**IN THE HIGH COURT OF JUDICATURE AT PATNA**
**Miscellaneous Appeal No.626 of 2016**

THE PRINCIPAL COMMISSIONER OF INCOME TAX I, PATNA.

... ... Appellant/s

Versus

R.A. HIMMATSINGKA AND CO., PATNA.

... ... Respondent/s

**Appearance :**

| | | |
|---|---|---|
| For the Appellant/s | : | Mrs. Archana Sinha, Sr. SC, Income Tax<br>Mr. Alok Kumar, Advocate |
| For the Respondent/s | : | Mr. D.V. Pathy, Advocate<br>Mr. Sadashiv Tiwary, Advocate |

**CORAM: HONOURABLE THE CHIEF JUSTICE**
**and**
**HONOURABLE MR. JUSTICE HARISH KUMAR**
**CAV JUDGMENT**
**(Per: HONOURABLE THE CHIEF JUSTICE)**

**Date : 27-02-2024**

The appeal is by the assessee against an order of the Income Tax Appellate Tribunal in an appeal by the Revenue and a cross objection filed by the assessee. The question of law arising in the above case is framed as follows:-

> *Whether the Tribunal misdirected itself in finding, no satisfaction in initiation of penalty proceedings having been recorded in the assessment order; when the satisfaction was recorded and a penalty proceeding initiated, which was dropped on the modifications made in the first appeal against the assessment order, which order*

*of dropping the penalty proceeding was revised under Section 263 of the Income Tax Act, 1961.*

**2**. We heard learned counsel for the assessee Sr. D.V. Pathy and the learned Standing Counsel for the Department Smt. Archana Sinha.

**3**. The facts leading to the above appeal arise from the assessment order of 2004-05. The assessee, who is the appellant herein, was a firm engaged in the dealership of vehicles and its servicing, as also a dealership of Bharat Petroleum Corporation Limited. The assessment order was framed for the subject assessment year and a proceeding under Section 261(1)(c) of the Act was initiated.

**4.** The assessee filed an appeal before the First Appellate Authority against the assessment order, which was rejected. A further appeal to the Tribunal saw certain modifications being made to the assessment order; when the Tribunal allowed the appeal in party. Thereafter, the Assessing Officer found that there was only a mere omission and that it was not intentional or attributable to a desire on the part of the assessee to conceal the income, so as to avoid payment of tax.

**5.** The Commissioner of Income Tax issued a notice under Section 263 of the Act on the ground that the order of the Assessing Officer dropping the penalty proceedings is erroneous and results in prejudice to the interest of the revenue. After hearing the assessee, the Commissioner of Income Tax interfered with the order by the Assessing Officer, dropping the proceedings and directed the Assessing Officer to consider the matter afresh on restoration of the penalty proceedings.

**6**. The assessee took the matter to this Court by a challenge under Article 226 of the Constitution of India, wherein a Division Bench of this Court in ***R.A. Himmatsingka & Co. v. Commissioner of Income Tax & Others*** reported in ***(2012) 340 ITR 253*** rejected the contentions of the assessee. The grounds raised to challenge the order under Section 263 was that the Commissioner could not have interfered with the dropping of proceedings, since it is not an assessment order and hence it is not an order revisable under Section 263. The Division Bench after considering a host of decisions of this Court and various High Courts found that dropping of the penalty proceedings by an order, is definitely revisable under Section 263. It was found that Section 263 employs the word ‘any order’ and ‘in any proceeding under the Act’ which was held to have a wide connotation. The ambit and sweep of Section 263 includes the orders of either dropping the proceedings or initiating any proceedings, which could be revised. Revising the order and dropping the proceedings of penalty, was upheld by the High Court.

**7.** Even at that point of time, the petitioner did not have a case that the assessment order did not record the satisfaction regarding the initiation of penalty proceedings. The penalty proceedings were initiated and then dropped; which later order was revised under Section 263.

**8**. As is evident from the order impugned in the appeal, the assessment order contained the following words '*penalty under Section 271(1)(c) is being initiated for furnishing inaccurate particulars of the income and thereby concealment of income'*(sic). The Tribunal, however, found that the specific heads under which the penalty was imposed was not referred to by the Assessing Officer, which is not necessary, even going by the decisions cited by the Tribunal.

**9**. ***Chandra Prakash Bubna v. ITO*** reported in ***(2015) 64 Taxman 155 (Kolkata Tribunal)*** was a proceeding under Section 271(1)(c), where there was no specific charges raised against the assessee. In recording the satisfaction at the time of pendency of the assessment proceedings, such specific allegations are not warranted, was the finding.

**10**. Another decision referred to was of the Karnataka High Court in ***Commissioner of Income Tax v. Manjunatha Cotton & Ginning Factory*** reported in ***(2013) 359 ITR 565 (Kar)***. Therein, the dictum clearly discernible is that the Assessing Officer will only have to arrive at a prima facie satisfaction during the course of assessment proceedings with regard to the assessee having concealed particulars of income or furnished inaccurate particulars, before he initiates penalty proceedings. The cited decision also referred to the decision of the Hon'ble Supreme Court in ***MAK Data Private Ltd. v. Commissioner of Income Tax*** reported in ***(2013) 358 ITR 593,*** wherein it was held that the Assessing Officer in recording such prima facie satisfaction, is not obliged to do it in a particular manner or even reduce it into writing. Even from a mere reading of the assessment order, satisfaction if clearly discernible that would be sufficient. There can be no flaw found in the subsequent initiation of penalty proceedings. That satisfaction has to be arrived at when the assessment is pending, is undisputed, which admittedly was recorded by the Assessing Officer in the present case. The

Assessing Officer later dropped the proceedings, which was revised under Section 263 by the Commissioner of Income Tax, upheld by a Division Bench of this Court; at which stage no contention regarding prima facie satisfaction having not been recorded was raised before the authority or before this Court.

**11**. As of now, the penalty proceedings have been initiated based on the order of the Commissioner of Income Tax under Section 263, approved by this Court. There can be no contention taken regarding the prima facie satisfaction having not been recorded in the assessment order; which was never taken up earlier and which demonstrably was recorded in the assessment order. We find absolutely no reason to sustain the order of the Tribunal. The question of law is answered in favor of the revenue and against the assessee.

**12.** We see that the First Appellate Authority had looked at the penalty order, on the quantum and interfered with the same. It is only proper that a factual adjudication is conducted by the Tribunal for which we remand the matter to the Tribunal.

**13.** Both the appeal and the cross objection stands restored to the files of the Tribunal. The question of satisfaction having been found by us, the legality of the penalty imposed and modified by the First Appellate Authority would be considered by the Tribunal, as expeditiously as possible at any rate within 6 months from the date of appearance of the parties.

**14.** The appeal stands allowed.

**(K. Vinod Chandran, CJ)**

**Harish Kumar, J:** I agree

**(Harish Kumar, J)**

sharun/-

| | |
|---|---|
| **AFR/NAFR** | |
| **CAV DATE** | 21.02.2024 |
| **Uploading Date** | 27.02.2024 |
| **Transmission Date** | |