

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर  
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCH-A, JAIPUR

श्री संदीप गोसाई, न्यायिक सदस्य एवं डॉ. एम. एल. मीना, लेखा सदस्य के समक्ष  
BEFORE: SHRI SANDEEP GOSAIN, JM & DR. M. L. MEENA, AM

आयकरअपील सं./ITA No. 132/JP/2022  
निर्धारणवर्ष / Assessment Year : 2016-17

Shri Dheeraj Singh Sisodiya 005, Village Beedmandi, Nayagaon, Ramganjmandi, Kota.	बनाम Vs.	The PCIT (Central), Jaipur.
स्थायीलेखा सं./जीआईआर सं./PAN No.: APAPS 6392E		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओरसे / Assesseeby : Shri P.C. Parwal (C.A.)  
राजस्व की ओर से / Revenue by : Shri Avdhesh Kumar (CIT)

सुनवाई की तारीख / Date of Hearing : 31.05.2022  
घोषणा की तारीख / Date of Pronouncement: 10/08/2022

आदेश / ORDER

PER DR. MITHA LAL MEENA, A.M.

This is an appeal filed by the assessee against the order of Id. PCIT(Central), Jaipur dated 16.03.2022 for the assessment year 2016-17. The assessee has raised the following grounds of appeal:-

"1. Under the facts and circumstances of the case, order passed by the Id. PCIT u/s 263 is illegal & bad in law and the same be quashed.

2. The Id. PCIT has erred on facts and in law in holding that in the order passed by AO he did not take a conscious decision relating to non-initiation/incorrect initiation of penalty which cause prejudice to the revenue

*without holding that assessment order passed by him is erroneous and prejudicial to the interest of revenue rather at the same time accepting that he is not disturbing the assessment that has already been made.*

*3. The appellant craves to alter, amend and modify any ground of appeal.*

*4. Necessary cost be awarded to the assessee."*

2. The brief facts of the case are that the assessee appellant filed his return of income on 30.06.2018 declaring total income of Rs.3,54,880/-. A search was conducted on the assessee on 15.11.2017. AO framed the assessment for AY 2012-13 to 2018-19 u/s 143(3) read with section 153A of the Act and initiated the penalty proceedings as under:-

<b>AY</b>	<b>Date of Order</b>	<b>Returned Income</b>	<b>Assessed Income</b>	<b>Section under which penalty proceeding initiated</b>
2012-13	23.12.2019	2,44,890/-	8,04,780/-	271(1)(c)
2013-14	23.12.2019	2,64,020/-	2,64,020/-	-
2014-15	23.12.2019	2,96,110/-	5,84,930/-	271(1)(c)
2015-16	23.12.2019	3,02,280/-	6,73,610/-	271(1)(c)
2016-17	23.12.2019	3,54,880/-	4,79,883/-	271AAB(1A)
2017-18	23.12.2019	10,55,830/-	24,22,010/-	271AAC and 271A
2018-19	23.12.2019	3,81,510/-	78,68,107/-	271AAB(1A) and 271AAC

3. The Ld. PCIT issued notice u/s 263 dt.03.03.2022 stating that the assessment order passed by AO is considered as erroneous in so far as the same is prejudicial to the interest of revenue for the reason that in the assessment order penalty proceeding is initiated u/s 271AAB(1A) whereas same ought to have been initiated u/s 271(1)(c) of the Act. In response to the same assessee filed the reply vide letter dt.10.03.2022.

4. The Ld. PCIT, however, held that in the order passed by AO, he did not take a conscious decision relating to non-initiation/ incorrect initiation of penalty as detailed in the show cause notice. It was an inadvertent error on AO's part whereby the penalty which had to be initiated and which he had wanted to initiate was not done. If penalty is not initiated at the time of assessment order, then the same cannot be initiated once the assessment order has been passed. Thus, the error relating to non-initiation/incorrect initiation of penalty by the AO has caused prejudice to the interests of revenue. Accordingly, in exercise of powers as per provisions of section 263 of the Income Tax Act 1961, the AO is directed to initiate and levy penalty under the requisite sections as detailed in the show cause notice after arriving at due satisfaction independently. The Ld. PCIT further held that he is not disturbing the assessment that has already been made and is only passing an order for initiation/ levy of penalty that too based upon independent satisfaction of the AO who will duly consider the replies of the taxpayer. The relevant part of the order u/s 263 is reproduced as under:

*" 3. The assessment order has been studied. It is noted that Penalty in your case needed to have been initiated u/s 271(1)(c), being a case relating to A.Y. 2016-17 when this was the law. The same has however been erroneously initiated u/s 271AAB(1A) of the IT Act, 1961, which came into statute w.e.f. 15.12.2016.*

*7. In view of the provisions detailed above, it is established that the case is not covered as a specified previous year as explained in the aforesaid provision of IT Act, 1961. Accordingly, penalty U/s 271(1)(c) of the IT Act,*

*1961 needed to have been initiated in the above case instead of penalty u/s 271AAB(1A) of the I.T. Act, 1961 as initiated while passing the assessment order. This the penalty initiated u/s 271AAB(1A) of the I.T. Act, 1961 in the case is bad in law, therefore, the order passed by AO is erroneous as it is prejudicial to the interest of the revenue.*

*6. I have examined the facts at hand and have studied the position of law. I have studied the reply of the taxpayer. The error caused by the Assessing Officer resulting in prejudice to Revenue has been detailed in the Show Cause Notice issued to the taxpayer as reproduced in this order. An examination of order of the Assessing Officer makes it clear to me that he did not take a conscious decision relating to non-initiation / incorrect initiation of penalty, as detailed in the show cause notice. He had always wanted to initiate the penalty under the rightly applicable provisions of the Income Tax Act, 1961. It was an inadvertent error on AO's part whereby the penalty which had to be initiated, and which he had wanted to initiate, was not done. Clearly, this error has caused prejudice to Revenue. I do not agree with the proposition of the taxpayer that the Assessing Officer had consciously chosen not to initiate / levy the penalty in question.*

*It has been brought forth that penalty which needed to have been initiated remained uninitiated in the assessment order. If penalty is not initiated at the time of assessment order, then the same cannot be initiated once the assessment order has been passed. Accordingly, the error relating to non-initiation/incorrect initiation of penalty by the Assessing Officer has caused prejudice to the interests of Revenue.*

*Accordingly, in exercise of powers conferred upon me as per provisions of section 263 of the Income Tax Act 1961, I direct the assessing officer to initiate and levy penalty under the requisite sections as detailed in the show cause notice as reproduced earlier, after arriving at due satisfaction independently. Needless to say, that the assessing officer will initiate penalty based upon his own satisfaction, and will give full opportunity to the taxpayer before proceeding to levy the penalty, which he chooses to levy (or not levy). As such, in my view, the taxpayer will not unduly suffer. Penalty will be levied or not levied, based upon the satisfaction of the assessing officer. For the proposition that the taxpayer will not suffer (as he will be given due opportunity at the time of levy or non-levy of penalty), I rely upon order of Hon'ble Supreme Court in the case of Rampyari Devi Saraogi versus Commissioner of Income Tax, reported in 67 ITR 84 (Supreme Court) (3rd last paragraph thereof maybe seen for this proposition).*

*I wish to make it clear that I am not disturbing the assessment that has already been made. I am only passing an order for, initiation / levy of penalty*

*as detailed above, that too based upon independent satisfaction of the assessing officer, who will duly consider the replies of the taxpayer."*

5. The Id. Counsel for the assessee has filed written submissions to support its contention raised during the course of hearing which reads as under:-

*"1. From the facts stated above, it can be noted that AO has initiated the penalty proceedings in different AYs under different sections of the Act after application of his mind. So far as AY under consideration is concerned, the AO has initiated penalty proceedings u/s 271AAB(1A) after making the following observations:-*

*"Therefore, the amount of investment made by the assessee for purchase of motorcycle in cash i.e. Rs.1,25,000/- is added to his total income treated as unexplained investment u/s 69 and tax is charged as per provisions of section 115BBE of the I.T. Act. The assessee has offered Rs.1,25,000/- for taxation during search proceedings in statement u/s 132(4), however, the assessee has not included Rs.1,25,000/- in the return filed u/s 153A, therefore, penalty proceedings u/s 271AAB(1A) is initiated accordingly."*

*Thus, AO has taken conscious decision to initiate the penalty proceedings u/s 271AAB(1A) of the Act. It may be noted that both u/s 271(1)(c) and u/s 271AAB it is the AO who is to satisfy himself whether on the additions made, penalty proceedings is required to be initiated or not and also the section under which it is to be initiated. Section 263 of the Act do not give any power to CIT to impose his satisfaction over the satisfaction of AO as to whether the penalty proceedings are to be initiated or not and if initiated under which section/ clause.*

*2. It may be noted that u/s 263, where the Commissioner finds while examining the records of an assessment order that AO has not initiated penalty proceedings, he cannot direct initiation of penalty proceedings because penalty proceedings are not part of assessment proceedings.*

*Therefore, the Commissioner cannot pass an order u/s 263 pertaining to penalty. In this connection, reliance is placed on the following cases:-*

***CIT Vs. Rakesh Nain Trivedi (2016) 128 DTR 309 (P&H) (HC) (PB 11-14)***

*In this decision after considering the decisions of various High Courts, both in favour and against the assessee, it was held that CIT cannot direct the AO u/s 263 of the Act to initiate the penalty proceedings. The relevant Para 5 to 8 of the order is reproduced as under:-*

*5. After hearing learned counsel for the parties, we find the issue that arises for consideration of this Court in this appeal is could the CIT in exercise of power under s. 263 of the Act hold the order of the AO to be erroneous and prejudicial to the interest of the Revenue where the AO had failed to initiate penalty proceedings while completing assessment under s. 153A of the Act.*

*6. It may be noticed that the said issue is no longer res integra. This Court in CIT vs. Subhash Kumar Jain (supra) agreeing with the view of High Courts of Delhi in Addl. CIT vs. J.K. D'Costa (supra), CIT vs. Sudershan Talkies (1993) 112 CTR (Del) 165; (1993) 201 ITR 289 (Del) and CIT vs. Nihal Chand Rekyan (1999) 156 CTR (Del) 59 : (2000) 242 ITR 45 (Del), Rajasthan in CIT vs. KeshrimalParasmal (1985) 48 CTR (Raj) 61 : (1986) 157 ITR 484 (Raj), Calcutta in CIT vs. Linotype & Machinery Ltd. (1991) 192 ITR 337 (Cal) and Gauhati in Surendra Prasad Singh &Ors. vs. CIT (1988) 71 CTR (Gau) 125 : (1988) 173 ITR 510 (Gau) whereas dissenting with the diametrically opposite approach of Madhya Pradesh High Court in Addl. CIT vs. Indian Pharmaceuticals (1980) 123 ITR 874 (MP), Addll. CIT vs. Kantilal Jain (1980) 125 ITR 373 (MP) and Addl. CWT vs. NathoolalBalaram (1980) 125 ITR 596 (MP) had concluded that where the CIT finds that the AO had not initiated penalty proceedings under s. 271(1)(c) of the Act in the assessment order, he cannot direct the AO to initiate penalty proceedings*

*under s. 271(1)(c) of the Act in exercise of revisional power under s. 263 of the Act. The relevant observations recorded therein read thus:*

*"9. Now adverting to the second limb, it may be noticed that the Delhi High Court in judgment reported in Addl. CIT vs. J.K. D'Costa (1981) 25 CTR (Del) 224 : (1982) 133 ITR 7 (Del) has held that the CIT cannot pass an order under s. 263 of the Act pertaining to imposition of penalty where the assessment order under s. 143(3) is silent in that respect. The relevant observations recorded are :*

*'It is well established that proceedings for the levy of a penalty whether under s. 271(1)(a) or under s. 273(b) are proceedings independent of and separate from the assessment proceedings. Though the expression "assessment" is used in the Act with different meanings in different contexts, so far as s. 263 is concerned, it refers to a particular proceeding that is being considered by the CIT and it is not possible when the CIT is dealing with the assessment proceedings and the assessment order to expand the scope of these proceedings and to view the penalty proceedings also as part of the proceedings which are being sought to be revised by the CIT. There is no identity between the assessment proceedings and the penalty proceedings; the latter are separate proceedings, that may, in some cases, follow as a consequence of the assessment proceedings. As the Tribunal has pointed out, though it is usual for the ITO to record in the assessment order that penalty proceedings are being initiated, this is more a matter of convenience than of legal requirement. All that the law requires, so far as the penalty proceedings are concerned, is that they should be initiated in the Court of the proceedings for assessment. It is sufficient if there is some record somewhere, even apart from the assessment order itself, that the ITO has recorded his satisfaction that the assessed is guilty of concealment or other default for which penalty action is called for. Indeed, in certain cases it is possible for the ITO to issue a penalty notice or initiate penalty proceedings even long before the assessment is completed though the*

*actual penalty order cannot be passed until the assessment finalised. We, therefore, agree with the view taken by the Tribunal that the penalty proceedings do not form part of the assessment proceedings and that the failure of the ITO to record in the assessment order his satisfaction or the lack of it in regard to the leviability of penalty cannot be said to be a factor vitiating the assessment order in any respect. An assessment cannot be said to be erroneous or prejudicial to the interest of the Revenue because of the failure of the ITO to record his opinion about the leviability of penalty in the case.'*

*10. Special leave petition against the said decision was dismissed by the apex Court [(1984) 147 ITR (St) 1]*

*The same view was reiterated by the Delhi High Court in CIT vs. Sudershan Talkies (1993) 112 CTR (Del) 165: (1993) 201 ITR 289 (Del) and followed in CIT vs. Nihal Chand Rekyan (1999) 156 CTR (Del) 59 : (2000) 242 ITR 45 (Del). The Rajasthan High Court in CIT vs. KeshrimalParasmal (1985) 48 CTR (Raj) 61 : (1986) 157 ITR 484 (Raj), Gauhati High Court in Surendra Prasad Singh &Ors. vs. CIT (1988) 71 CTR (Gau) 125 : (1988) 173 ITR 510 (Gau) and Calcutta High Court in CIT vs. Linotype & Machinery Ltd. (1991) 192 ITR 337 (Cal) have followed the judgment of Delhi High Court in J.K. D'Costa's (1981) 25 CTR (Del) 224 : (1982) 133 ITR 7 (Del) case.*

*11. However, Madhya Pradesh High Court in Addl. CIT vs. Indian Pharmaceuticals (1980) 123 ITR 874 (MP) which has been followed by the same High Court in Addl. CIT vs. Kantilal Jain (1980) 125 ITR 373 (MP) and Addl. CWT vs. NathoolalBalaram (1980) 125 ITR 596 (MP) has adopted diametrically opposite approach.*

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



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

7. In view of the above, equally we are unable to subscribe to the view adopted by Allahabad High Court in Surendra Prasad Aggarwal's case (supra) where judgment of Madhya Pradesh High Court in Indian Pharmaceuticals' case (supra) noticed hereinbefore has been concurred with.

8. Accordingly, it is held that the initiation of proceedings under s. 263 of the Act was not justified and we uphold the order of the Tribunal cancelling the revisional order passed by the CIT.

***CIT Vs. KeshrimalParasmal (1986) 157 ITR 484 (Raj.) (HC) (PB 7-10)***

*CIT in revision is not entitled to set aside the assessment order on the ground of non-mention of initiation of penalty proceedings. Also, he cannot direct the ITO to make fresh assessment to initiate penalty proceedings. Thus, the order of Tribunal cancelling CIT's order u/s 263 whereby the CIT set aside the assessment order to be made de novo for initiation of penalty proceedings is justified.*

*Though these cases are with reference to the power of CIT u/s 263 as to the non-initiation of penalty proceedings by AO in the assessment order, the principle laid down in these cases equally applies where the AO has initiated the penalty proceedings under a different section.*

3. The Ld. CIT without distinguishing the case laws relied by the assessee on this issue has incorrectly observed at Para 6 of the order that AO did not take a conscious decision relating to non initiation/ incorrect initiation of penalty though he always wanted to initiate the penalty and thus, it was an

*inadvertent error on AO's part which caused prejudice to the revenue. It may be noted that section 263 can be invoked only when the assessment order is erroneous in so far as prejudicial to the interest of the revenue. The Ld. CIT has nowhere held the assessment order to be erroneous in as much as he has categorically stated that he is not disturbing the assessment that has already been made. Thus, once no error is found in the income determined in the assessment order, he has no authority u/s 263 to direct the AO for initiation of penalty proceedings.*

*In view of above, order passed by Ld. PCIT u/s 263 is illegal & bad in law and be quashed."*

6. Per contra, the Id. CIT D/R supported the impugned order. The Id. D/R has submitted that the assessee has failed to furnish corroborative documentary evidences in support of the income before the Id. PCIT.

7. We have heard the rival contentions, perused the material available on record, assessment order and impugned order and the case laws cited before us. Admittedly, the AO has initiated penalty proceedings u/s 271 AAB(1A) with the observations that the amount of investment made by the assessee for purchase of motorcycle in cash i.e. Rs.1,25,000/- is added to his total income treated as unexplained investment u/s 69 and tax is charged as per provisions of section 115BBE of the I.T. Act. The assessee has offered Rs.1,25,000/- for taxation during search proceedings in statement u/s 132(4), however, the assessee has not included Rs.1,25,000/- in the return filed u/s 153A,

therefore, penalty proceedings u/s 271AAB(1A) is initiated accordingly. The Ld. AR argued that the AO has taken conscious decision to initiate the penalty proceedings u/s 271AAB(1A) of the Act. It may be noted that both u/s 271(1)(c) and u/s 271AAB it is the AO who is to satisfy himself whether on the additions made, penalty proceedings is required to be initiated or not and also the section under which it is to be initiated. The mandate under section 263 of the Act do not give any power to CIT to impose his satisfaction over the satisfaction of AO as to whether the penalty proceedings are to initiated or not and if initiated under which section/clause. In our view, on examination of assessment record, the PCIT cannot direct initiation of penalty proceedings because penalty proceedings are not part of assessment proceedings. Thus, the PCIT's revisionary decision relating to non-initiation/incorrect initiation of penalty which without holding that assessment order passed by the AO as erroneous and prejudicial to the interest of revenue is vague and bad in law.

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

9. In the result, appeal of the assessee is allowed.

Order pronounced in the open court on 10/08/2022.

Sd/-

(संदीप गोसाई)

(Sandeep Gosain)

न्यायिक सदस्य / Judicial Member

Sd/-

(डॉ. एम. एल. मीना )

(Dr. M.L. Meena)

लेखा सदस्य / Accountant Member

जयपुर / Jaipur

दिनांक / Dated:- 10/08/2022.

das/

आदेश की प्रतिलिपिअग्रेषित / Copy of the order forwarded to:

1. अपीलार्थी / The Appellant- Shri Dheeraj Singh Sisodiya, Kota.
2. प्रत्यर्थी / The Respondent-The PCIT( Central),Jaipur.
3. आयकरआयुक्त / CIT
4. आयकरआयुक्त / CIT(A)
5. विभागीय प्रतिनिधि, आयकरअपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्डफाईल / Guard File {ITA No. 132/JP/2022}

आदेशानुसार / By order,

सहायकपंजीकार / Asst. Registrar