the penalty proceedings u/s 271(1)(c), which was not applicable from the AY 2017-18 for the cases having addition u/s 68. It is the submission that the very assumption of jurisdiction is contrary to the facts of law and fact on record hence proceedings u/s 263 of the Act and impugned order dated 13.03.2024 is liable to be quashed. Ld. AR placed his reliance on following judgments on this issue:

(i) Smt. Rekha Shekhawat vs PCIT, ITAT- Jaipur (ITA No. 7/JP/2021)

3.1 In Ground No.-3, the assessee has challenged the assumption of jurisdiction u/s 263 for not initiating penalty proceedings u/s 271 AAC of the Act. The Ld. CIT held that the additional income was also subjected to penalty u/s 271 AAC of the Act and accordingly set aside the subjected assessment order.

*3.2 After hearing both the parties and perusing the materials available on record as well as judicial pronouncements cited by both the parties, we at the outset have no hesitation to hold that the issue involved is no more res integra in as much as the Hon'ble Rajasthan HC in the case of **CIT vs Keshrimal Parasmal [1986] 27 Taxmann 447 (Raj)**, held as under:*

"In J,K, D'Costa's case (supra), it was held that the Commissioner was 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 order and that he could not direct the ITO to make fresh assessment to initiate penalty proceedings. The Supreme Court has dismissed the special leave petition in the said case in Special Leave Petition (Civil) Nos. 11391 and 11392 of 1981, dated 2-3-1984 [1984] 147 ITR (St.) 1. As the position was concluded and settled by the Supreme Court, the question which was sought to be referred could not be said to be a substantial

question of law arising out of the Tribunal's order, it was only a question of academic nature,

There are several other decisions cited by the Id. AR of the assessee for which no contrary decision was brought to our notice. Hence, we are of the considered view that the Id. Pr. CIT acted beyond jurisdiction in holding that the additional income was subjected to penalty u/s 271 AAC of the IT Act. Thus Ground No. 3 of the assessee is allowed.

(ii) Dheeraj Singh Sisodia vs PCIT, ITAT Jaipur (ITA No. 132/JP/2022)

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.

8. Respectfully, following the jurisdictional High Court in the case of “CIT Vs. Keshrimal Parasmal”, we hold that the PCIT is not entitled to direct the AO to initiate penalty proceedings. Accordingly, the order passed under s. 263 is quashed.

(ii) CIT vs Rakesh Nain Trivedi in ITA No. 290/2014

4. We have heard learned counsel for the parties.
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 Assessing Officer 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* (2011) 335 ITR 364 agreeing with the view of High Courts of Delhi in *Additional CIT v. J.K.D.'Costa* (1982) 133 ITR 7 (Del), *Commissioner of Income Tax v. Sudershan Talkies* (1993) 201 ITR 289 (Del) and *Commissioner of Income Tax v. Nihal Chand Rekyan* (2000) 242 ITR 45 (Del), Rajasthan in *Commissioner of Income Tax v. Keshrimal Parasmal* (1986) 157 ITR 484 (Raj), Calcutta in *Commissioner of Income Tax v. Linotype & Machinery Ltd.* (1991) 192 ITR 337 (Cal) and Gauhati in *Surendra Prasad Singh and others v. Commissioner of Income Tax* (1988) 173 ITR 510 (Gau.) whereas dissenting with the diametrically opposite approach of Madhya Pradesh High Court in *Additional Commissioner of Income Tax v. Indian Pharmaceuticals* (1980) 123 ITR 874 (MP), *Additional Commissioner of Income Tax v. Kantilal Jain* (1980) 125 ITR 373 (MP) and *Addl. CWT v. Nathoolal Balaram* (1980) 125 ITR 596 (MP) had concluded that where the CIT finds that the Assessing Officer had not initiated penalty proceedings under Section 271 (1)(c) of the Act in the assessment order, he cannot direct the Assessing Officer to initiate penalty proceedings under Section 271 (1)(c) of the Act in exercise of revisional power under Section 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 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 and to view the penalty proceedings also as part of the proceedings which are being sought to be revised by the Commissioner. 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 finalized. 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 liveability 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."

12.2 Based on aforesaid submissions, it was the prayer by Ld. AR that the initiation of proceedings u/s 263 for initiation of penalty is not justified. Therefore, the order u/s 263 is liable to be quashed.

12.3 Per contra, LD. CIT-DR vehemently supported the order of Ld. PCIT, submitted that in the present case, the PCIT had just noted that section of initiation of penalty was wrongly taken as 271(1)(c) by the Ld. AO, which is not in operation for the relevant year qua the additions u/s 68 of the Act, whereas the penalty should have been initiated u/s 271AAC. It was a mistake committed by the Ld. AO, causing laws of revenue to the exchequer, therefore, such error is covered by the issues to be picked up for revision by invoking the provisions of section 263, consequently, Ld. PCIT had rightly exercised his powers to correct the section of initiation of penalty. In view of such facts, it is requested to uphold the order of Ld. PCIT u/s 263.

12.4 We have considered the rival submissions, perused the material available on record and the judicial pronouncements relied upon by the parties. As per facts of the present case, Id. AO have made the addition u/s 68 and have also recorded the satisfaction to invoke provisions of section 271(1)(c) for levy of penalty on account of concealment of income by the assessee. It is to be noted that the penalty *qua* the addition's u/s 68 effective from 01.04.2017 are to be initiated u/s 271AAC. Such error was identified by the Ld. PCIT, though, as the issue has been dealt with and decided by Hon'ble High Courts, wherein it is clearly mandated that the initiation of penalty proceedings cannot be the subject matter of powers conferred upon the revisionary authority u/s

263, however, initiation of penalty under an incorrect section cannot be placed in the same position wherein, the revisionary proceedings are initiated only for invoking the penalty proceedings, we, thus, are of the considered view that finding a mistake in the order of Ld. AO, wherein the mandate of law is being vitiated can be corrected by way of revisionary proceedings u/s 263, especially in a case, wherein there was prejudice to the interest of revenue on an issue besides the issue of levy of penalty under a wrong section. In view of such facts and circumstances, the facts of the present case are distinguishable then the facts in cases referred to supra, therefore, we find justification in the contention of the Ld. CIT-DR, accordingly, the order of Ld. PCIT u/s 263 is upheld on this aspect.

12.5 In result, **Ground no. 3** of the present appeal is **Dismissed**.

13. Ground No. 4 & 5: That Ld. PCIT erred in exercising jurisdiction u/s 263 on account of assessing officer's failure to make proper inquiry while framing the assessment u/s 147 r.w.s. 144B of the Act.

13.1 Apropos, the inquiries by the Ld. AO during the assessment proceedings, Ld. AR submitted that adequate enquiries with respect to alleged bogus sales are made. Necessary submissions, and documentary evidence were furnished by the assessee, which are duly verified by the Ld. AO. The

reasons for exercising the powers u/s 263 by the PCIT are not proper to show that how the enquiries made by the Ld. AO are not proper, sufficient or adequate. Under such circumstances, setting aside of the assessment order by the Ld. PCIT was arbitrary, illegal and unsustainable. It was, therefore, the prayer that the revisionary order passed u/s 263 needs to be quashed.

13.2 In rebuttal, Ld. CIT-DR vehemently supported the impugned order of Ld. PCIT passed u/s 263 of the Act.

13.3 We have considered the rival submissions, perused the material available on record. The proceedings u/s 263 are initiated by the Ld. PCIT, for the obvious reason that the Ld. AO failed to follow the mandatory provision of law i.e., he missed to apply the provisions of section 115BBE. On account of such error there was an apparent loss to the revenue, therefore, the order of Ld. AO has been erroneous so far as prejudicial to the interest of revenue. Further, the contention raised by the Ld. AR that the Assessing Officer had made adequate enquiries with respect to the issue of bogus sale and all the necessary evidence / document are furnished by the assessee, cannot deprive the Ld. PCIT to exercise his powers u/s 263, as there was no material on record about the issue that Ld. AO, during the assessment proceedings had enquired about the applicability of provisions of section 115BBE on the addition made u/s 68

and thereby had taken a plausible view to not apply the same in present case. Rather the provisions of section 115BBE are mandatory in nature, which essentially needs to be invoked in a case where addition is made u/s 68, this shows that it was a total failure on the part of Ld. AO due to which the revenue has the reasons to treat the order of Ld. AO being erroneous and prejudicial to the interest of revenue. In view of such factual position, Ld. PCIT was well within his jurisdiction to assume and exercise powers conferred upon him under the provisions of section 263, consequently, we do not find any error in the order of Ld. PCIT passed u/s 263 of the Act dated 13.03.2024, the same, therefore, is upheld. **Ground No. 4 & 5** of the assessee's appeal, thus, are **rejected**.

14. In result, the appeal of the assessee in **ITA No. 212/RPR/2024** has been rendered as **dismissed** in terms of our aforesaid observations.

Order pronounced in the open court on 08/01/2025.

Sd/-

(RAVISH SOOD)

न्यायिक सदस्य / JUDICIAL MEMBER

रायपुर/Raipur; दिनांक Dated 08/01/2025

Vaibhav Shrivastav

Sd/-

(ARUN KHODPIA)

लेखा सदस्य ACCOUNTANT MEMBER

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

1. अपीलार्थी / The Appellant- Shri Vijay Kumar Patel, Raipur
2. प्रत्यर्थी / The Respondent- PCIT-1, Raipur
3. The Pr. CIT, Raipur (C.G.)
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, रायपुर/ DR, ITAT, Raipur
5. गार्ड फाईल / Guard file.

// सत्यापित प्रति True copy //

आदेशानुसार/ BY ORDER,

(Senior Private Secretary)
आयकर अपीलीय अधिकरण, रायपुर/ITAT, Raipur