IN THE INCOME TAX APPELLATE TRIBUNAL
[DELHI BENCH: 'G' NEW DELHI]

BEFORE MS. SUCHITRA KAMBLE, JUDICIAL MEMBER
A N D
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

I.T.A. No. 496/Del/2021 (A.Y. 2015-16)
(THROUGH VIDEO CONFERENCING)

Ms. Sunila Awasthi, E–802, Uniworld City East, Sector : 30, Gurugram, Haryana. **PAN : AAEPA9591J** **(APPELLANT)**	Vs.	Principal CIT – 12, New Delhi. (**RESPONDENT)**

Assessee by :	Shri Deepak Chopra, Adv.; & Shri Harpreet Singh Ajmani, Advocate;
Department by :	Shri H. K. Chaudhary [CIT] – DR;

Date of Hearing	01.07.2021
Date of Pronouncement	07.07.2021

O R D E R

PER PRASHANT MAHARISHI, AM :

01. This appeal is filed by the assessee against the order of the Ld. Pr. Commissioner of Income Tax, Delhi–12, New Delhi, [The ld PCIT] for assessment year 2015-16 dated 30.03.2021, passed u/s 263 of The Income tax Act, 1961 [The Act] wherein it has been held that the assessment order passed by the ACIT, Circle 61(1) New Delhi, [the ld AO] under Section 143(3) of the Income Tax Act, 1961 (the Act) dated 31st August, 2017 is erroneous and prejudicial to the interest of Revenue as on the facts and circumstances of the case the ld. Assessing Officer is not correct in not initiating penalty proceedings under Section 271(1)(c) of the Act.

02. However, the assessee has raised in all 15 grounds, but all challenges are made towards the order passed by the ld. Pr. Commissioner of Income Tax, under Section 263 of the Act.

03. Brief facts of the case shows that assessee is an Advocate by profession and derives professional income. She filed her return of income on 29.09.2015 declaring total income of Rs. 1,52,77,870/-. This return was revised on 31st December 2016 declaring total income of Rs. 1,97,54,000/-. The case of the assessee was selected for limited scrutiny through computer added selection system and the reasons were:

(i) Contract receipt / fees mis-match;

(ii) Sales turnover mis-match; and

(iii) Tax credit mis-match.

04. So the notice under Section 143(2) of the Act was issued on 20.09.2016. The ld. Assessing Officer accepted the revised return and assessed the total income at Rs. 1,97,54,000/- as per order under Section 143(3) of the Act passed on 31st August, 2017. In the assessment order, the ld. AO did not initiate penalty proceedings under Section 271(1) (c) of the Act.

05. On examination of the record of the assessee, the ld. Pr. CIT noted that the order passed by the AO is erroneous and prejudicial to the interest of Revenue. She found that the assessee has revised the return on 31st December 2016 only when the assessee was asked to reconcile the mis-match between the receipts shown in Income Tax return and 26AS. According to Pr. CIT, section 139(5) of the Act has been enacted when a bonafide mistake is discovered; assessee can revise her return of income. Thus, according to her, assessee mis-used this provision for her undue benefit. Ld Pr. CIT relied on Press release dated 14.12.2016 of the CBDT. Based on these facts and circumstances she noted that assessee has intentionally not offered for tax the professional receipts amounting to Rs. 44,74,100/- in the

original return of income and its deliberate suppression of facts, which attracts penalty under Section 271(1)(c) of the Act. Therefore, according to her, penalty on the income of Rs. 44,74,100/- which was under-stated and offered for taxation by the assessee after its detection by the Department is leviable. She, therefore, was of the view that Assessing Officer did not apply his mind and did not make due verification as she passed an order without initiating penalty proceedings under Section 271(1)(c) of the Act and, therefore, the order is erroneous in so far as it is prejudicial to the interest of Revenue. Therefore, she issued a show cause notice on 23rd of March 2021.

06. The assessee submitted that during the course of assessment for assessment year 2014-15 assessee discovered that tax counsel, who prepared the return for assessment year 2014-15 did not reconcile the professional receipts with Form No. 26AS and, therefore, she revised return for assessment year 2014-15. As the counsel of the assessee was the same for preparation of return for assessment year 2015-16 also, she hired the firm of Chartered Accountants for review of her return for this year. As per reconciliation prepared by CA, the return was revised and tax was paid by the assessee. A letter stating the above facts was also placed before the Assessing Officer on 9 January 2017.

07. The ld. Pr. CIT noted that from the perusal of the record it is evident that assessee had revised her return of income only after the notice under Section 143(2) of the Act for scrutiny of the case was served on her. The Assessing Officer is not correct in not initiating penalty proceedings under Section 271(1) (c) of the Act and, therefore, the order passed by the AO under Section 143(3) of the Act on 31.08.2017 without initiating penalty proceedings under Section 271(1) (c) of the Act is erroneous in so far as it is prejudicial to the interest of Revenue. She further held that there exists a prima facie case of concealment of income in case of the assessee. Therefore, she directed the Ld

Assessing Officer to initiate penalty proceedings under Section 271(1)(c) of the Act for concealment of income and the order of the Assessing Officer was modified to that extent. Such order under Section 263 of the Act was passed on 30.03.2021.

08. Assessee is aggrieved with that order and, therefore, has preferred this appeal.

09. The ld. AR submitted that assessee has revised her return of income within the time available as per law. He further reiterated the submissions made by her before ld AO and Ld PCIT. He repeated submission of assessee vide letter dated 09th January, 2017, which was also placed at page No. 14 of the Paper Book. He submitted that though notice under Section 143(2) of the Act was issued to the assessee on 20.09.2016, however, notice under Section 142(1) of the Act was issued on 23 June 2017 wherein the basic information including the computation of total income, audited accounts, and tax audit report were asked for. He, therefore, submitted that the assessee revised her return of income as soon as she came to know about the bonafide error in the original return of income. He referred to the provisions of the Act wherein according to Section 139(5) of the Act assessee could validly revise her return of income as found bona fide error in it. Therefore, his contention was that assessee revised her return of income when she found a bonafide error in the original return and it was before detection of such error by the Assessing Officer. He also submitted that the CA, who committed the error, has also submitted an affidavit dated 6 January 2017 wherein he owned the mistake. Such affidavit is placed at page No. 20 of the Paper book. He also submitted that identical facts existed in assessment year 2014-15 wherein penalty was levied on the assessee of Rs. 14,08,420/- by the ld AO , which travelled up to the appellate stage of the co-ordinate bench, who passed an order in ITA. No. 3611 (Del) of 2019 for assessment year 2014-15 dated 22.11.2019 wherein the penalty was deleted. He, therefore, submitted that no such penalty

can sustain for this year also as there is no change in the facts and circumstances of the case. He further submitted that the issue is squarely covered in favour of the assessee by following decisions of various High Courts:

(i) Addl. CIT Vs. J. K. D' Costa;
9 Taxman 88 (Del.);

(ii) Addl. CIT Vs. Achal Kumar Jain;
11 Taxman 228 (Del.);

(iii) CIT Vs. Rakesh Nain Trivedi
282 CTR 205 (P & H); &

(iv) Amarjeet Dhall Vs. CIT
46 taxmann.com168 (Chandigarh – Trib).

10. Based on the above decisions, he submitted that penalty proceedings being independent from assessment proceedings, CIT dealing with assessment proceedings could not expand his powers and direct the Assessing Officer to initiate penalty proceedings, which are not before him. He further relied upon several other judicial precedents on the merits that no penalty could be levied on the facts and circumstances of the case. He submitted that when revised return filed by an assessee is accepted by Assessing Officer then merely by virtue of the fact that such revised return discloses a higher income, penalty under Section 271(1) (c) of the Act could not be imposed automatically. He further submitted that even inadequate enquiry in itself cannot give power to revise the order if LD AO has a different opinion in the matter. He further submitted that even otherwise bonafide omission with reasonable cause could not lead to imposition of penalty. He submitted that even otherwise acting on the professional advice of the expert is a reasonable cause. In the end, he referred to the Press release dated 14 December 2016 of the CBDT, which was with respect to filing of revised Income Tax return, by the taxpayer post-demonetization of currency, which was relied by the LD PIT. He

submitted that reliance on the above Press release is de void of any merit as the case of the assessee does not have such facts. Therefore, he submitted that the order passed by the ld. Pr. CIT is un-sustainable and deserves to be set aside.

11. The ld. [CIT]–DR narrated the facts of the case once again and stated that the case of the assessee was selected for scrutiny as there was a mis-match found in the receipts of the profit and loss account with Form No. 26AS. Therefore, it was detected at the time of selection of the case itself. Therefore, on detection of the income shown lesser by the assessee the assessee revised her return of income. Therefore, it was not a case that assessee disclosed before detection any higher income in revised return. He further submitted that when the Assessing Officer failed to initiate the penalty proceedings the ld Pr. CIT was within her power to examine that order and to hold that the Assessing Officer should have initiated penalty proceedings, which AO failed to initiate, and, therefore, the order is passed by the ld. Pr. CIT finding that such assessment order is erroneous and prejudicial to the interest of revenue. . She, therefore, is correct in passing the order under Section 263 of the Act. He submitted that at present, we are not concerned that assessee may be penalized or not, which could be decided by the Assessing Officer later on levying the penalty proceedings, but the matter here is that whether the order passed by the Assessing Officer is erroneous or not. He submitted that it is so, therefore, he supported the order of the ld. Pr. CIT.

12. We have carefully considered the rival contentions and perused the orders of the lower authorities. We have also considered the various judicial precedents relied upon by the learned authorised representative. Facts are already culled out above. We find that the issue is squarely covered in favour of the assessee by the decision of the honourable jurisdictional High Court holding that the assessment proceeding is a separate proceedings from penalty proceedings. When the learned principal Commissioner of income tax is assuming

jurisdiction u/s 263 of the income tax act, she does not have any right to direct the learned assessing officer to initiate penalty proceedings u/s 271 (1) © of the act. Honourable Delhi High Court 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, as 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."

13. 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. Keshrimal Parasmal (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 case (supra).

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

15. We are also mindful that it is not the case where ld AO has initiated penalty proceedings and dropped it later on. Case before us is the ld AO did not initiate proceedings at the first instance and ld PCIT has invoked his jurisdiction u/s 263 Of the Act. We are also mindful of the argument of the learned departmental representative that assessing officer is required to initiate penalty proceedings in the assessment order itself by recording the satisfaction about the concealment or furnishing of inaccurate particulars of income for initiation of penalty proceedings u/s 271 (1) © of the act. The satisfaction of the assessing officer is always the part of the order of assessment. Therefore, initiation of penalty proceedings is always the part of the order of the assessment. The non-initiation of penalty proceedings by the learned assessing officer makes the order of the learned assessing officer

erroneous. He submitted that the various judicial precedents submitted by the learned authorised representative related to the penalty proceedings with respect to late filing of the return etc and subsequently followed for other penalty proceedings. He also referred to the several judicial precedent where it was held that the learned assessing officer is required to record the satisfaction with respect to the initiation of the penalty proceedings. Therefore, it cannot be said that non-initiation of the penalty proceedings is not part of the assessment order. He also stated that penalty proceedings by issue of show cause notice u/s 274 of the act is a separate proceedings thereafter but initiation of the penalty proceedings and recording the satisfaction of the assessing officer are part of the assessment proceedings. Therefore the decisions relied upon by the learned authorised representative should not have been applied. He otherwise stated that there is no alternative left with the revenue wherein the assessing officer does not initiate penalty proceedings. He submitted that there is no other provisions of the law with safeguards the interest of the revenue in such circumstances. We have also carefully perused the arguments of the learned departmental representative However, in view of the decision of the honourable Delhi High Court, we are duty-bound to follow it.

16. Therefore, respectfully following the decision of the honourable Delhi High Court we do not find any reason to sustain the order passed by the learned principal Commissioner of income tax u/s 263 of the income tax act.

17. Even otherwise we find that the assessee filed the original return on 29/9/2015, notice u/s 143 (2) was issued by the learned AO on 20/9/2016, assessee revised her return of income on 31 December 2016 and first notice u/s 142 (1) was issued to the assessee on 23rd of June 2017 wherein the copy of the income tax return, balance sheet et cetera were asked. This was the first instance where the assessing officer got hold of the record of the assessee where AO could have find

out the error. No doubt the case of the assessee was selected for scrutiny with respect to the mismatch between the financial statements and 26 AS, however when the assessing officer received the details of income tax return and the annual accounts by letter dated 17 July 2017 of the assessee in response to notice u/s 142 (1) of the act, that was the first instance i.e. 17 July 2017 wherein the assessing officer would have the first instance to detect that there was an error in turnover reported by the assessee in her annual accounts as well as in26AS. However, the assessee has revised return of income on 31 December 2016 itself. Therefore, it is a clear-cut case that before the detection by the learned assessing officer of an error in the return of income, she revised return of income. Therefore even otherwise in such cases penalty u/s 271 (1) © of the act could not have been levied. Therefore, now the initiation of penalty proceedings by the learned assessing officer is also guided by the above clear-cut facts. Therefore, the order of the learned assessing officer cannot be said to be erroneous order, if she did not initiate penalty proceedings on the above fact.

18. Meanwhile in the case of the assessee for assessment year 2014 – 15 on identical facts and circumstances the coordinate bench in ITA number 3611/del/2019 dated 22/11/2019 deleted the penalty levied by the learned assessing officer. The learned interval Commissioner of income tax issued show cause notice for assuming jurisdiction u/s 263 of the act on 23/3/2021. Therefore, at the time of examination of the record by the learned principal Commissioner of income tax, issue is squarely covered in favour of the assessee by the decision in her own case in previous year, therefore, she was not justified in passing an order on the identical facts by directing the learned assessing officer to initiate the penalty proceedings for concealment of income. Thus on this count also the order of the learned principal Commissioner of income tax is not sustainable.

19. Further more on going through the order passed by the learned principal Commissioner of income tax u/s 263 of the income tax act it is clear-cut that she relied on the president is dated 14 December 2016 issued by the government of India, central board of direct taxes with respect to the filing of income tax return by the taxpayers post de monetization of currency. Those she relied on the paragraph number two of that pretzel in stating that if there is no omission or wrong statement made in the original return of income the assessee cannot revise the return filed originally. However, in the present case, we find that there is an omission and a wrong statement, which is bona fide, and therefore the assessee was entitled to revise a return of income. It is also a fact that it is not a case of demonetization of currency. Therefore, the assessee is validly entitled to revise a return of income. If the argument of the learned principal Commissioner of income tax is accepted then the sanctity of revising the return of income then in assessee finds an error or omission in the originally filed return, automatically in all such cases initiation of the penalty proceedings would be mandatory. Such is not the mandate of law and therefore on this count also the order passed by the learned principal Commissioner of income tax is not sustainable.

20. In view of the above facts and reasoning, we hold that the order passed by the learned principal Commissioner of income tax u/s 263 of the act on 30th of March 2021 is not sustainable in law and therefore it is quashed.

21. In the result, appeal filed by the assessee is allowed.

Order pronounced in the open court on :**<u>07/07/2021</u>**

-Sd/-	**-Sd/-**
(SUCHITRA KAMBLE)	**(PRASHANT MAHARISHI)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 07/07/2021.

MEHTA

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT (Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI