आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर
IN THE INCOME TAX APPELLATE TRIBUNAL
INDORE BENCH, INDORE

BEFORE SHRI B.M. BIYANI, ACCOUNTANT MEMBER
AND
SHRI PARESH M JOSHI, JUDICIAL MEMBER

ITA No.417/Ind/2025
(AY: 2018-19)

Radheshyam Agarwal, Prop. M/s Laxmandas Radheshyam Saraf, Marwari Road, Bhopal **(PAN:AAOPA5650L)**	**बनाम/** Vs.	PCIT, Central, Bhopal
(Appellant)		(Respondent)
Assessee by	Shri Govind Rinwa,CA	
Revenue by	Shri Anup Singh, CIT-DR	
Date of Hearing	06.01.2026	
Date of Pronouncement	16.01.2026	

आदेश / O R D E R

Per Paresh M Joshi, J.M.:

This is an Appeal filed by the Assessee under section 253 of the income tax Act 1961[herein after referred to as the Act for the sake of brevity] before this tribunal. The Assessee is aggrieved by the order bearing Number:-ITBA /REV/F/REV5/2024-25/1074524226(1) dated 15.03.2025 passed by the Ld. PCIT(Central), Bhopal, u/s 263 of the Act which is herein after referred to as the **"Impugned order".** The Relevant Assessment year is 2018-19 and the

corresponding previous year period is from **01.04.2017 to 31.03.2018.**

2. **Factual Matrix**

2.1 That as and by way of an Assessment order passed under section **147/143(3**) of the Act, the Assessee's total income **exigible to tax** was computed and Assessed at Rs. **1,00,50,700/-.** The total income shown in the return of income filed u/s 148 was also at **Rs. 1,00,50,700/-**. The aforesaid Assessment order bears **No:- ITBA/AST/S/147/2022-23/1051722704(1)** and that same is dated **31.03.2023** which is herein after referred to as the **"Impugned Assessment order"**

2.2 That it is recorded in the **"Impugned Assessment order"** that the information regarding discrepancies in case as well as stock were found during the course of survey action u/s 133A of the Income tax Act, received in the case of the assessee on the insight portal of Income tax Department which suggested that certain Quantum of income escaped Assessment for AY 2018-19.

2.3 That the Assessee is a Propritor of M/s Laxmandas Radheshyam Saraf, Chintaman Chouraha, Chowk, Bhopal which is engaged in the business of **sale & purchase of gold and silver ornaments & money lending business etc.**

2.4 That a survey action u/s 133A of the Act was conducted at the business Premises of the Assessee at M/s Laxmandas Radheshyam Saraf [Prop. Shri Radheshyam Agrawal, Marwari Road, Bhopal on **08.03.2018.**

2.5 That during the course of survey proceedings, following discrepancies were observed by the Department which are as under:-

In regard to cash book

Cash book was found/ maintained at the business premise of Shri Radhey Shyam Agrawal Prop. M/s Laxmandas Radheshyam Saraf, the business premise Chintaman Chouraha, Bhopal (M.P.). As per Cash Book Rs (26,41,477/-) & after physical verification total (Rs 22,85,800/-) difference of (-) Rs 3,55,677/- was found at the business premise.

In regard to stock register

Stock Register was maintained at this premise, the copy of the Stock Register maintained in the books of accounts (up to 08.03.2018). As per Books the value of Silver stock was at Rs 41,12,673/- and gold Rs.66,166/- whereas during physical verification silver & gold stoc

k was found at Rs 64,14,906/-, thus, there is a excess stock of Rs 23,02,233/- was accepted by the assessee as his undisclosed income for the year under consideration and promised to pay tax thereon accordingly.

In regard to undisclosed interest income:

During the course of survey proceedings, statement of the assessee was

recorded on oath, wherein he has accepted to have undisclosed interest income of Rs.49,82,740/-. Declaration made by the assessee, during the course of survey, is reproduced as under:

(24)

3) वर्ष से अधिक समय से गिरवी रखे सोना चाँदी जेवर का आज मार्केट कीमत जोड़के पर वसूल हो रहा ब्याज का अनुमान

वित्त वर्ष	रहन रखा जेवर का (A) मूलधन अनुमान	रहन रखे जेवर की कीमत (B) सोना जेवर अनुमान	(B) चाँदी जेवर अनुमान	वसूल होने वाला ब्याज का अनुमान (B − A)
2011-12	1722820/-	510 ग्राम = 1088,850/-	49,650 ग्राम = 1064,990/-	431,020/-
2012-13	37,11,410/-	1555 ग्राम = 33,19,925/-	76325 ग्राम = 1637,170/-	1245,685/-
2013-14	37,11,410/-	1555 ग्राम 3319,925/-	76325 ग्राम = 16,37,170/-	1245,685/-
2014-15	57,00,000/-	2600 ग्राम = 55,51,000/-	103 किलो 2209,350/-	2060350/-

= कुल योग: 49,82,740/-

इस प्रकार मैं राशि. 49,82,740/- (अनुमानित) वित्त वर्ष 2017-18 A.Y 2018-19 के लिए. ब्याज से आय (गिरवी मूलधन राशि पर ब्याज) के रूप में घोषित करता हूँ.

9-3-2018
(राधेश्याम अग्रवाल)

2.6. However, it was found that the assessee had not filed his return of income for A.Y. 2018-19 which clearly

indicates that discrepancy found during the course of survey plus his regular income has escaped taxation.

2.7 That in the aforesaid **"Impugned Assessment order"** following is also Recorded which is reproduced by us as below:-

> *"6. On the basis of such information, a show cause notice u/s 148A (b) dt. 31.03.2022 was issued to the assessee. In response to this notice, assessee submitted reply on 02.04.2022. Considering the reply of assessee, order u/s 148A(d) was passed on 13.04.2022. Subsequently, notice u/s 148 of the Income-tax Act, dt. 13.04.2022 along with order u/s 148A(d) issued to the assessee after obtaining the prior approval of the PCIT (Central), Bhopal.*
> *7. In response to this notice, the assessee, vide acknowledgement no.601395070290422, filed his ITR on 29.04.2022 for the year under consideration declaring total income of Rs.1,00,50,700/- (inclusive of the income of Rs.73,00,000/-surrendered during survey proceedings). Subsequently, notice u/s 143(2) of the IT Act was issued on 29.06.2022*
> *8. Further, It is also seen from the ITR filed for AY 2018-19 that income shown in return is inclusive of income surrender during the course of survey proceedings. It is also found from ITR that tax has not been paid as per the provision of section 115BBE of Income-tax Act and therefore, vide notice u/s 142(1) dt.20.03.2023, the assessee was asked as to why tax rate as per section 115BBE of the IT Act, 1961 should not be levied in his case.*
> *8.1 In this regard, vide reply dt.22.03.2023, the assessee has made submission, which is reproduced as under:*
> *2. During survey at the business premises of the assessee on 08/03/2018, excess stock of Gold and Silver Ornaments was found. It is not in dispute that the assessee is engaged in the business of these metal ornaments. In fact, the entire stock of Gold Ornaments and also the Silver Ornaments available at the business premises of the assessee was weighed and was compared with the weight of stock available in the books of the*

assessee. The difference between the physical weight and the weight in the books was considered by the Department as excess stock of business, which was accepted by the assessee and was duly incorporated in the books by debiting the Trading Accounts and crediting the Profit & Loss Account. In the case of Choksi Hiralal Maganlal v/s DCIT TTJ (AHD.)-1 it was held that in a case where source of investment/expenditure is clearly identifiable and alleged undisclosed asset has no independent existence of its own or there is no separate physical identity of such investment/ expenditure then first what is to be taxed is the undisclosed business receipt invested in unidentifiable unaccounted asset Where asset in which undeclared investment is sought to be taxed is not clearly identifiable or does not have independent identity but is integral and inseparable (mixed) part of declared asset falling under a particular head, then the difference should be treated as undeclared business income explaining the investment. In the present case, the excess stock was part of the stock held of business purpose and had no nexus with any other income or receipt. The assessee is dealing in the sale of gold and silver omaments, and the excess stock which was found during the course of survey is stock of gold and silver ornaments Further, the assessee is also engaged in the Money-Lending business and the excess Interest from Pawning Debtors which was found during the course of survey is out of the Pawning Debtors (Gehna Girvi) and it had no nexus with any other Income or receipt. Therefore, the investment in procurement of such stock of gold and silver omaments and interest from pawning debtors is clearly identifiable and related to the regular business assets of the assessee: In ACIT Central Circle-13 Mumbai v. Rahil Agencies order dated 23/11/2016 the Tribunal held that section 115BBE does not apply to business receipts/ business turnover. Therefore, the investment in the excess stock and interest from pawning debtors has to be brought to tax under the head business income and not u/s 69.

3. In Fashion World v/s ACIT (ITAT Ahmedabad Bench B) ITA No.1634/AHD/2006 it was held that where there is no physical distinction between the accounted stock or unaccounted stock, the difference in stock is part and parcel of the entire lot of stock The difference between declared stock in the books and what is physically found would only be a mathematical expression in terms of value and not a separate independent identifiable asset. Therefore, it cannot be said that there is an undisclosed asset existing independently Once this is so then what is not declared to the Department is receipt from business and not any investment as it cannot be co-related with any specific asset. Thus in a case

where source of investment/ expenditure is clearly identifiable and alleged undisclosed stock has no independent existence of its own or there is no separate physical identity of such investment/expenditure then what is to be taxed is the undisclosed business receipt invested in unidentifiable unaccounted stock and there is no scope for taxing the same as deemed income u/s 69

4. In Lovish Singhal and Ors. v/s ITO and Ors. (ITAT Jodhpur Bench) ITA No.142-146/ JODH./2018, the Hon'ble Bench following the decision of Hon'ble Rajasthan High Court in the case of Brajrang Traders in ITA No.258/2017 dated 12/09/2017 observed that in respect of excess stock found during the course of survey and surrender made thereof is taxable under the head Business and Profession and it is not justified to apply section 69 of the Act Hence, there is no justification for taxing such income u/s 115BBE of the Act.

5. In PCIT v Deccan Jewellers (P) Ltd. [2021] 132 taxmann.com 73 (AP)] it was held that where explanations have been offered by the assessee that excess stock was a result of suppression of profits from business over the years the same could not have been treated as undisclosed investment u/s 69. During the course of survey, the assessee explained that the excess stock was part of the stock held of business purpose and the excess interest from pawning debtors was part of the money-lending business of the assessee Therefore the same should not be charged to tax as per section 115BBE

6. It is therefore submitted and requested that the excess income from pawning debtors and excess stock of gold and silver ornaments found at the time of survey and incorporated by the assessee in his books may not be considered as unexplained investment u/s 69 and may not please be taxed u/s 115BBE of the Act.

8.2 Reply of the assessee is perused and considered but not found to be acceptable as he could not substantiate his claim of such surrender income to be part of his business concern. After the survey proceedings carried out in his business premise, he has taken into books of accounts and filed ITR accordingly. Merely doing such addition of surrender income into his books of accounts does not show that the same was part of his business. In view of the above facts as discussed above, it is evident that unexplained money of Rs.49,82,740/-(on account of interest income earned in earlier year) and unexplained investment in stock of Rs.23,02,233/- was surrendered by the assessee at the time of survey proceedings. Therefore, the same is attracted the

deeming provision of sec 69 and 69A r.w.s 115BBE of IT Act and taxed accordingly"

2.8 That the aforesaid **"Impugned Assessment order"** was made **subject matter of Proceedings u/s 263 of the Act** by the Ld. PrCIT(Central) Bhopal who by the **"Impugned order"** has **revised** the aforesaid **"Impugned Assessment order"** by holding amongst others as under in Para 8,9 & 10 which we reproduce as under:-

"8. It is an established law that an assessment which is passed under section 147 of the Income Tax Act, 1961, it is expected from Assessing Officer that he will make requisite enquiry and do necessary verification to find out the correct course of action, including the correct assessable income of the assessee, and not take the facts placed by the assessee on their face value. In the case, Assessing Officer failed to make proper / any enquiry and has passed the order without proper consideration of law & application of mind on the issues discussed above. Consequently, the assessment order passed by him is erroneous and pre-judicial to the interest of revenue. Thus, the case of assessee is clearly covered under clause (a) of Explanation 2 below section 263(1) of IT Act, 1961. For the sake of clarity the same is reproduced herein below:

"263. (1) The Principal Commissioner or Commissioner may call for and examine the record of any proceeding under this Act, 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, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment.

Explanation 1.-.....

Explanation 2.-For the purposes of this section, it is hereby declared that an order passed by the Assessing Officer shall be deemed to be erroneous in so far as it is prejudicial to the interests of the revenue, if, in the opinion of the Principal Commissioner or Commissioner,-

(a) the order is passed without making inquiries or verification which should have been made;

(b) .....

9. In the case of Malabar industry Co. Ltd. Vs CIT[(2000) 109 Taxman 66(SC)], it was held that where the assessment order was framed without making any enquiry or proper application of mind, it would be an erroneous order within the meaning of section 263 of I.T. Act. Similarly, in the case of CIT Vs Ashok Logani [(2011) 202 Taxman. 201], Hon'ble Delhi High Court has held revision u/s 263 to be valid when it was found that there was no proper consideration by A.O to issues at hand and he left many loose ends. Similarly, in the case of Raj Mandir Estates [386 ITR 162] and Daniel Merchants Pvt. Ltd. Vs ITO [2017 TIOL-2526-H.C Kolkata-IT], it was held by Hon'ble Kolkata High Court that the CIT is entitled to revise the assessment order u/s 263 of I.T. Act on the ground that the A.O did not make any proper enquiry while accepting the explanation of the assessee.

10. Accordingly, after careful examination of the facts placed on record and the legal position discussed as above, I am of the considered opinion that the Assessing Officer has not enquired into and verified and has passed the order without proper consideration of law & application of mind and, accordingly, has not initiated penalty u/s 271AAC(1) on the surrendered income of Rs. 72,84,973/- despite the AO himself having applied provisions of section 69 and 69A r.w.s. 115BBE and he has not carried out inquiries or verifications to conclude that initiation / levy of penalty is not called for. More so since the assessee has not paid tax on such surrendered income as per provisions of section 115BBE of the I.T. Act before the end of the relevant previous year and, therefore, the assessee does not get benefit / relief under the proviso below section 271AAC(1);which he should have examined and applied before completing the assessment as was required from him. In view of the above facts, I am satisfied that the order passed by the Assessing Officer u/s 147 for A.Y. 2018-19 on 31.03.2023 is erroneous in so far as it is prejudicial to the interest of the revenue. Therefore, the order passed by the Assessing Officer u/s 147 for A.Y. 2018-19 on 31.03.2023 is set aside to the above extent. The Assessing Officer is directed to reframe the assessment de novo to the above extent (leaving the other issues in the original assessment order as such) after conducting proper inquiries in the light of the directions/discussion above and after affording reasonable opportunity of being heard to the assessee."

2.9 That the Assessee being aggrieved by the aforesaid **"Impugned order"** has filed the instant appeal before this tribunal & and raised following grounds of appeal in the form No. 36 which are as under:-

"1. That the order made by the PCIT, Central, Bhopal u/s 263 setting aside the Assessment Order u/s 143(3) stating it to be erroneous and directing the Assessing Office to initiate penalty u/s 271AAC(1) on the surrendered income be held to be erroneous and be quashed.

2. The appellant craves leave to add, amend or alter any Ground of Appeal before or during the course of appellate proceedings."

2.10 That the Assessee has placed on the record of this tribunal following statement of facts which is reproduced by us as below:-

"The appellant is proprietor of M/s Laxmandas Radheshyam Saraf and is engaged into the business of trading of Gold and Silver Ornaments and Money Lending business.
Survey proceedings u/s 133A were carried out at the business premises of the appellant on 08/03/2018. During the survey proceeding, entire stock of Gold Ornaments and Silver Omaments available at the business premises of the assessee was weighed and was compared with the weight of stock available in the books of the assessee. The difference between the physical weight and the weight in the books was accepted by the assessee and was duly incorporated in the books of accounts. Interest Income from Pawning Debtors was also declared by the appellant during the course of survey. The interest income declared during the course of survey was also duly incorporated in the books of the appellant. Thereafter, the return of income was filed on 29/04/2022 showing total income at Rs.1,00,50,700/-.

In the Order u/s 147 the learned A.O. accepted the above-mentioned declarations made by the appellant and no addition was made to the income of the assessee. However, the learned A.O. was of the opinion that the undisclosed interest income and the discrepancy in the stock of gold and silver ornaments found at the business premises of the assessee during the survey proceeding should be chargeable to tax u/s 115BBE. The action of the learned A.O. and the chargeability of tax u/s 115BBE r.w.s. 69 and 69A were disputed and hence an appeal was filed before the CIT(A).

Later, the PCIT, Central, Bhopal passed an Order u/s 263 setting aside the Assessment Order u/s 143(3) stating that the Order u/s 143(3) was erroneous and directed the Assessing Office to initiate penalty u/s 271AAC(1) on the surrendered income. The order made by the PCIT, Central, Bhopal u/s 263 dated 15/03/2025 is disputed in this appeal."

3. **Record of Hearing**

3.1 The hearing in the matter took place before this Tribunal on **06.01.2026** when the Ld. AR appearing for & and behalf of the Assessee interalia contended that the **"Impugned order"** u/s 263 of the Act is bad in law illegal & not Proper. It should be set aside by this Tribunal in exercise of it's appellate jurisdiction conferred upon it under the Act. It was submitted that by the **"Impugned order"** the Ld. PCIT by virtue of section 263 has **revised** the **"Impugned Assessment order"** & has directed the Ld. AO to reframe the Assessment denovo to the extend specified in the **"Impugned order"** at para 10 which we reproduce as under:-

> ***"10. Accordingly, after careful examination of the facts placed on record and the legal position discussed as above, I am of the considered opinion that the Assessing Officer has not enquired into and verified and has passed the order without proper consideration of law & application of mind and, accordingly, has not initiated penalty u/s 271AAC(1) on the surrendered income of Rs. 72,84,973/- despite the AO himself having applied provisions of section 69 and 69A r.w.s. 115BBE and he has not carried out inquiries or verification to conclude that initiation / levy of penalty is not called for. More so since the assessee has not paid tax on such surrendered income as per provisions of section 115BBE of the I.T. Act before the end of the relevant previous year and, therefore, the assessee does not get benefit / relief under the proviso below section 271AAC(1);which he should have examined and applied before completing the assessment as was required from him. In view of the above facts, I am satisfied that the order passed by the Assessing Officer u/s 147 for A.Y. 2018-19 on 31.03.2023 is erroneous in so far as it is prejudicial to the interest of the revenue. Therefore, the order passed by the***

Assessing Officer u/s 147 for A.Y. 2018-19 on 31.03.2023 is set aside to the above extent. The Assessing Officer is directed to reframe the assessment de novo to the above extent (leaving the other issues in the original assessment order as such) after conducting proper inquiries in the light of the directions/discussion above and after affording reasonable opportunity of being heard to the assessee."

In brief it was submitted that since in the **"Impugned Assessment order" had not** initiated the penalty **u/s 271AAC(1)** the proceedings **u/s 263** came to be **initiated & impugned order came to be passed. It was submitted that merely because the Ld. AO in the "Impugned Assessment order" has not spoken about the initiation of penalty proceedings u/s 271AAC(1)or has not carried out inquiries or verifications to conclude that initiation/levy of penalty is not called for "Ipso facto" is no ground to initiate the proceedings u/s 263 of the Act. Mere failure or omission or not to initiate proceedings u/s 271AAC(1) in the "Impugned Assessment order" does not mean that same is "erroneous" & "Prejudicial to the interest of Revenue."** The Ld. AR then contended & submitted that mere fact that the penalty direction/satisfaction for the **"Initiation of penalty proceedings"** is not given in the

impugned assessment order that by itself is no ground to **trigger chapter xx- section 263 of the Act** which deals with revision of orders which are erroneous & prejudicial to the interest of the revenue. It was then submitted by the Ld. AR for the Assessee that the penalty initiation is not compulsory exercise in the course of the Assessment Proceedings & in the passing of the **"Impugned Assessment order"**. The Ld. AR then brought to our attention the notice which was issued in section 263 proceedings which is already reproduced in the **"Impugned order"** & read out para 2,3 & 4 of the said notice at page No. 2 & 3 of the **"Impugned order".** It was submitted that under section 271AAC(1) which deals with penalty in respect of certain income uses the word **"May"** which should be interpreted as **"discretionary" & not mandatory. It should be liberally be construed & not strictly.** It was submitted that the income surrendered in the survey & in the assessment proceedings are normal business income of the assessee & same is exigible to tax at normal rate of Tax & Ld. AO has wrongly invoked 115 BBE of the Act. It was also submitted

that against the **"Impugned Assessment order"** the Assesse has preferred the first appeal before the Ld. CIT(A) & that the same is pending. The Assessee has paid normal rate of tax on the income so computed & assessed. In brief it was contended that disputed Tax u/s 115 BBE is pending. A bonafide dispute on rate of Tax applicable i.e. normal rate of tax vis a vis tax u/s 115 BBE does not mean that the **"Impugned Assessment order"** becomes erroneous & prejudicial to the interest of Revenue. The Ld. AR has placed on the record of this Tribunal submissions along with appeal Memo from pages 1 to 2 which we reproduce as under:-

BEFORE THE INCOME TAX APPELLATE TRIBUNAL, INDORE BENCH, INDORE

Appellant	:	Radheshyam Agarwal Prop. M/s Laxmandas Radheshyam Saraf, Marwari Road, Bhopal-462001
PAN	:	AAOPA5650L
Assessment Year	:	2018-19

SUBMISSION

Your Honour,

Please refer to the Order u/s 263 dated 15/03/2025 made by PCIT(Central), Bhopal. In the aforesaid order, the Honourable PCIT (Central), Bhopal has set aside the assessment order passed by the Assessing Officer u/s 143(3) dated 31/03/2023, with a direction to the Assessing Officer to reframe the assessment de novo.

The basis of the said direction is that the Assessing Officer has not initiated the penalty u/s 271AAC(1) of the Act while passing the Assessment Order u/s 143(3) dated 31/03/2023 and non-initiation of the said penalty makes the assessment order prima-facie erroneous in so far as it is prejudicial to the interest of revenue.

1. With regard to your aforesaid order, it is humbly submitted that the initiation of penalty u/s 271AAC(1) is not compulsory where income of the appellant is assessed u/s 69 and 69A and tax is levied u/s 115BBE. The initiation of penalty u/s 271AAC(1) is discretional and not mandatory in nature. The provisions of section 271AAC(1) is also produced for your kind perusal:

   *"**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"*

   The appellant would like to draw your attention to the judgement of the Honourable Income Tax Appellate Tribunal, Indore Bench in **ITA No.289/Ind/2024, Sriyans Kumar Jain HUF v PCIT(Central), Bhopal** where it was held that:

   *"A careful reading of above section 271AAC clearly reflects that the imposition of penalty is not compulsory in every case, the use of words **"may direct"** shows discretion available to the AO. Therefore, the AO may or may not impose penalty as per his analysis. When it is so,*

it cannot be said that there is any error in the order of AO. The order passed by AO cannot be said to be erroneous for non-initiation of penalty proceeding when the imposition of penalty is not mandatory and one of the discretion of AO. In the circumstance, we are inclined to quash the revision order passed by PCIT wrongly holding that the AO's order is erroneous. We order accordingly to quash the revision-order and restore the AO's order. The assessee succeeds in this appeal."

2. The provisions of section 263 are also produced for your kind perusal:

***263(1)**: The Principal Commissioner or Commissioner may call for and examine the record of any proceeding under this Act, 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, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment.*

Since, the initiation of penalty is not mandatory and is at the discretion of the Assessing Officer, non-initiation of penalty cannot be held as erroneous in nature and prejudicial to the interests of the revenue.

Further, in **Additional CIT v JK D'costa (1982) 133 ITR 7 (Delhi)** the Honourable Court has held that if the Commissioner finds, while examining the records of an Assessment Order u/s 263, that the A.O. has not initiated penalty proceedings, he cannot direct initiation of penalty proceedings because penalty proceedings are not a part of assessment proceedings. The Commissioner cannot pass an order u/s 263 pertaining to initiation of penalty proceedings and on this basis alone jurisdiction u/s 263 is not justified and the assessment made should not be set-aside.

The said order of the honourable Delhi High Court was also followed in **CIT v Nihal Chand Rekyan (2000) 242 ITR 45 (Delhi)**.

3. In view of the above it is therefore humbly submitted that the Order u/s 263 dated 15/03/2025 made by PCIT(Central), Bhopal may please be dropped or set aside.

Submitted,

Yours faithfully,

Place: Bhopal
Dated: 01/05/2025

3.2 Per contra the Ld. DR appearing for & on behalf of the revenue submitted that the **"Impugned order"** is legal & proper & requires no intervention of this Tribunal in the exercise of it's appellate jurisdiction. It meets all the material ingredients of section 263 of the Act. The **"Impugned order"** is correctly passed by PCIT with due application of mind. It is speaking & well-reasoned order. Full & complete opportunities were afforded to the assessee in the revision proceedings u/s 263 of the Act. The act of non initiation of penalty proceeding u/s 271AAC(1) **triggered the proceedings u/s 263 of the Act as in the "Impugned Assessment order" there is not even a whisper about** the initiation of the penalty proceedings u/s 271AAC(1) nor there is any recording of satisfaction with regard to the imposition/initiation of penalty proceedings u/s 271AAC of the Act. Under these circumstances the provisions of section 263 comes into play & it can safely be said that the **"Impugned Assessment order"** is erroneous & prejudicial to the interest of Revenue. It was submitted by the Ld. DR that entire the gamut of the case is required to be adjudged &

adjudicated by the Ld. AO **which includes the initiation** of penalty proceedings u/s 271AAC(1) as the provisions of section 69/69A rws 115BBE are invoked in the **"Impugned Assessment order"**. Since the Ld. AO had failed to do so, the proceedings u/s 263 were triggered & and **"Impugned order"** came to be passed rightly by the Ld. PCIT. The Ld. DR vide letter bearing No. CIT (DR)/ITAT/Ind/2025-26 dated 05.01.2026 has submitted a compilation of case law relied upon by revenue. In this regard the Ld. DR has placed reliance on the judgment of the ***Hon'ble Allahabad High Court in case of CIT vs Surendra Prasad Agrawal reported in (2005) 142 taxman 653 (Allahabad)*** & on para 18 which we reproduce as below:-

> ***"18. It is well established that the Assessing Officer has to initiate proceedings for imposition of penalty during the course of the assessment itself. If he fails to initiate or record his satisfaction for the initiation of the penalty proceedings during the course of the assessment proceedings it would be a case where the assessment order can be said to be erroneous as he has not decided a point nor recorded a finding on an issue which ought to have been done or decides it wrongly as held by this Court in the case of Saraiya Distillery (supra). Thus the omission of the Income Tax Officer to initiate penalty proceedings during the course of the assessment renders the assessment order erroneous and prejudicial to the interest of the Revenue."***

The Ld. DR then invited our attention to yet another judgment of the ***Hon'ble Allahabad High Court in case of CIT vs Associated contractor's corpn reported in (2005) 145 Tax man 356 (Allahabad)*** & invited our attention to para 4 & 5 which we reproduce as below:-

> ***"4. Recently, this Court had the occasion to consider in great detail the decision of the Delhi High Court in the case of Addi. CIT v. J.K. D'Costa [1982] 133 ITR 7[1] and other case in CIT v. Sri Surendra Prasad Agrawal [IT Reference No. 148 of 1984, dated 1-9-2004] and this Court has held that non-initiation of penalty proceeding by the assessing authority in the course of assessment proceedings, also renders the order erroneous and prejudicial to the interest of the Revenue and, therefore, can be the subject-matter of revision under section 263 of the Act.***
>
> ***5. Respectfully following the aforesaid decision, we answer the question of law referred to us in the negative i.e., in favour of the Revenue and against the assessee. However, there shall be no order as to costs."***

The Ld. DR then invited our attention to the ***Jurisdictional Hon'ble MP High Court judgment in case of Addl. Commissioner of Income Tax u/s India pharmaceuticals reported in [1980]123ITR 874[MP]*** & laid emphasis on following:-

> *"It was contended by learned counsel appearing for the revenue that proceedings for assessment under s. 143 of the Act are proceedings where the ITO had to apply his mind to the circumstances which would attract the provisions contained in s. 271(1)(a) as it is only during the proceedings pending before the ITO that the ITO has to be satisfied*

about the existence of facts which would attract the provisions contained in s. 271(1)(a) of the Act. He, therefore, contended that while proceeding with the proceedings of assessment and ultimately passing an order of assessment if the ITO has omitted
to consider the facts which would attract s. 271(1)(a) and has failed to apply his mind, this will be an error in the proceedings which would confer jurisdiction on the Commissioner under s. 263 of the Act. Learned counsel, in support of his contentions, placed reliance on C.A. Abraham v. ITO [1961] 41 ITR 425 (SC) and CIT v. Bhikaji Dadabhai & Co. [1961] 42 ITR 123 (SC). It was also contended that the Tribunal has placed reliance on a decision of the Madras High Court in M.A. Abdul Waheed v. CCT [1972] 30 STC 277; but that decision will have no application in the present case and according to learned counsel the decisions referred to above of their Lordships of the Supreme Court conclusively establish that during the proceedings of assessment under s. 143 of the Act, the ITO is expected to apply his mind to the facts attracting the provisions contained in s. 271(1)(a) of the Act.
Learned counsel appearing for the assessee on the other hand contended that s. 263 of the Act confers jurisdiction on the Commissioner only in cases where there is any error in the order passed by the ITO and that error is prejudicial to the interests of the revenue. He contended that the orders of assessment passed by the ITO in the instant case have not been found to be erroneous as apparently it could not be contended that there is any error in those orders under s. 143 of the Act. He contended that what their Lordships of the Supreme Court in the two cases cited by learned counsel for the revenue held was that it is in the proceedings for assessment that jurisdiction could be exercised for imposition of penalty as, according to their Lordships, the term "assessment" is used in a wider sense. But learned counsel contended that it could not be said that if the ITO has failed to notice certain facts which could attract the provisions contained in s. 271(1)(a), the order of assessment is erroneous, He, therefore, contended that the case relied upon by the Tribunal is the case which applies with full force and the Tribunal was right in following that case.
Section 271(1)(a) of the Act provides:
"271. (1) If the Income-tax Officer or the Appellate Assistant Commissioner, in the course of any proceedings under this Act, is satisfied that any
person—
(a) has without reasonable cause failed to furnish the return of total income which he was required to furnish under sub-section (1) of section
139 or by notice given under sub-section (2) of section 139 or section 148 or has without reasonable cause failed to furnish it within the time

allowed and in the manner required by sub-section (1) of section 139 or by such notice, as the case may be, or.....
he may direct that such person shall pay by way of penalty....."
It is clear from this provision that the ITO or the AAC in the course of any proceedings under this Act, if he is satisfied about the existence of facts enumerated in sub-cl. (a) quoted above, an order for payment of penalty could be passed. It is, therefore, clear that if no proceedings are pending before the ITO, s. 271(1) could not be used to impose penalty. It is also apparent that it is only in the proceedings pending before an ITO that he may discover the facts attracting sub-cl. (a). Section 143 of the Act provides for the assessment and when proceedings of assessment are pending before an ITO it is not disputed that he is free to consider if the facts come to his notice attracting s. 271(1)(a) of the Act.
In C.A. Abraham v. ITO [1961] 41 ITR 425, while considering the word "assessment", their Lordships of the 'Supreme Court observed (at page 429):
"A review of the provisions of Chapter IV of the Act sufficiently discloses that the word "assessment" has been used in its widest connotation in that chapter. The title of the chapter is "Deductions and Assessment". The section which deals with assessment merely as computation of income is section 23; but several sections deal not with computation of income, but determination of liability, machinery for imposing liability and the procedure in that behalf. Section 18A deals with advance payment of tax and imposition of penalties for failure to carry out the provisions therein. Section 23A deals with power to assess individual members of certain companies on the income deemed to have been distributed as dividend, section 23B deals with assessment in case of departure from taxable territories, section 24B deals with collection of tax out of the estate of deceased persons, section 25 deals with assessment in case of discontinued business, section 25A with assessment after partition of Hindu undivided families and sections 29, 31, 33 and 35 deal with the issue of demand notices and the filing of appeals and for reviewing assessment and section 34 deals with assessment of incomes which have escaped assessment. The expression "assessment" used in these sections is not used merely in the sense of computation of income and there is in our judgment no ground for holding that when by section 44, it is declared that the partners or members of the association shall be jointly and severally liable to assessment, it is only intended to declare the liability to computation of income under section 23 and not to the application of the procedure for declaration and imposition of tax liability and the machinery for enforcement thereof. Nor has the expression, 'all the provisions of Chapter IV shall so far as may be apply to such assessment' a restricted content; in terms it says that all the provisions of Chapter IV shall apply so far as may be to assessment of firms which

have discontinued their business. By section 28, the liability to pay additional tax which is designated penalty is imposed in view of the dishonest or contumacious conduct of the assessee. It is true that this liability arises only if the Income-tax Officer is satisfied about the existence of the conditions which give him jurisdiction and the quantum thereof depends, upon the circumstances of the case."

These observations of their Lordships, therefore, clearly indicate that the assessment does not mean only computation of income but consideration of all facts including the liability for penalty, or, as the language of s. 271(1)(a) indicates, consideration of facts that may attract the provisions contained in that section.

In CIT v. Bhikaji Dadabhai and Co. [1961] 42 ITR 123 , their Lordships of the Supreme Court were considering the provisions of the

Hyderabad Act, which were similar to the provisions contained in the Indian I.T. Act. Their Lordships quoted the view taken by the High Court (atpage 127):

"The Hyderabad Income-tax Act also used the expression 'assessment' in different senses. In certain sections, for instance sections 31 and 39, the expression is used as in the sense of mere computation of income; in other sections it is used in the sense of determination of liability and in certain other sections in the sense of machinery for imposing liability and procedure in that behalf. By the Finance Act, 1950, the Hyderabad Income-tax Act was expressly kept alive in respect of periods which include the assessment year in question for purposes of levy, assessment and collection of income-tax. The High Court expressed the view that the word 'assessment' in section 13(1) included the whole procedure for imposing liability upon the taxpayer but not to the procedure for imposing a penalty. They thought that the Hyderabad Income-tax Act dealt with liability to pay income-tax and penalty in distinct provisions, both relating to imposition and recovery and that if the Legislature had intended to

keep alive the Hyderabad Income-tax Act for all purposes including the levy of penalty with respect to any particular year or years of

assessment, it could have said so in terms clear and unambiguous instead of limiting the operation only to 'levy, assessment and collection'. In the view of the High Court, imposition of penalty was not a necessary concomitant or incident of the process of assessment, levy and collection of tax.

The High Court proceeded upon the view that by saving the Hyderabad Income-tax Act for the purposes of levy, assessment and collection of income-tax, the entire procedure for imposing liability to pay tax and for collection of tax was saved, but penalty not being tax, provisions relating to imposition of and collection of penalty did not survive the repeal of the Hyderabad Income-tax Act." and thereafter following the decision in C.A. Abraham v. ITO [1961] 41 ITR 425

(SC) quoted with approval (at p. 127):
"The expression 'assessment' used in these sections (provisions of Chapter IV of the Indian Income-tax Act) is not used merely in the sense of computation of income and there is in our judgment no ground for holding that when by section 44, it is declared that the partners or members of the association shall be jointly and severally liable to assessment, it is only intended to declare the liability to computation of income under section 23 and not to the application of the procedure for declaration and imposition of tax liability and the machinery for enforcement thereof...By section 28, the liability to pay additional tax which is designated penalty is imposed in view of the dishonest or contumacious conduct of the assessee."
and on this basis allowed the appeal. It is, therefore, clear that according to the view of their Lordships of the Supreme Court the word "assessment" is not used in the Indian I.T. Act in the narrow sense of computing income only but is used in a wider perspective and, therefore, when proceedings for assessment are pending before the ITO, if facts attracting the provisions of s. 271(1)(a) come to his notice while proceeding with the assessment, it is necessary for the ITO to invoke the provisions for the recovery of penalty.
Learned counsel for the assessee referred to the Note at page 1207 in Kanga and Palkhivala's "The Law and Practice of Income-tax", seventh edn., Vol. I, wherein the observations of their Lordships of the Supreme Court in C.A. Abraham v. ITO [1961] 41 ITR 425 have been analysed and it appears that the learned author has suggested that tax and penalty are distinct and different concepts and has noted some cases of their Lordships of the Supreme Court. But in the present case we are not concerned with the observations in [1961]
41 ITR 425 about penalty being described as additional tax, but we are only concerned with the meaning of the word "assessment" and learned counsel for the assessee could not contend that that view taken by their Lordships of the Supreme Court has been given up in subsequent decisions.
The decision reported in M.A. Abdul Waheed v. CCT [1972] 30 STC 277 on which reliance has been placed by the Tribunal is a sales tax matter. In that decision, a Division Bench of the Madras High Court took the view that under s. 12(2) of the Tamil Nadu General Sales Tax Act power is conferred to make the assessment and once the assessment is made the power has been exercised properly as, according to their Lordships, the assessment could not be set aside on the ground that the assessing officer overlooked the provisions of s. 12(3) of that Act and failed to exercise the power while making the assessment. In that case, their Lordships were dealing with the Tamil Nadu Sales Tax Act and it is not clear as to what is the scheme of assessment in that law. So far as the I.T. Act is concerned, the scheme of assessment as considered by their

Lordships of the Supreme Court is not restricted to the mere computation of income and tax but a number of other things and, therefore, in the proceedings for assessment if the ITO fails to take notice of the facts attracting the provisions contained in s. 271(1)(a), it could not be said that his failure to take notice of the facts which were before him attracting the provisions of s. 271(1)(a) does not amount to an error prejudicial to the interests of the revenue.

It was contended by learned counsel that even if the ITO omitted to take note of the facts attracting the provisions under s. 271(1)(a) during the proceedings of assessment it may be that some error in the proceedings has been committed. But so far as the order of assessment is concerned, according to learned counsel, failure to take action under s. 271(1)(a) could not be said to be an error if the order of assessment otherwise is found to be in order. This contention of learned counsel for the assessee cannot be accepted in view of the wide meaning given to the term "assessment" as laid down by their Lordships of the Supreme Court in the cases referred to above. It is also not disputed before us that the proceedings of assessment are not only computation of income and tax but various other things which fall within the scheme of Chap. XIV which talks of procedure for assessment. And it also could not be disputed that when s. 271(1) talks of "proceedings pending" it will include the proceedings for assessment within the scheme of Chap. XIV of the Act, and the proceedings of assessment under the scheme of this law ultimately culminating in an order of assessment.

Section 263 (1) of the Act reads:

"263. (1) The Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the Income-tax Officer is erroneous in so far as it is prejudicial to the interests of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment. "

Under this provision, jurisdiction is conferred on the Commissioner to call for and examine the record of any proceeding under this Act and on such examination if he finds that the order passed therein by the ITO is erroneous in so far as it is prejudicial to the interests of the revenue, he may revise the order after following the procedure prescribed under this provision. If, therefore, the ITO during the pendency of the proceedings has omitted to take notice of facts attracting s. 271(1)(a) of the Act during the pendency of proceedings which ultimately ended in an order of assessment, the order would be erroneous and in this view of the matter, the Commissioner was right in exercising jurisdiction conferred on him under s. 263 of the Act. In this view of the matter, therefore, our

answer to the question referred to us is in the negative. In the circumstances of the case parties shall bear their own costs.

The Ld. DR then invited our attention to the order dated 20.02.2023 of ITAT Mumbai in case of ***Anjis developers Pvt. Ltd. v/s PCIT-5 [ITA No. 999/Mum/2022 AY 2017-18]*** & laid emphasis following paragraphs which we reproduce as below:-

"5. On the contrary, the Ld. Departmental Representative (DR) submitted that omission by the Assessing Officer to initiate penalty proceedings has squarely rendered the assessment order erroneous and prejudicial to the interest of Revenue. In support, he relied on the Hon'ble Allahabad High Court in the case of CIT v. Surendra Prasad Agrawal [2005] 142 Taxman 653 (Allahabad).

6. We have heard rival submission of the parties on the issue-in-dispute and perused the relevant material on record. According to the Ld. PCIT, the Assessing Officer failed to make inquiries on the issue of initiating penalty proceedings u/s 270A of the Act and said action of the Assessing Officer is without application of the mind. Before the Ld. PCIT, it was submitted on behalf of the assessee that all material facts were disclosed before the Assessing Officer.It was further submitted that case of the assessee falls within the exclusion mentioned u/s 270A(6) of the Act and therefore addition made cannot be considered as under reporting of the income for the purpose of section 270A of the Act and it was possible that Assessing Officer had after considering the fact of the case and exclusion mentioned 270A(6) of the Act, arrived at the decision that the assessee was not liable for initiating the penalty proceedings. But we find that there is no such whisper in the assessment order or in the assessment record that case falls under exclusion mentioned in section 270A(6) of the Act. Further, we find that in the case of Addl. CIT v. J.K. D's Costa (supra), the Hon'ble High Court has held penalty proceedings do not from part of assessment proceedings and failure of the Assessing Officer or ITO to record in the assessment order, his satisfaction or lack of it in regard to the leviability of the penalty,

cannot be said to be a factor vitiating the assessment order in any respect. The Hon'ble Delhi High Court in the case of Achal Kumar Jain (supra) following the finding in the case of J.K. D's Costa (supra). However, we find that the Hon'ble Allahabad High Court in the case of Surendra Prasad Agrawal (supra) after considering the decision of the Hon'ble Delhi High court in the case of J.K. D's Costa (supra) and Achal Kumar Jain (supra) held that non-initiation of penalty proceedings u/s 271(1)(c) of the Act has rendered, the assessment order erroneous in so far as prejudicial to the interest of the Revenue. The relevant finding of the Hon'ble Allahabad High Court is reproduced as under:

"5. We have heard Shri A.N. Mahajan, the learned Standing Counsel for the Revenue and Shri Rishi Raj Kapoor, leamed counsel for the respondent. 6. The learned counsel for the Revenue submitted that the Tribunal was not justified in holding that the Commissioner of Income Tax could not have assumed jurisdiction under section 263 of the Act in a case in which there was no order passed by the Income Tax Officer under the Act in as much as omission to initiate penalty proceedings while passing the assessment order was erroneous as also prejudicial the interest of the Revenue. He further submitted that the Commissioner of Income Tax has remanded the matter and if the order was erroncous and prejudicial on two points, the Commissioner had the power to remand the matter and direct for initiation of penalty proceedings also. He relied upon the following decisions

1. Saraiya Distillery's case (supra)

2. Malabar Industrial Co. Lid. v. CIT (2000) .243 ITR 83-(SC).

7. Shri R.R. Kapoor leamed counsel for the respondent submitted that omission to initiate penalty proceedings under section 273(1) of the Act by the Income Tax Officer while passing the assessment order did not amount to an order which could be revised by the Commissioner of Income Tax under section 263 of the Act. While supporting the decision of the Tribunal he relied upon the following decisions:

1. Adell. CIT v. J.K. D'Costa (19821 133 ITR 7& (Delhi)

2. Addl. CIT v. Achai Kumar Jain (1983) 142 ITR 606 (Delhi)

3. CIT v. Nihal Chand Rekyan (20001 242 INTR 45 (Delhi).

8. Having heard the learned counsel for the parties we find that the Delhi High Court in the case of J.K. D'Costa (supra) has held that the assessment cannot be said to be erroneous or prejudicial to the interest of the revenue because of the failure of the Income Tax Officer to record his opinion about the leviability of penalty in the case. It has held as follows:

The only question before us is whether the Tribunal was right in revoking the order of the Addl. Commissioner in so far as it pertains to the question of penalties under sections 271(1)(a) and 273(b). Here, we find ourselves in complete agreement with the view taken by the Tribunal. It is well established that procecdings for the levy of a penalty whether under section 271(1)(a) or under section 273(6) 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 section 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 course 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 assessee 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 is 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 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..." (p. 11)

9. The aforesaid decision has been consistently followed by the Delhi High Court in the cases of Achal Kumar Jain (supra), P.C. Puri v. CIT (1985) 151 ITR 584 (Delhi), Addl. CIT v. Precision Metal Works (1985) 156 MIR 6934, CWT v. A.N. Sarvaria (1986) 161 ITR

694, Addl. CIT v. Sudershan Talkies (1993).200 ITR 153, CIT v.Sudershan Talkies [19931.201 ITTR 289 and Nihal Chand Rekvan (supra).
10. Similar view has been taken by the Rajasthan High Court in the case of CIT v. KeshrimalParasmal (1986)157 ITR 484%, Gauhati High Court in the case of Surendra Prasad Singh v. CIT (19881_173 ITR 610°, Calcutta High Court in the case of CIT v. Linotype & Machinery Lid. (19911_192 ITR 337 and Madras High Court in the case of CIT v. C.R.K. Swami (2002) 254 ITR 1584.

11. On the other hand the Madhya Pradesh High Court has taken a contrary view in the case of Addl. CIT v.Indian Pharmaceuticals [19801_123 ITR 874 Addl. CIT v. Kantilal Jain (19801 125 ITR 3735, Addl. CWT v. NathoolalBala Ram (1980). 125 ITR 596& and CIT v. Narpat Singh Malkhan Singh (19811 128 ITR 777
12. This Court in the case of Saraiva Distillery (supra) has held that an order can be said to be erroneous either when it does not decide a point or record a finding on an issue which ought to have been done or decides it wrongly. In the aforesaid case the Assessing Officer had not charged interest while passing the assessment order. This Court following the decision of Kerala High Court in the case of CIT v. Cochin Malabar Estates Lid. (1974)27 ITR 466 and Calcutta High Court in the case of Singho Mica Mining Co. Lid. v. CIT (19781_LL ITR 231 has held that the order passed by the ITO being prejudicial to the interest of the revenue, the Additional Commissioner had jurisdiction under section 263 to pass the order. The Madhya Pradesh High Court in the case of Indian Pharmaceuticals orders.
6.1 Thereafter, Hon'ble High Court in para 18 held as under:

"18. It is well established that the Assessing Officer has to initiate proceedings for imposition of penalty during the course of the assessment itself. If he fails to initiate or record his satisfaction for the initiation of the penalty proceedings during the course of the assessment proceedings it would be a case where the assessment order can be said to be erroneous as he has not decided a point nor recorded a finding on an issue which ought to have been done or decides it wrongly as held by this Court in the case of Saraiya Distillery (supra). Thus the omission ofthe Income Tax Officer to initiate penalty proceedings during the course of the assessment renders the assessment order erroneous and prejudicial to the interest of the Revenue.

19. In this view of the matter, we are in respectful agreement with the view taken by the Madhya Pradesh High Court in the case of Indian Pharmaceuticals (supra).

20. In view of the foregoing discussions we are of the considered opinion that the Tribunal was not justified in holding that the failure to initiate penalty proceedings in the course of the assessment did not render the assessment order erroneous and prejudicial to the interest of the revenue. The Commissioner of Income Tax had the jurisdiction to revise such an order."

6.2 The issue in dispute in the instant case is in relation to penalty u/s 270A of the Act which is more or less 'pari materia' with section u/s 271(1)(c) of the Act. For ready reference the section 271(1)(c) of the Act and section 270A are reproduced as under:

Section 271(1)(c)

[Failure to furnish returns, comply with notices, concealment of income, etc.
271. (1) If the Assessing Officer or the Commissioner (Appeals)) any proceedings under this Act, is satisfied that nay person-
(b)
*(c) has concealed the particulars of "his income or so*** "furnished inaccurate particulars of 81/such income, or/7°*
(d)he may direct that such person shall pay by way of penalty,-
(1) [****]
84 (i) in the cases referred to in clause (b), & in addition to tax, if any, payable) by him, la sum of ten thousand rupees) for each such failure; ST
(ii) in the cases referred to in clause (c) & or clause (d)), in addition to tax, if any, payable) by him, a sum which shall not be less than, but which shall not exceed three times), the amount of tax sought to be evaded by reason of the concealment of particulars of his income 9 or fringe benefits) or the furnishing of inaccurate particulars of such income or fringe benefits).
Section 270A
270A. (1) The Assessing Officer or the Commissioner (Appeals) or the Principal Commissioner or Commissioner may, during the course of any proceedings under this Act, direct that any person who has under-reported his income shall be liable to pay a penalty in addition to tax, if any, on the under-reported income.

6.3 Since, both the penalty u/s 271(1) of the Act as well as penalty u/s 270A of the Act could be initiated if the Assessing Officer or other authority prescribed may consider so under the proceeding of the Act. Therefore, the issue decided by Hon'ble Allahabad High Court (supra) being pari materia, respectfully following the finding, the grounds raised by the assessee are dismissed."

Basis above authoritative Pronouncements the Ld. DR emphasised that the word **"May"** used in section 271AAC(1) should be strictly construed & is not discretionary as in other penalty sections under the Act **"May"** has been given meaning as **"not discretionary" too**. Hence the **"Impugned order"** is legal & proper & should not be interfered with by this Tribunal. It was also contended that an **"Assessment order"** has **wider import.** It encompasses in it ambit not only the quantum of the Assessed income exigible to Tax but other aspect of act's omission's commission's etc. on part of the assessee to ensure compliances etc. under the Act. It was also contended that the Assessee has not followed the obligations as per the **"Impugned Assessment order"**. The Ld. DR emphasised paragraph 5 of the **"impugned order"** which we reproduce as below:-

"5.It may be seen from the above that the assessment order dated 31.03.2023 was passed by the AO without verifying the fact that penalty u/s

271AAC(1) of the Income Tax Act, 1961 was required to be initiated on the 'surrendered income of Rs. 72,84,973/-, makes the assessment order prima facie erroneous in so far as it is prejudicial to the interest of revenue, among other aspects, at least within meaning of Explanation 2(a)to section 263(1) of IT Act."

3.3 At the Rejoinder stage of the arguments the Ld. AR was given an opportunity to file one pager submission which was filed during the day which we reproduce as under:-

BEFORE THE INCOME TAX APPELLATE TRIBUNAL, INDORE BENCH, INDORE

Appellant	:	Radheshyam Agarwal Prop. M/s Laxmandas Radheshyam Saraf, Marwari Road, Bhopal-462001
PAN	:	AAOPA5650L
Assessment Year	:	2018-19
Appeal No.	:	ITA 417/Ind/2025

SUBMISSION

Your Honour,

In continuation of the hearing of the aforesaid case heard on 06/01/2025 the appellant humbly submits following case supreme court and high court judgements in favour of the appellant:

1. The **Honourable Supreme Court** in case of ***Malabar Industrial Co. Ltd. v. Commissioner of Income Tax, (2000) 243 ITR 83 (SC)*** *held that:*

   "The phrase prejudicial to the interests of the revenue has to be read in conjunction with an erroneous order passed by the Assessing Officer. Every loss of revenue as a consequence of an order of Assessing Officer cannot be treated as prejudicial to the interests of the revenue, for example, when an Income-tax Officer adopted one of the courses permissible in law and it has resulted in loss of revenue; or where two views are possible and the Income tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the revenue unless the view taken by the Income-tax Officer is unsustainable in law."

2. **(SC) :(1973) 88 ITR 192 :(1973) 2 CTR 177** in case of **Commissioner of Income-tax v. Vegetable Products Ltd. the SUPREME COURT OF INDIA** held that:

There is no doubt that the acceptance of one or the other interpretation sought to be placed on section 271(1)(a)(i) by the parties would lead to some inconvenient result, but **the duty of the court is to read the section, understand its language and give effect to the same**. If the language is plain, the fact that the consequence of giving effect to it may lead to some absurd result is not a factor to be taken into account in interpreting a provision. It is for the legislature to step in and remove the absurdity. On the other hand, **if two reasonable constructions of a taxing provision are possible, that construction which favours the assessee must be adopted. This is a well-accepted rule of construction recognised by this court in several of its decisions.** Hence, all that we have to see is, what is the true effect of the language employed in section 271(1)(a)(i). **If we find that language to be ambiguous or capable of more meanings than one, then we have to adopt that interpretation which favours the assessee, more particularly so because the provision relates to imposition of penalty.**

It is true that the Lahore and Delhi High Courts have taken a different view. But the view taken by the Calcutta and Mysore High Courts cannot be said to be untenable view. Hence, particularly in view of the fact that we are interpreting, not merely a taxing provision but a penalty provision as well, the interpretation placed by the Calcutta and Mysore High Courts cannot be rejected. Further, as seen earlier, the consequences of accepting the interpretation placed by the revenue may lead to harsh results.

3. **(P&H-HC) [2011] 335 ITR 364** in case of **Commissioner of Income-tax-I, Ludhiana v. Subhash Kumar Jain**, the **Honourable HIGH COURT OF PUNJAB AND HARYANA** held that:

"*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.*"

"We are in agreement with the view taken by the High Courts of Delhi, Rajasthan, Calcuttaand Gauhati, and express our inability to subscribe to the view of Madhya Pradesh High Court."

"Accordingly, it is held that the initiation of proceedings under section 263 was not justified. The Tribunal was right in holding that after examining the records of the assessment in exercise of powers under section 263, where the CIT finds that the Assessing Officer had not initiated penalty proceedings, he cannot direct the Assessing Officer to initiate penalty proceedings under section 271(1)(c) of the Act."

4. In view of the above judgements, since there is more than one tenable view/ opinion of the high courts, in such a case the construction which favours the assessee must be adopted. It is therefore humbly submitted that the Order u/s 263 dated 15/03/2025 made by PCIT(Central), Bhopal may please be dropped or set aside.

Submitted,

Yours faithfully,

Place: Bhopal
Dated: 06/01/2026

CA Govind Rinwa, AR

At the rejoinder stage the Ld. AR laid emphasis on the judgement of the ***Hon'ble Supreme Court in case of Vegetable Product*** case too. The matter was heard & concluded.

4. **Observations Findings & Conclusions**

4.1 We now have to decide the legality validity & proprietary of the **"Impugned order"** basis records of the case & the rival submissions canvassed before us.

4.2 We have carefully perused the records of the case & have heard the submissions.

4.3 We basis records of the case & after hearing & upon examining the rival contentions of the Ld. AR & the Ld. DR canvassed before us, are of the considered opinion that **"Impugned order"** u/s 263 of the Act is legal & proper. **We find No infirmities in it.** The **"Impugned order"** is with an application of mind. It is speaking & well-reasoned order. The Ld. AR basis his submissions has not been able to **assail** the **"Impugned order"** on any cogent grounds. We are of the considered view that the **"Assessment order"** has a vide import & includes within it's encompass, ambit & scope not only the total income computation exigible to tax but several other aspects of various compliances under the Act which are far many like interest, penalty etc. Besides **"Assessment order"** it is also an order of "Adjudication" & "Ad-judgement". It is not only the original stage of assessment/Reassessment but the original stage of compliances under the act with regard to other aspects of the Assessment/Reassessment like interest, Penalty etc. The entire return of income & it's

computation is before the Ld. AO basis several papers, material, evidences, documents, information dats's, books of accounts, etc which the Ld. AO is expected to peruse the same together with the say of the Assessee. At times evidences are led before the Ld. AO & cross examinations also do take place. Investigation report, inspector's report, inquiry, investigation, due verification, spot verification etc too are done by the Ld. AO. **The conduct & Demenaur of the assessee** is before the Ld. AO. The Ld. AO is required to carefully swift through the Number of things in the course of the Assessment/Reassessment proceedings. In fact proceedings before the Ld. AO are judicial proceedings under the Act by virtue of section 136 .In brief the assessment order is not a simple assessment/reassessemnt of income perse but it is a **comprehensive order encompassing within its scope & nature the entire gamut of the case with a view to ascertain whether the provisions of the Income Tax Act 1961 & Rules made there under are followed or not.** Whether the compliances stipulated under the act has been correctly made or not. Thus it is

adjudication order where entire facts & circumstances of the case in hand is adjudged & adjudicated.

4.4 We are therefore of the considered opinion that in the **"Impugned Assessment order"** since there is an finding of unexplained money of **Rs. 49,82,740/-& unexplained investment in stock of Rs. 23,02,233/-** which was surrendered by the assessee at the time of survey proceedings [u/s 133A] [8.3.2018/09.03.2018] & the same was treated as deemed income **u/s 69/69A rws 115BBE of the Act & taxed accordingly,** we are of the considered view that in such a gross situation the Ld. AO ought to have initiated the penalty proceedings u/s 271AAC(1) of the Act by recording satisfaction/initiation after due inquiry in this regard & since he failed, the **"Impugned order"** is correctly made. The **initiation** of penalty proceedings u/s 271AAC(1) & **recording a satisfaction ipsofacto is not imposition of penalty u/s 271AAC(1)** as penalty proceedings are treated as separate but it has **linkages & nexus with the entire gamut of the case of the assessee including his**

submissions, etc which are allrecorded basis which the Ld. AO is required to take a call also on which provisions of the act are at least prima facie infringed by the assessee, though later on by due process he may impose a penalty for such infraction of law, which is a separate & an independent penalty provision wherein too the due process of law is required to be followed as stipulated under the Act. The core issue in the **"Impugned order"** is non-initiation of penalty u/s 271AAC(1) of the act & no inquiry in this regard. It is **this in action** of the Ld. AO in the **"Impugned Assessment order"** is treated as "**erroneous & prejudicial to the interest of revenue"**. We hold that while penalty proceedings are separate & independent from the Assessment proceedings but to ensure whether the compliances under the act are made or not & whether such compliances has the effect on Revenue is required to be analysed if not in detail but atleast primafacie by conducting the necessary inquires & verifications basis which Ld. AO can conclude whether initiation/levy of penalty is called for or not whether it is warranted or not. Unfortunately this

above **exercise perse is not done** & that there is **total silence** on it in the **"Impugned order"** despite determination of income u/s 69/69A of the act to the extent of Rs. 49,82,740/- [interest income earned in earlier year] & Rs. 23,02,233/- [unexplained investment in stock] which were surrendered during course of survey action u/s 133A of the act. We hold that mere surrender ipsofacto does not mean business income perse. The Ld. AO is required to determine by inquiry so as to ensure whether there is compliance or not of other provisions of the act. This whole exercise is not done so in the **"Impugned Assessment order"** by way of a due inquiry & verification in depth so that it could be ascertain at least prima facie whether there was any act, omission, commission, failure in meeting other obligations casted upon the assessee under the Act.

4.5 Under the act say for example section 270A(1) there is a provision that Ld. AO during the course of any proceedings under the act direct that any person who has under reported his Income shall be liable to pay a penalty in addition to tax if any, on under reported Income. Similar provision is under

section 271 AAD. Section 271(1) contemplates satisfaction in course of any proceedings for penalty u/s 271(a)(b)(c)(d). Under section 271AAC(1) an obligation is casted where income determined includes any income referred to in section 68,69,69A,69B, 69C, 69D to pay penalty **is addition to tax payable u/s 115BBE.** While the actual proceeding u/s 271AAC(1) later on may be separate & independent but while determining such income the Ld. AO is supposed & expected to examine and at least conduct an inquiry & verification prima facie as to how such an income is earned & if there is an infraction of law he may initiate the penalty proceeding u/s 271AAC(1) but **that does not mean that he should not examine & conduct the inquiry, verification etc at least primafacie to arrive at a perse view or satisfaction that the penalty is required to be initiated or not. This exercise is absent in the "Impugned Assessment order"** hence Ld. PCIT in the impugned order has exercised his power u/s 263 **correctly.**

4.6 In brief we are of the considered opinion that for imposition of penalties various expression are used in the Act but nevertheless there must be a finding if not conclusively but at least primafacie/perse whether in the Assessment proceeding or during the course of any other proceedings **Prior to actual imposition of** penalty which proceedings are separate & independent, that there exists a reasonable ground for the initiation of penalty proceeding under the Act. **We feel that this is the scheme under the Act when the act is read as a whole**. Accordingly we hold that non-initiation of penalty u/s 271AAC(1) of the Act in the impugned Assessment order without there being any whisper on it renders the same has erroneous & prejudicial to the interest of revenue. Accordingly we upheld the **"impugned order".**

4.7 The Ld. AR has placed reliance on few judgments of Hon'ble High Court i.e:-

(i)Addl. CIT v/s JK D'costa (1982) 133 ITR 7 (Delhi)
(ii)CIT v/s Nihal chand Rekyan (2000) 242 ITR 45 (Delhi)
(iii) CIT v/s Subhas Kumar Jain (2011) 335 ITR 364 [P &H] HC)

4.8 The Ld. DR has too placed reliance on few judgement of High Court i.e:-

(i) CIT v/s Surendra Prasad Agrawal (2005) 142 taxmann 653 (Allahabad)
(ii) CIT v/s Associated contractors corp (2005) 145 Taxman 356(Allahabad)
(iii) Addl. CIT v/s Indian Pharmaceuticals (1980)123 ITR 874(MP)

However we respectfully follow the view of the Hon'ble jurisdictional High Court of M.P (supra) which we have already quoted above.Further since a decision of jurisdictional High Court of M.P. exists the ratio of the Hon'ble Supreme Court in Vegetable Product in our considered view would not be applicable.

4.9 In the Premises drawn up by us we reject the Assessee's appeal. Accordingly assessee's appeal is dismissed.

5. **Order**

In result the appeal of the Assessee is dismissed.

Pronounced in open court on 16.01.2026.

Sd/- Sd/-

(BHAGIRATH MAL BIYANI) **(PARESH M JOSHI)**
ACCOUNTANT MEMBER **JUDICIAL MEMBER**

Indore
Dated : 16/01/2026
Patel/Sr. PS

Copies to: (1) The appellant
(2) The respondent
(3) CIT
(4) CIT(A)
(5) Departmental Representative
(6) Guard File

By order

Senior Private Secretary
Income Tax Appellate Tribunal
Indore Bench, Indore