

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

ITA No. 290 of 2014

Date of Decision: 29.10.2015

Commissioner of Income Tax (Central), Ludhiana

....Appellant.

Versus

Shri Rakesh Nain Trivedi

...Respondent.

1. Whether the Reporters of the local papers may be allowed to see the judgment?
2. To be referred to the Reporters or not?
3. Whether the judgment should be reported in the Digest?

**CORAM:- HON'BLE MR. JUSTICE AJAY KUMAR MITTAL.
HON'BLE MR. JUSTICE SHEKHER DHAWAN.**

PRESENT: Mr. Rajesh Katoch, Advocate for the appellant.

Mr. Ravish Sood, Advocate for the respondent.

AJAY KUMAR MITTAL, J.

1. This appeal has been filed by the revenue under Section 260A of the Income Tax Act, 1961 (in short “the Act”) against the order dated 26.3.2014 (Annexure A-III) passed by the Income Tax Appellate Tribunal, Amritsar Bench, Amritsar (hereinafter referred to as “the Tribunal”) in ITA No. 300(ASR)/2013 for the assessment year 2008-09, claiming the following substantial question of law:-

“Whether on the facts and in the circumstances of the case, the Hon'ble ITAT was right in law in cancelling the order u/s 263 of the Income Tax Act, 1961 by holding that the order passed by the Assessing Officer

is not erroneous and prejudicial to the interest of revenue, on the issue of penalty proceedings u/s 271(1)(c) of the Income Tax Act, 1961 read with Explanation 5A which had not been initiated by the Assessing Officer during the course of the assessment proceedings on the ground that due date for filing return includes return filed u/s 139(4) of I.T. Act?

2. Briefly stated, the facts necessary for adjudication of the instant appeal as narrated therein may be noticed. The assessee derives income from real estate business. On 11.12.2008, search and seizure operation under Section 132 of the Act was conducted at the premises of the assessee. Notice under Section 153A of the Act was issued to the assessee who filed his return of income on 31.3.2009 for the assessment year 2008-09 at ₹ 78,16,530/-. The Assessing Officer framed the assessment vide order dated 8.12.2010 (Annexure A-I) under Section 153A of the Act accepting the returned income. The Commissioner of Income Tax (Central) (for brevity "the CIT") vide order dated 12.3.2013 (Annexure A-II) in exercise of powers under Section 263 of the Act set aside the assessment order holding that the same was erroneous and prejudicial to the interest of the revenue. The assessment order was cancelled by the CIT on the ground that i) the commission of ₹ 47,925/- had been paid without deduction of TDS and was not allowable; ii) Penalty under Section 271(1)(c) of the Act had not been initiated; and iii) Penalty under Section 271A and 271B of the Act had not been initiated. Accordingly, the CIT directed the Assessing Officer to re-frame the order in accordance with the provisions of the Act.

Feeling aggrieved, the assessee filed an appeal before the Tribunal. The Tribunal vide order dated 26.3.2014 (Annexure A-III) partly allowed the appeal of the assessee holding that the assessee was not liable to deduct the TDS as his receipt did not exceed ₹ 40 lacs in the earlier year. Further, the Tribunal observed that the CIT cannot direct the Assessing Officer to initiate penalty proceedings under Section 271(1)(c) of the Act and that the penalty proceedings under Sections 271A and 271B of the Act are not related to the assessment and can be initiated at any time and, therefore, the assessment framed is not effected and there is no scope to apply provisions of Section 263 of the Act. Hence the present appeal by the revenue.

3. Learned counsel for the revenue in support of its case has relied upon the judgment of Allahabad High Court in **Commissioner of Income Tax v. Surendra Prasad Agrawal (2005) 275 ITR 113 (All)**. On the other hand, learned counsel for the assessee has placed reliance upon the judgments in **Commissioner of Income Tax v. J.K. D's Costa (1984) 147 ITR (St.) 1 (SC)**, **Commissioner of Income Tax v. Subhash Kumar Jain (2011) 335 ITR 364 (P&H)**, **Additional Commissioner of Income Tax v. J.K.D' Costs (1982) 133 ITR 7 (Delh)**, **Commissioner of Income Tax v. Jagriti Aggarwal (2011) 339 ITR 610 (P&H)** and **Commissioner of Income Tax v. Jagtar Singh Chawla (2013) 215 Taxman 154 (P&H)**.

4. We have heard learned counsel for the parties.

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 Section 263 of the Act hold the order of

the Assessing Officer to be erroneous and prejudicial to the interest of the revenue where the Assessing Officer had failed to initiate penalty proceedings while completing assessment under Section 153A of the Act.

6. It may be noticed that the said issue is no longer res integra. This Court in **Commissioner of Income Tax v. Subhash Kumar Jain (2011) 335 ITR 364** agreeing with the view of High Courts of Delhi in **Additional CIT v. J.K.D.'Costa (1982) 133 ITR 7 (Del)**, **Commissioner of Income Tax v. Sudershan Talkies (1993) 201 ITR 289 (Del)** and **Commissioner of Income Tax v. Nihal Chand Rekyan (2000) 242 ITR 45 (Del)**, Rajasthan in **Commissioner of Income Tax v. Keshrimal Parasmal (1986) 157 ITR 484 (Raj)**, Calcutta in **Commissioner of Income Tax v. Linotype & Machinery Ltd. (1991) 192 ITR 337 (Cal)** and Gauhati in **Surendra Prasad Singh and others v. Commissioner of Income Tax (1988) 173 ITR 510 (Gau.)** whereas dissenting with the diametrically opposite approach of Madhya Pradesh High Court in **Additional Commissioner of Income Tax v. Indian Pharmaceuticals (1980) 123 ITR 874 (MP)**, **Additional Commissioner of Income Tax v. Kantilal Jain (1980) 125 ITR 373 (MP)** and **Addl. CWT v. Nathoolal Balaram (1980) 125 ITR 596 (MP)** had concluded that where the CIT finds that the Assessing Officer had not initiated penalty proceedings under Section 271(1)(c) of the Act in the assessment order, he cannot direct the Assessing Officer to initiate penalty proceedings under Section 271(1)(c) of the Act in exercise of revisional power under Section 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 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 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 levability 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. Keshrimal Parasmal (1985) 48 CTR (Raj) 61 : (1986) 157 ITR 1984 (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's Costa's case (supra).

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. Nathoolal Balaram (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 Section 263 of the Act was not justified and we uphold the order of the Tribunal cancelling the revisional order passed by the CIT.

9. Consequently, the appeal is dismissed.

(AJAY KUMAR MITTAL)
JUDGE

October 29, 2015
gbs

(SHEKHER DHAWAN)
JUDGE