

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "A" MUMBAI

BEFORE SHRI KULDIP SINGH (JUDICIAL MEMBER)
AND
SHRI OM PRAKASH KANT (ACCOUNTANT MEMBER)

ITA No. 959/MUM/2022
Assessment Year: 2017-18

Anjis Developers Private Limited,
2nd floor, Soham Apartments,
208, Walkeshwar Road, Teen
Batti,
Mumbai-400006.
PAN No. AAACA 6022 H
Appellant

PCIT-5,
Room No. 515, 5th floor,
Vs. Aayakar Bhavan, MK.
Road,
Mumbai-400020.
Respondent

Assessee by	:	S. Sriram/Dinesh Kukreja/SsnyakNavedie
Revenue by	:	Shri Chetan Kacha, DR
Date of Hearing	:	25/11/2022
Date of pronouncement	:	20/02/2023

ORDER

PER OM PRAKASH KANT, AM

This appeal by the assessee is directed against revision order dated 10.03.2022 passed by the Ld. Principal Commissioner of Income-tax-5, Mumbai (in short 'the Ld. PCIT') for assessment year 2017-18, raising following grounds :

1. *That the Ld. Pr CIT erred in holding that the Assessing Officer was bound by law to initiate proceedings for*



- imposition of penalty w/s 270A of the Act in every assessment proceeding.*
- 2. That the Ld. Pr CIT erred in holding that non-initiation of proceedings for imposition of penalty w/s 270A of the Act by itself renders the Assessment Order erroneous and prejudicial to interest of Revenue.*
 - 3. That the Ld. Pr CIT erred in holding that non-initiation of proceedings for imposition of penalty u/s 270A of the Act by itself was prejudicial to the interest of the Revenue, without forming an independent prima face belief that the initiation of penalty proceeding can result in imposition of penalty w/s 270A of the Act.*
 - 4. That when there are two views possible on whether the Ld. A.O. is bound to initiate proceedings for imposition of penalty in every case where an addition is made by the A.O. in the course of assessment, the Pr CIT erred in holding the Assessment order to the erroneous.*
 - 5. The Ld. Pr CIT erred in directing the A.O. to initiate proceedings for imposition of penalty, when the A.O. has the discretion to initiate penalty proceedings. The authority to initiate proceedings for imposition of penalty is with the A.O. alone, who has to form a belief that the addition made in the course of assessment is a fit case for examination as to whether penalty is impossible. Where the A.O. has formed a belief that the addition made in the course of assessment does not even warrant initiation of proceedings for imposition of penalty, the Pr CIT, though a supervisory authority to the A.O., could not have stepped into the shoes of the A.O. to have directed the A.O. to initiate penalty proceedings.*
 - 6. The Appellant craves leave to, add to, alter, amplify, modify or delete all or any of the aforesaid grounds at or before the hearing.*

2. Briefly stated facts of the case are that the assessee e-filed its return of income on 23.10.2017 declaring loss of Rs.9,40,85,832/-. The assessee was engaged in the business of real estate development. The case was selected for scrutiny and Assessing



Officer assessed deemed rental income on the stock-in-trade of unsold flats and made addition of Rs.75,40,807/- u/s 143(3) of the Income-tax Act, 1961 (in short 'the Act'). However, in the assessment order, the Assessing Officer did not initiate penalty proceedings u/s 270A of the Act.

3. The Ld. PCIT called for the assessment records and after examining the same, he was of the view that in view of addition made of Rs.75,40,807/- under the head 'income from house property' in respect of unsold flats, the Assessing Officer was required to initiate penalty proceedings u/s 270A of the Act and non-initiation of penalty has rendered the assessment order erroneous in so far as prejudicial to the interest of the Revenue within the meaning of section 263 of the Act. The Ld. PCIT after considering submission of the assessee held the assessment order as erroneous and prejudicial to the interest of the Revenue observing as under:

"1. The submission of the assessee has been carefully considered. The assessee company, in its submission has stated that section 263 cannot be initiated for non initiation of penalty proceedings as levy of penalty proceedings are independent of and separate from the assessment proceedings. The power of revision by the CIT us.263 of the Act is very wide and it is in the nature of supervisory jurisdiction. It is well settled that incorrect assumption of facts or application of law satisfies the requirement of law i.e. order being erroneous & prejudicial to the interest of revenue. The order passed by the A.O. without application of mind or order showing apparent error of reasoning the order where the A.O. simply accepts



where the assessee stated in his return of income and fails to make the enquiries which are called for in the facts and circumstances of the case will also call for intervention us 263 of the Act by the CIT/Pr.CIT. It is a trite law that the disclosure of facts by the assessee in the return of income and for in the course of assessment proceedings cannot give immunity from revisional Jurisdiction of the CIT/Pr. CIT u/s 263.

1. In this context, it may be mentioned here that in the cases of CIT vs. Smt. Kiran Jaiswal, CIT vs. Ganeshi Lal Ram Krishna and CIT Vs. Surendra Prasad Agarwal (2005) 275 IT 113 (All), the Hon'ble Allahabad High Court held that the omission of the AO to initiate penalty proceedings during the course of the assessment renders the assessment order erroneous and prejudicial to the interest of the revenue. In such factual background, I am of the considered view that the impugned assessment was made by the AO is erroneous in so far as it is prejudicial to the interests of the revenue.

5. As per amended law, Explanation 2 clause (a) below section 263(1) of the Act, any assessment made without conducting requisite enquiry and verification by the AO is erroneous in so far as it is prejudicial to the interests of revenue. Even under pre-amended law, SC in the case of Smt. Tara Devi Agarwal (88 ITR 0323] and also Rampyari Devi Saraogi (67 IT 0084] have held that any assessment completed without necessary enquiries as warranted on facts of the case is erroneous in so far as it is prejudicial to the interests of revenue.

5.1Hence, considering the facts in totality. I am of the considered opinion that the AO in the instant case has failed to conduct all necessary enquiries as warranted on facts of the case and as discussed in this order supra. Hence, the assessing officer is directed to initiate penalty us.270A of the Act and decide the same on merits as per, law. The assessment order is erroneous in so far as it is prejudicial to the interests of the revenue in respect of non-initiation of penalty proceedings as per law as warranted on facts of the case. Accordingly, the same is hereby set aside

5.2The AO is hereby directed to initiate penalty proceedings as per law and decide the same on merits after conducting all



necessary enquiries and verifications as warranted on facts of the case and also after giving due opportunity of being heard to the assessee before passing the assessment order.”

4. Before us, the Ld. Counsel of the assessee submitted that to initiate or not to initiate penalty proceedings is within the discretionary authority and satisfaction of the Assessing Officer and the Ld. PCIT cannot replace the satisfaction of the Assessing Officer by his own satisfaction. The Ld. Counsel referred to the submission made before the Ld. PCIT. The Ld. Counsel also relied on the decision of the Hon'ble Delhi High Court in the case of **Addl. CIT v. J.K. D's Costa [1982] 9 Taxman 88 (Delhi)** and **Addl. CIT v. Achal Kumar Jain [1982] 11 Taxman 228 (Delhi)**.

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 form 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, learned 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 erroneous 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

I. Saraiya Distillery 's case (supra)

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

7. Shri R.R. Kapoor learned 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 (1982) 133 ITR 7& (Delhi)

2. Addl. CIT v. Achal Kumar Jain [1983] 142 ITR 606 (Delhi)

3. CIT v. Nihal Chand Rekyan (2000) 242 ITR 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 proceedings 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 [1993] 201 ITR 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 (1988) 173 ITR 610°, Calcutta High Court in the case of CIT v. Linotype & Machinery Lid. [1991] 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 [1980] 123 ITR 874 . Addl. CIT v. Kantilal Jain [1980] 125 ITR 3735, Addl. CWT v. NathoolalBala Ram [1980] 125 ITR 596& and CIT v. Narpat Singh Malkhan Singh (1981) 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 [1978] 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 after*



referring to the decision of the Apex Court in the case of C.A. Abraham v. ITO[1961] 41 ITR 425 and CIT v. Bheekha Bhai Dada Bhai [1961] 42 ITR 123 has held that the assessment does not mean only computation of income but consideration of all facts including the liability for penalty that may attract the provisions contained in section 271(1)(a) of the Act. It has further held that if in any proceeding for assessment the Income Tax Officer fails to take notice of the facts attracting the provisions contained under section 271(1)(a) of the Act, it could not be said that his failure to take notice of the facts which were before him attracting the provisions of section 271(1)(a) of the Act does not amount to an error prejudicial to the interest of the Revenue. It concluded that if therefore the ITO during the pendency of the proceedings has omitted to take notice of facts attracting section 271(1)(a) of the Act during the pendency of the 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 section 263 of the Act. The other decision of the M.P.High Court has followed its earlier decision in the case of Indian Pharmaceutical (supra). The Delhi High Court in the case of Achal Kumar Jain (supra) had considered the decision of the Madhya Pradesh High Court in the case of Indian Pharmaceuticals (supra), Shri Kanti Lal Jain (supra), NathoolalBalaram (supra) and Narain Singh Malkhan Singh (supra) and while disagreeing has held as follows:

"On a cursory examination, it appeared to us that the view of the Madhya Pradesh High Court as indicated in the abovementioned decisions is correct, but on closer scrutiny we respectfully disagree with the same. In any case, the matter is not res integra as far as this court is concerned. In Addl. CIT v. J.K.D.' Costa, Income-tax Reference No. 82 of 1974, disposed of by us on 27th April, 1981-reported in [1982] 133 ITR7. we held on similar facts that the Commissioner could not pass an order pertaining to penalty under section 263 of the Act. We held that the penalty proceedings do not form part of the assessment proceedings. Further, the failure of the ITO to record his satisfaction or the lack of it in the assessment order, with regard to the levability of penalty cannot be a factor vitiating the assessment 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 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.

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)or

(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 (ii) in the cases referred to in clause (b), & in addition to tax, if any, payable] by him, [a sum of ten thousand rupees] for each such failure ;] sT

(iii) 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.

7. In the result, the appeal filed by the assessee is dismissed.

Order pronounced in the open Court on 20/02/2023.

Sd/-
(KULDIP SINGH)
JUDICIAL MEMBER

Sd/-
(OM PRAKASH KANT)
ACCOUNTANT MEMBER

Mumbai;
Dated: 20/02/2023
Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Assistant Registrar)
ITAT, Mumbai