IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE BECHU KURIAN THOMAS

TUESDAY, THE 15TH DAY OF FEBRUARY 2022 / 26TH MAGHA, 1943

**WP(C) NO. 2712 OF 2022**

**PETITIONER:**

MALLELIL INDUSTRIES PRIVATE LIMITED,
MALLELIL HOUSE,
ATTACHAKKAL P.O.,
PATHANAMTHITTA,
KERALA 689 691,
REPRESENTED BY ITS MANAGING DIRECTOR,
SREEDHARAN NAIR RAGHAVAN PILLAI.

BY ADVS.
SRI.ANIL D. NAIR
SMT.TELMA RAJU
SMT.EDATHARA VINEETA KRISHNAN
SRI.ARAVIND SREEKUMAR

**RESPONDENT:**

ADDITIONAL/ JOINT/ DEPUTY/ ASSISTANT
COMMISSIONER OF INCOME TAX
INCOME TAX OFFICER,
NATIONAL FACELESS ASSESSMENT CENTRE,
NATIONAL E-ASSESSMENT CENTRE-NeAC
ROOM NO 402, 2ND FLOOR,
E-RAMP, NEAR GATE NO.10,
JAWHARLAL NEHRU STADIUM
DELHI 110003.

BY ADVS.
SRI.JOSE JOSEPH, SC FOR INCOME TAX

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON 27.01.2022, THE COURT ON 15.02.2022 DELIVERED THE FOLLOWING:

**BECHU KURIAN THOMAS, J.**
**-------------------------------**
**W.P.(C) No.2712 of 2022**
**--------------------------------**
Dated this the 15th day of February, 2022

## JUDGMENT

Petitioner assails an order of penalty issued under section 271(1)(c) of the Income Tax Act, 1961, (for short, 'the Act') in this proceeding under Article 226 of the Constitution of India. Though an alternate remedy of appeal is available to the petitioner, resort is made to the extraordinary jurisdiction of this Court, on the contention that the entire exercise that resulted in the impugned order was one without jurisdiction.

2. Petitioner is an assessee under the Act and carries on its business of quarrying and sale of rock aggregates. For the assessment year 2013-14, the revised return filed by the petitioner was accepted and the assessment was completed under section 143(3) of the Act on 27.12.2016. Subsequently, in exercise of the powers under section 263 of the Act, the Principal Commissioner of Income Tax, Kottayam, called for and examined the proceedings that resulted in the assessment order and found

the assessment order erroneous and prejudicial to the interest of revenue. Therefore, the assessment order was set aside and remanded to the assessing officer for passing a fresh assessment order. Pursuant thereto, by order dated 05.12.2019, a fresh order of assessment was issued, assessing the total income of the petitioner after disallowing the existing depreciation claimed. On 03.08.2021, a show-cause notice was issued to the petitioner proposing to impose a penalty. After considering the objections filed by the petitioner, Ext.P6 order was issued, imposing a penalty upon the petitioner. The impugned order of penalty issued under section 271(1)(c) is produced as Ext.P6.

3. Sri.Anil D.Nair, learned counsel for the petitioner, vehemently contended that the order of penalty is *ex facie* without jurisdiction or authority since the assessment proceedings having been initiated pursuant to the proceedings under section 263 of the Act, cannot confer authority upon the assessing officer to initiate proceedings for imposing penalty. Learned Counsel based his contentions on the fact that the original assessment order had not expressed the satisfaction of the assessing officer necessary to initiate proceedings for

imposing penalty under section 271(1)(c) of the Act. According to the learned counsel, the subsequent order of assessment issued consequent to the order under section 263 of the Act cannot confer the jurisdiction upon the assessing officer to initiate proceedings for imposing penalty. Learned Counsel relied upon the decisions in **Commissioner of Income Tax v. Super Metal Re-Rollers (P) Ltd.** [(2004) 265 ITR 82 (Del.)], **Addl. Commissioner of Income Tax v. J.K.D's Costa** [(1982) 133 ITR 7 (Del.) **Commissioner of Income Tax v. Keshrimal Parasmal** [(1986 157 ITR 484 (Raj.)], **Commissioner of Income Tax v. C.R.K. Swamy** [(2002) 254 ITR 158 (Mad.)] **Commissioner of Income Tax v. Parmanand M.Patel** [(2005) 278 ITR 3 (Guj.)] **Commissioner of Income Tax (Central), Ludhiana v. Rakesh Nain Trivedi** [(2016) 282 CTR 205 (Punjab & Haryana)].

4. Sri.Jose Joseph, learned Standing Counsel for the respondent, submitted that the order assailed in this writ petition can be the subject matter of an appeal and hence the petitioner has an efficacious and alternative remedy under the statute and also that recourse to Article 226 of the Constitution was not

warranted. He further submitted that the order of assessment issued after remand clearly expressed the satisfaction of the assessing officer that penalty proceedings ought to be initiated, which satisfies the requirements of section 271(1)(c) of the Act and hence there is no lack of jurisdiction.

5. I have considered the rival contentions.

6. A perusal of Ext.P2 order issued under section 263 of the Act reveals that the earlier assessment order was set aside in its entirety, and a fresh assessment order was directed to be issued. It was observed in the said order that virtually no enquiries were made by the assessing officer at the time of assessment and only a very 'sketchy order' was passed.

7. Though the learned counsel for the petitioner vehemently asserted that Ext.P2 order was not an open remand but only a limited remand solely to consider the question of excess depreciation claimed/allowed, I cannot agree. A perusal of Ext.P2 order reveals that the aforesaid argument is incorrect. In this context, it is appropriate to refer to some of the observations in Ext.P2 order issued under section 263 of the Act.

> *"2. The Assessing Officer passed a very sketchy order without application of mind accepting the claims made by*

*the assessee on face value without any inquiries. He failed to examine and consider the observations of the Hon'ble Supreme Court in the case of* **Mak Data P. Ltd vs. Commissioner of Income Tax-II**.

*3. Further, it is also observed from the records that during the course of survey some incriminating material/document were found & the same were seized. These books/documents were never confronted by the Assessing Officer to assessee at the time of assessment proceedings though it was survey assessment. Whatever books of account were produced by the assessee was accepted on their face value without any observations regarding impounded books of account/document in this case by the Assessing Officer.*

8. Finally, in the concluding two paragraphs, the following are observed:

*"The main issue of non-examination of impounded books of account with reference to the return of income filed is apparent from records as discussed above. After detailed discussion as per order sheet entry dated 25-03-2019, the assessee stated that the company shall have no objection for revision u/s.263 of the Income-Tax Act, 1961 of the assessment order dated 27-12-2016 if the same is set aside for fresh assessment as per law, by passing a speaking order by the Assessing Officer provided the assessee is given a reasonable opportunity of being heard."*

*"In view of above discussion and the detailed show cause notice u/s 263 issued in this case it is held that assessment order u/s.143(3) dated 27-12-2016 passed by the DCIT, Circle-1, Thiruvalla is both erroneous as well as prejudicial to the interest of the revenue and is a fit case for revision u/s 263 of the Income Tax Act. Accordingly, the Assessment Order u/s.143(3) dated 27-12-2016 is set*

*aside with the directions to the AO to pass a fresh assessment order, after affording a reasonable opportunity of being heard to the assessee."*

9. A reading of the aforesaid observations clearly indicates that the initial order of assessment was wholly set aside and the proceedings were remanded as an open remand. On a reading of Ext.P2 order in its entirety, it is explicit that there were no limited issues for the assessing officer to decide. In my considered opinion, Ext.P2 order was an open remand, conferring power upon the assessing officer to pass fresh orders of assessment on all the issues.

10. Consequent to Ext.P2, the assessing officer issued Ext.P3 order of assessment, wherein he has expressed his satisfaction that this is a fit case where penalty under section 271(1)(c) of the Act, for concealment of income, ought to be initiated. As a consequence of the said satisfaction expressed in Ext.P3 assessment order, the notice of penalty was issued as Ext.P4. Thereafter Ext.P6 order was issued imposing a penalty upon the petitioner.

11. Since I have already held that Ext.P2 order was an open remand, I find that the assessing officer, while issuing

Ext.P3 order of assessment, was vested with all the powers including the jurisdiction to express his satisfaction for initiating penalty proceedings, as has been held in **Commissioner of Income Tax and Others v. S.V.Angidi Chettiar** (AIR 1962 SC 970). In the aforementioned judgment, it was held that the power to impose penalty depends upon the satisfaction of the Income Tax Officer in the course of proceedings under the Act and the proceedings for penalty ought not to be commenced before the conclusion of proceedings for assessment.

12. In the context of the circumstances arising in this case, it is profitable to bear in mind the distinction between the proceedings under section 263 and the initiation of penalty under section 271(1)(c). There is no quarrel that while issuing orders under section 263 of the Act, the Principal Commissioner of Income Tax cannot direct penalty to be imposed. However, when in the exercise of powers under section 263 of the Act, an assessment order was set aside and remanded back to the assessing officer, all the powers of an original assessing officer gets vested by operation of law. In such proceedings, if the assessing officer expresses his satisfaction that penalty

proceedings can be initiated, the same is, in my considered view, within his jurisdiction and authority.

13. The satisfaction recorded by the assessing officer in Ext.P3 that proceedings for penalty must be initiated under section 271(1)(c) is clearly within his jurisdiction, despite the fact that the original assessment order did not mention anything about initiating penalty proceedings. Ext.P3 assessment order issued after remand, is a proceeding under this Act and satisfies the ingredients of section 271(1)(c) and hence, the assessing officer was vested with the jurisdiction to record his satisfaction and thereafter initiate penalty proceedings.

14. The decisions in **Commissioner of Income Tax v. Super Metal Re-Rollers (P) Ltd.** [(2004) 265 ITR 82 (Del.)], **Addl. Commissioner of Income Tax v. J.K.D's Costa** [(1982) 133 ITR 7 (Del.) **Commissioner of Income Tax v. Keshrimal Parasmal** [(1986 157 ITR 484 (Raj.)], **Commissioner of Income Tax v. C.R.K. Swamy** [(2002) 254 ITR 158 (Mad.)] **Commissioner of Income Tax v. Parmanand M.Patel** [(2005) 278 ITR 3 (Guj.)] **Commissioner of Income Tax (Central), Ludhiana v. Rakesh Nain Trivedi** [(2016) 282 CTR

205 (Punjab & Haryana)] are all cases where the assessment order had not recorded the satisfaction for initiating penalty proceedings. In the above cases, such a satisfaction was either recorded in proceedings under section 263 of the Act or directed to initiate penalty. The facts in those cases are totally different and the principle laid down therein have no application to the case on hand.

15. Coming to the instant case, nowhere in Ext.P2 order has the Principal Commissioner of Income Tax expressed his satisfaction for initiating penalty proceedings. On the contrary, he merely set aside the assessment order in its entirety and remanded the case for a fresh consideration by the assessing officer. Thus, while issuing the order of assessment, as per Ext.P3, the assessing officer was bestowed with all powers as in an original assessment, including the power to express his satisfaction for initiating penalty proceedings. In such a view of the matter, I find that the initiation of proceedings for imposing penalty and the consequent imposition was within the jurisdiction and authority of the assessing officer. Hence there is no merit in the challenge raised.

Accordingly, I dismiss this writ petition. However, liberty of the petitioner to pursue its statutory remedies against the order imposing penalty (Ext.P6) shall not be affected and if any such appeal is preferred, the same shall be considered and disposed of in accordance with law, untrammelled by any of the observations made in this judgment.

Sd/-

**BECHU KURIAN THOMAS**
**JUDGE**

vps

**APPENDIX**

**PETITIONER'S/S' EXHIBITS**

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| **EXHIBIT P1** | **TRUE COPY OF THE ASSESSMENT ORDER DATED 27.12.2016 FOR THE YEAR 2013-14 PASSED BY THE DEPUTY COMMISSIONER OF INCOME TAX THIRUVALLA.** |
| **EXHIBIT P2** | **TRUE COPY OF THE ORDER DATED 27.3.2019 UNDER SEC.263 PASSED BY THE PRL. COMMISSIONER OF INCOME TAX, KOTTAYAM.** |
| **EXHIBIT P3** | **TRUE COPY OF THE ORDER DATED 05.12.2019 PASSED BY THE AST. COMMISSIONER OF INCOME TAX, THIRUVALLA.** |
| **EXHIBIT P4** | **TRUE COPY OF THE SHOW CAUSE NOTICE DATED 03.08.2021 FOR PENALTY UNDER SEC.271(1)(c) ISSUED BY THE RESPONDENT.** |
| **EXHIBIT P5** | **TRUE COPY OF THE REPLY TO THE SHOW CAUSE NOTICE FILED BY THE PETITIONER.** |
| **EXHIBIT P6** | **TRUE COPY OF THE ORDER DATED 12.01.2022 UNDER SEC.271(1)(c) WAS ISSUED BY THE RESPONDENT.** |