

**IN THE INCOME TAX APPELLATE TRIBUNAL, COCHIN**

BEFORE SHRI INTURI RAMA RAO, ACCOUNTANT MEMBER  
AND  
SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA No. 187/Coch/2023  
Assessment Year : 2018-19

Pazhayangadi G Gold, Eazhome Pazhayangadi, Kannur-670303 PAN : AAUFP9485G	vs.	ITO, Ward-1& TPS, Kannur
(Appellant)		(Respondent)

For Assessee :	Shri Arun Raj S. Adv.
For Revenue :	Shri Sanjit Kumar Das, CIT-DR
<b>(Heard in Hybrid Bench)</b>	

Date of Hearing :	25-03-2025
Date of Pronouncement :	27-05-2025

**ORDER**

**PER SANDEEP SINGH KARHAIL, J.M :**

1. The assessee has filed the present appeal challenging the impugned order dated 17/02/2023, passed under section 263 of the Income Tax Act, 1961 ("*the Act*") by the learned Principal Commissioner of Income Tax, Kozhikode, [*learned PCIT*], for the assessment year 2018-19.

2. The only grievance of the assessee is against the revisionary proceedings initiated under section 263 of the Act culminating in the impugned order.

3. The brief facts of the case are that the assessee is a partnership firm engaged in the purchase and manufacturing of gold jewellery. For the year under consideration, the assessee filed its return of income on 30/01/2019, declaring a total income of Rs.Nil. The return filed by the assessee was selected for complete scrutiny under CASS on the issue of "*Share Capital/Other Capital*", and statutory notices under section 143(2) and section 142(1) of the Act were issued and served on the assessee. Upon perusal of the balance sheet and profit and loss account filed by the assessee, it was found that out of six partners, five partners had introduced capital in kind with some gold owned by them during the year under consideration. Accordingly, the assessee was asked to explain the source of the addition made to the capital account of partners amounting to Rs. 3,31,24,523. In response, the assessee submitted that the additions have been made by the partners in kind by way of gold ornaments of family and self-inherited from childhood onwards and by way of cheque out of foreign savings. During the assessment proceedings, the assessee was asked to prove the creditworthiness, genuineness and identity of the person introducing the capital by furnishing the identity proof and residence proof, filed by them in the countries of their residence, bank account statement from which the amounts were transferred to the capital accounts. However, the assessee only filed the computerised receipts in respect of old gold and photocopies of cheques. As the assessee

failed to prove the identity, creditworthiness and genuineness of the transaction by not submitting the relevant documents, the Assessing Officer ("AO"), vide order dated 15/03/2021 passed under section 143(3) read with section 143(3A) and 143(3B) of the Act, held that the averment of the assessee is concocted story to enable them to change the colour of their unaccounted money. The AO, from the examination of financials as well as the contention of the assessee, held that the partners of the assessee firm have introduced their own unaccounted money in the guise of capital, and the source of credits in the capital account is not explained. Accordingly, the AO treated the addition in the capital account amounting to Rs. 3,21,24,523 as unexplained credit and added the same to the returned income of the assessee under section 68 of the Act. The AO further recorded the satisfaction that the income is under-reported by the assessee, and accordingly, a penalty under section 270A of the Act was initiated for under-reporting of income.

4. Subsequently, the learned PCIT issued a notice under section 263 of the Act, observing as follows: -

*"The assessment order u/s 143(1) rws 143(3A) & 143(3B) was completed on 15.03.2021 in the case of M/s Pazhayangadi G Gold for the AY 2018-19 by assessing total income at Rs.3,31,24,523/-. On perusal of the assessment order it is seen that in para 8 the following remark has been made and the penalty proceedings were initiated.*

*"In view of the unexplained credit in capital account amounting to Rs. 3,31,24,523/- is added back to the returned income of*

*the assessee firm u/s 68 of the Income Tax Act, 1961. I am satisfied that income is under reported buy the assessee. Accordingly, penalty u/s 270A of the Income Tax Act, 1961 is hereby initiated for under reporting of income."*

*The addition of Rs.3,31,24,523/- was made u/s 68 of the Income Tax Act, 1961 as unexplained credits. According to provisions of section 271AAC(2) no penalty under the provisions of section 270A shall be imposed upon the assessee in respect of income referred to in section 68, section 69, section 69B, section 69C or section 69D. The penalty proceedings should have been initiated u/s 271AAC in place of penalty u/s 270A as initiated in the assessment order. This has rendered the assessment order erroneous and prejudicial to the interest of revenue.*

*In addition, the Review Unit, vide review report dated 29.09.2021, on draft for dropping penalty proceedings u/s 270A has stated the following:*

*"the draft drop penalty order seems to be justified. Further, it is suggested that Jurisdictional Assessing Officer (JAO) of the assessee may be informed to take remedial action by reviewing the assessment order passed under section 143(3) dated 15.03.2021 under section 263 of the Income Tax Act, 1961."*

*From the above it is evident that during the course of scrutiny assessment, the assessing officer has not conducted proper verification rendering the assessment order erroneous in so far as it is prejudicial to the interest of revenue. It is therefore proposed to revise the assessment order dated 15.03.2021 and revision proceedings u/s 263 of the Income Tax Act, 1961 are hereby initiated.*

*In this regard you are required to submit explanation/proof on why the assessment order dated 15.03.2021 should not be revised to initiate penalty proceedings u/s 271AAC of the Income Tax Act, 1961."*

5. The learned PCIT, vide impugned order, disagreed with the submissions of the assessee filed in response to the notice issued under section 263 of the Act and held that initiation of penalty under section 270A was under a wrong section. The learned PCIT held that the order passed by the AO is erroneous and prejudicial to the

interest of the Revenue. Accordingly, the learned PCIT set aside the assessment order to the extent of non-initiation of penalty proceedings under the correct section and directed the AO to pass a fresh order accordingly. The relevant findings of the learned PCIT, vide impugned order, are reproduced as follows: –

*"4. I have carefully considered the mater. The assessee had furnished several judicial pronouncements in support of proposition that initiation of penalty proceedings under wrong section or non-initiation of penal proceedings cannot be cured by provisions of section 263 of the Act. Hon'ble Madhya Pradesh High Court in the case, of Addl CIT Vs Indian Pharmaceuticals (1980) 125 ITR 373 (MP) and Hon'ble Allahabad High Court in the case of (2005)275 ITR (All) had taken a view that non-initiation of penalty proceedings is sufficient reason for invoking provisions of section 263 of the Act. In the case of Surendra Prasad Agarwal (supra), the Hon'ble High Court had considered several decisions quoted by the assessee in its favour. Decision of Hon'ble High Court of Delhi in the case of Addl CIT Vs J.K.D'Costa (1982) 133 ITR 7 (Del) (SLP of Department dismissed by the Hon'ble Apex Court) was also considered. The Hon'ble Court took a view that failure to initiate penalty proceedings can invite provisions of section 263 of the Act.*

*5. In case of present assessee, the initiation of penalty u/s 270A was under a wrong section. The order of the AO was erroneous and prejudicial to the interest of revenue. Hence the order of the AO is set aside to the extent of non-initiation of penalty proceedings under the correct section. The AO is directed to pass fresh order accordingly."*

Being aggrieved, the assessee is in appeal before us.

6. During the hearing, the learned Authorised Representative ("*learned AR*") submitted that subsequent to the assessment order, penalty proceedings under section 270A of the Act were initiated, however, the same were later dropped. The learned AR submitted that the AO recorded the satisfaction only with regard to the under-

reporting of income by the assessee, and accordingly directed the initiation of penalty under section 270A of the Act. Thus, the learned AR submitted that no satisfaction was recorded by the AO for initiating penalty proceedings under section 271AAC of the Act.

7. On the other hand, the learned Departmental Representative vehemently relied upon the order passed by the learned PCIT under section 263 of the Act.

8. We have considered the submissions of both sides and perused the material available on record. In the present case, it is evident from the record that the only basis on which the learned PCIT assumed jurisdiction under section 263 of the Act is to initiate the penalty under section 271AAC of the Act. As per the learned PCIT, since the addition was made, vide assessment order, under section 68 of the Act, therefore the penalty is only leviable under section 271AAC of the Act. Before proceeding further, it is relevant to note the provisions of section 271AAC of the Act, which reads as follows: –

*"Penalty in respect of certain income.*

*271AAC. (1) The Assessing Officer may, notwithstanding anything contained in this Act other than the provisions of section 271AAB, direct that, in a case where the income determined includes any income referred to in section 68, section 69, section 69A, section 69B, section 69C or section 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 the rate of ten per cent of the tax payable under clause (i) of sub-section (1) of section 115BBE:*

*Provided that no penalty shall be levied in respect of income referred to in section 68, section 69, section 69A, section 69B, section 69C or section 69D to the extent such income has been included by the assessee in the return of income furnished under section 139 and the tax in accordance with the provisions of clause (i) of sub-section (1) of section 115BBE has been paid on or before the end of the relevant previous year.*

*(2) No penalty under the provisions of section 270A shall be imposed upon the assessee in respect of the income referred to in sub-section (1).*

*(3) The provisions of sections 274 and 275 shall, as far as may be, apply in relation to the penalty referred to in this section."*

9. Therefore, on a plain reading of the provisions of section 271AAC of the Act, it is evident that the same starts with the non-obstante clause and provides that notwithstanding anything contained in this Act, other than the provisions of section 271AAB of the Act, in a case where the income determined, inter-alia, includes any income referred to in section 68 of the Act, the assessee shall pay by way of penalty, in addition to tax payable under section 115-BBE of the Act. From the perusal of the provisions of section 271AAC of the Act, we further find that sub-section (2) specifically prohibits imposition of penalty under the provisions of section 270A upon the assessee in respect of the income referred to in section 271AAB(1), which, inter-alia, includes income referred to in section 68 of the Act.

10. From the perusal of the assessment order, it is ostensible that the addition of Rs. 3,21,24,523 was made by the AO under section 68 of the Act as the assessee failed to prove the identity,

creditworthiness and genuineness of the transaction in relation to the introduction of capital by its partners. Thus, it cannot be disputed that the solitary addition made by the AO vide assessment order passed under section 143(3) read with section 143(3A) and 143(3B) of the Act was only under section 68 of the Act. However, we find that instead of initiating penalty proceedings under section 271AAC of the Act, the AO initiated the penalty proceedings under section 270A of the Act on the basis that income is under-reported by the assessee.

11. At the outset, it is evident that the initiation of penalty proceedings under section 270A of the Act by the AO is directly contrary to the provisions of section 271AAC(2) of the Act, which specifically prohibit the imposition of a penalty under section 270A of the Act in respect of additions, inter-alia, made under section 68 of the Act. Thus, we are of the considered view that the penalty proceedings under section 270A of the Act were rightly dropped by the AO.

12. As regards the submission of the learned AR that no satisfaction was recorded by the AO for initiating a penalty under section 271AAC of the Act, it is evident from the perusal of the assessment order that the AO was satisfied and recorded a finding that the partners of the assessee firm have introduced their own unaccounted money in the guise of capital, and accordingly, in the absence of proof of identity,

creditworthiness and genuineness of the transaction, the AO made the addition under section 68 of the Act treating the capital amounting to Rs. 3,31,24,523 introduced by the partners as unexplained credit. Thus, once the sole addition has been made by the AO under section 68 of the Act after due examination of the material placed on record, we are of the considered view that necessary prima facie satisfaction to initiate the penalty under section 271AAC of the Act is discernible from the assessment order. Therefore, we do not find any merit in the aforesaid submission made on behalf of the assessee.

13. The learned PCIT, vide impugned order passed under section 263 of the Act, placed reliance upon the decision of the Hon'ble Allahabad High Court in CIT v/s Surender Prasad Agarwal, reported in [2005] 275 ITR 113 (All.), wherein the Hon'ble High Court held that omission of ITO to initiate penalty proceedings in course of assessment renders assessment order erroneous and prejudicial to interests of the Revenue and the Commissioner has jurisdiction to revise such an order under section 263 of the Act. We find that the Hon'ble Madras High Court in CIT v/s Chennai Metro Rail Ltd., reported in [2018] 92 taxmann.com 329 (Mad.), after considering the aforesaid decision of the Hon'ble Allahabad High Court, observed as follows: –

*"14. In view of Section 271(1) read with Section 263 of the Act, the Principal Commissioner might pass such order as the circumstances of the case might justify, which could include an order enhancing or modifying the assessment or cancelling the assessment or directing a fresh assessment. Directing fresh assessment would, in our view, include assessment of penalty. It cannot, therefore, be said that the Principal Commissioner had no jurisdiction to pass such order. The issue has been decided by a Division Bench of the High Court of Allahabad in CIT v. Surendra Prasad Agrawal [2005] 142 Taxman 653. However, the Principal Commissioner, we find, has recorded a finding that "on examination of the records, it is found that the Assessing Officer had in the assessment order established that the Assessee had concealed his income by filing inaccurate particulars". There is no such finding in the order of assessment. The Principal Commissioner seems to have distorted the order of assessment. The finding of the Principal Commissioner is to that extent perverse.*

*15. In our view, in the absence of any finding of the Assessing Officer with regard to concealment of income or with regard to furnishing of inaccurate particulars of income, the Commissioner clearly erred in holding that omission to record satisfaction to initiate penalty proceedings was erroneous or prejudicial to the interest of Revenue. The learned Tribunal rightly set aside the direction of the Principal Commissioner directing the Assessing Officer to initiate penalty proceedings although we may not agree with the reasoning in its entirety."*

14. Therefore, the Hon'ble Madras High Court held that unless and until there is a finding of the AO with regard to concealment of income or with regard to furnishing of inaccurate particulars of income, the learned PCIT cannot hold that omission to record satisfaction to initiate penalty proceedings is erroneous or prejudicial to the interest of the Revenue. However, in the present case, as noted above, the only basis for initiating a penalty under section 271AAC of the Act is the addition under section 68 of the Act, which was made by the AO after the detailed examination of facts. Therefore, we are of the considered view that the AO recorded

thenecessary findings for initiating the penalty under section 271AAC of the Act. Accordingly, we find the decisions placed reliance upon by the assessee to be factually distinguishable.

15. In any case, it is pertinent to note that the provisions of section 271AAC of the Act mandate the levy of a penalty where the income determined, inter-alia, includes any income referred to in section 68 of the Act. Further, it is pertinent to note that, unlike section 271(1)(c) of the Act, which requires the AO to record the satisfaction as regards various circumstances as dealt therein, no such requirement under the provisions of section 271AAC of the Act has been brought to our attention.

16. Therefore, in the present case, we do not find any infirmity in the invocation of revisionary proceedings under section 263 of the Act. Accordingly, the impugned order passed under section 263 of the Act and the directions rendered therein are upheld. As a result, the grounds raised by the assessee are dismissed.

17. In the result, the appeal by the assessee is dismissed.

Order pronounced on 27-05-2025 by way of proper mentioning  
on the Notice Board

Sd/-  
[INTURI RAMA RAO]  
ACCOUNTANT MEMBER  
Cochin, Dated: -05-2025  
TNMM

Sd/-  
[SANDEEP SINGH KARHAIL]  
JUDICIAL MEMBER

Copy to :

- 1) The Appellant
- 2) The Respondent
- 3) The CIT concerned
- 4) The D.R, ITAT
- 5) Guard file

By Order

Asst. Registrar  
I.T.A.T, Cochin