आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ 'B' अहमदाबाद ।

IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH, AHMEDABAD

BEFORE SHRI RAJPAL YADAV, JUDICIAL MEMBER &
SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER

आयकर अपील सं./I.T.A. No. 1232/Ahd/2018

(**निर्धारण वर्ष /** Assessment Year : 2003-04)

Kiri Dyes and Chemicals Ltd. 53, Manekbaug Society, Lane No.7, Gate No.3, Nehrunagar, Ahmedabad	**बनाम**/ Vs.	**Pr. Commissioner of Income Tax-2** Ahmedabad 1st Floor, Navjivan Trust Bulding, B/h Gujarat Vidyapith, Ahmedabad - 380014
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAACK9025C		
(अपीलार्थी /**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

अपीलार्थी ओर से /**Appellant by :**	Shri Tushar Hemani & Shri P. B. Parmar, A.Rs.
प्रत्यर्थी की ओर से / **Respondent by :**	Shri Alok Singh, CIT.D.R.

सुनवाई की तारीख / **Date of Hearing**	09/10/2019
घोषणा की तारीख /**Date of Pronouncement**	10/10/2019

आदेश/O R D E R

PER PRADIP KUMAR KEDIA - AM:

The captioned appeal has been filed at the instance of the assessee against the revisional order passed by the Principal Commissioner of Income Tax-2, Ahmedabad ('Pr.CIT' in short) dated 28.03.2018 under S. 263 of the Income Tax Act, 1961 (the Act) arising as a consequence of assessment order dated 07.10.2015 passed by the Assessing Officer (AO) under s.143(3) r.w.s. 254 of the Act relevant to AY. 2003-04.

2. In its appeal, the assessee seeks to assail the action of the Pr.CIT in invoking Section 263 of the Act and contends that the subject assessment order framed under s.143(3) r.w.s. 254 of the Act passed by the AO cannot be termed as 'erroneous and prejudicial to the interest of the Revenue' to put Section 263 in motion.

3. The Relevant facts in brief are that the assessment under s.143(3) of the Act for AY 2003-04 was framed vide order dated 30.03.2006 whereby the AO inter alia disallowed the claim of Rs.3,78,28,641/- under s.10B of the Act. The aforesaid action of the AO was subjected to judicial scrutiny at various levels and eventually the matter was restored to the AO for re-adjudication. The order passed by the AO in the second round of proceedings was once again remitted back by the ITAT to the AO with certain directions. An assessment order under s.143(3) r.w.s. 254 of the Act was consequently passed on 07.10.2015 in the third round of proceedings. The AO maintained its original stance of disallowance of claim of deduction under s.10B of the Act. However, while denying deduction claimed under s.10B of the Act, the AO did not choose to initiate penalty under s.271(1)(c) of the Act while passing the impugned order under s.143(3) r.w.s. 254 of the Act.

4. The failure of the AO to initiate penalty proceedings under s.271(1)(c) of the Act on denial of deduction under s.10B of the Act while passing the assessment order prompted the Pr.CIT to exercise its jurisdiction under s.263 of the Act to correct the aforesaid failure of the AO.

5. The controversy thus arises on maintainability of the revisional action of the Pr.CIT for lapse/failure on the part of the AO to initiate penalty proceedings in the course of assessment proceedings. We find that the issue is no longer *res integra* and is squarely covered in favour of the assessee by the decision of the co-ordinate bench of Tribunal in *Easy Transcription & Software Pvt.Ltd. vs. CIT (2017) 88 taxmann.com 772 (Ahmedabad-Trib.)*. It was held by the Tribunal therein that the designated

authority under s.263 of the Act is not entitled to correct the alleged lapse of the AO in failure to initiate the penalty proceedings under s.271(1)(c) of the Act.

6. The relevant para of the order of the ITAT in the said case is extracted hereunder for easy reference:-

> *"10. Section 263 enables the concerned Pr.CIT / CIT to review the records of any proceedings and order passed thereon by the Assessing officer. It empowers the Commissioner concerned to call for and examine the record of any proceeding under the Act and if he considers that any order passed therein by the AO is erroneous in so far as it is prejudicial to the interests of the Revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such enquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or canceling the assessment and directing a fresh assessment. Thus, the revisional powers conferred on the CIT under S. 263 are of wide amplitude with a view to address the revenue risks which are objectively justifiable.*
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> *11. As per the arguments, the legal issue that emerges for adjudication is whether the Commissioner under the umbrella of revisionary powers is entitled to upset the finality of assessment proceedings before the AO who has omitted to initiate penalty proceedings in respect of defaults stipulated under section 271(1)(c) when the circumstances for doing so exists. The other integral issue that arises is whether scope of assessment includes initiation of penalty proceedings under S. 271(1)(c) or not. There are long line of judicial precedents on the issue both for and contra. The Hon'ble Gujarat High also had occasion to deal with the issue relevant to assessment year 1982-83 in CIT vs. Parmanad M. Patel 278 ITR 3 (2005) wherein the decision was rendered in favour of the assessee. Riding on the decision of the Hon'ble Gurarat High Court, the co-ordinate bench of Tribunal in J. P. Construction vs. CIT ITA No. 1304/ Ahd./ 2009 order dated 24.07.2009 [AY 2005-06] cancelled the action of the CIT under section 263 wherein the assessment order was set aside for framing assessment afresh in order to initiate penalty under S. 271(1)(c) of the Act. The assessee herein seeks to place reliance on the decision of Gujarat High Court in Parmanand Patel (supra) followed by Tribunal in JP Construction. The Revenue on the other hand seeks to dispute the position of law as read by the Hon'ble Jurisdictional High Court in Parmanand M. Patel case (supra) on the grounds of amendment carried out in S. 271(1)(c). The Revenue submits that the impugned decision in Parmanand Patel case was rendered prior to amendment carried out in Section 271(1)(c). Post amendment, the Pr. CIT/ CIT is also inserted as a designated authority for the purposes of exercising powers under S. 271(1)(c). Thus the handicap which formed the basis for outcome in Parmanand Patel stands addressed by the legislative amendment. It is therefore contended that in view of the legislative changes, the decision in Parmanand Patel has lost its proposition. Continuing further, negating the ratio of decision of Tribunal in J P Construction (supra), the revenue submits that the aforesaid ITAT order has been set aside and remanded back to ITAT for fresh adjudication in CIT vs. J P Construction in Tax appeal no. 2581 of 2009 order dated 22/10/2013 by the Hon'ble Gujarat High Court taking cognizance of this legislative amendment.*
>
> *11.1. Having regard to the controversy involved, it would be desirable to reproduce hereunder the relevant paras of the order of the Tribunal in J P Construction case in ITA No.1304/Ahd/2009 to begin with.*

"4. Heard both parties and perused the record. Carefully going through the impugned order of the learned CIT, we find that since the Assessing Officer has not initiated penalty proceedings u/s.27191)9c) on the addition of Rs.1,72,73,488 which was offered by the assessee in the revised return, the learned CIT by invoking power u/s.263 has set aside the assessment for framing the same afresh. Therefore, the question to be decided in the present case is – Where the Assessing Officer has failed to initiate penalty proceedings u/s.271(1)(c) of the Act in the assessment proceedings, whether the CIT is empowered u/s.263 to set aside the assessment and direct the Assessing Officer to frame the assessment afresh? Such a question is no more res integra. In the case Addl.CIT vs. J.K. D'Costa [192] 133 ITR 7 (Delhi) followed in ACIT v. Achal Kumar Jain (142 ITR 606) and CIT v. Nihal Chand Rekyan [2000] 242 ITR 45 (Delhi) and in Addl.CIT vs. Sudarshan Talkies (1993) 200 ITR 153 (Delhi); also by Hon'ble Madras High Court in CIT vs. C.K.K.Swami (254 ITR 158); Sarda Prasad Singh v. CIT (173 ITR 510 (Gauhati), it has been hled that if the Commissioner finds, while examining the records of an assessment order under section 263, that the Assessing Officer has not initiated penalty proceedings, he cannot direct initiation of penalty proceedings because penalty proceedings are not a part of assessment proceedings. The Commissioner cannot pass an order under section 263 p0ertaining to penalty. Hon'ble Supreme Court has dismissed special leave petition against the Delhi High Court decision in Addl.CIT vs. J.K. D'Costa [reported in (1984) 147 ITR (St) 1)]. In the case of CIT v. Dr.Suresh G.Shah (289) ITR 110 (Guj) following its earlier judgement in the case of CIT v. Parmanand M.Patel (2005) 198 CTR (Guj) 641/278 ITR 3 (Guj), Hon'ble Gujarat High Court has held that while exercising powers under Section 263, CIT is not competent to direct initiation of penalty proceedings under s.271(1)(a) or s.273(2)(c) of the Act. In the case of CIT v. Parmanand M.Patel (supra), Hon'ble jurisdictional High Court has held that the CIT is not empowered to record satisfaction by invoking s.271(10(c) of the Act and if he is not entitled to do so, on his own, he cannot do it by directing the assessing authority. The Court observed that in other words, what the CIT himself cannot do, he cannot get it done though the assessing authority by exercising revisional powers.

5. In view of the above, since the CIT has set aside the assessment for framing assessment afresh in order to initiate levy penalty u/s.271(1)(c) of the Act, the order passed u/s.263 is not in order and therefore, we cancel the same."

11.2. As noted earlier, the Hon'ble Gujarat High Court has quashed and set aside the impugned tribunal order and remanded the matter back to the ITAT for its fresh consideration in the light of amendment in S. 271(1)(c) of the Act. The short order thereon in Tax Appeal No.2581 of 2009 is reproduced hereunder to appreciate the issue in perspective.

"Present Tax Appeal has been preferred by the appellant Revenue challenging the impugned judgment and order dated 24th July 2009 passed by the Income Tax Appellate Tribunal, Ahmedabad {"Tribunal" for short} in I.T.A No. 1304/Ahd/2009 with respect to A.Y 2005-06 on the following question of law :-

> *"Whether the Appellate Tribunal is right in law and on facts in setting aside the order passed by the Commissioner of Income Tax u/s. 263 of the Act when the Assessing Officer failed in initiating proceedings u/s. 271 [1](c) of the Act ?"*

Having heard Ms. Paurami Sheth, learned advocate appearing for the appellant-Revenue and Shri Manish J. Shah, learned advocate appearing on behalf of the respondent and considering the impugned judgment and order dated 24th July

2009 passed by the Tribunal, it appears that while allowing the appeal preferred by the assessee, the Tribunal has relied upon the decision in case of CIT v. Parmanand M. Patel, reported in 278 ITR 3 (Guj).

It is not in dispute that the decision in case of Parmanand M. Patel [Supra] was rendered considering pre-amended Section 271 [1] of the Income-tax Act, 1961 {"Act" for short}. It is also not in dispute that the Tribunal was required to consider post-amended provision of section 271 [1] of the Act. Under the circumstances, the impugned judgment and order passed by the Tribunal cannot be sustained and the same deserves to be quashed and set-aside, and the matter is required to be remanded to the Tribunal for deciding the appeal by considering the amendment in Section 271 [1] of the Act. Learned advocates appearing on behalf of respective sides are not in a position to dispute the same and as such are not disputing the above.

In view of the above and without expressing anything on the merits on behalf of the either parties and solely on the aforesaid ground, the impugned judgment and order dated 24th June 2009 passed by the Tribunal is hereby quashed and set-aside and the matter is remanded to the Tribunal to decide and dispose of the said appeal afresh in accordance with law on merits and considering the amended Section 271 [1] of the Act.

Present Tax Appeal is accordingly allowed to the aforesaid extent with no order as to costs."

12. In the wake of developments narrated above, the controversy has resurfaced again and issue has become open to debate having regard to the amendment in S. 271(1)(c), which we seek dwell upon.

13. On perusal of the decision of Hon'ble Gujarat High Court in Parmanand Patel case (pre amended law), we note that basis for holding that the CIT lacks jurisdiction under S. 263 to cancel the assessment for failure of the AO to initiate penalty proceedings were multifold. The propositions emerging therein are broadly summarized as under:

*(**A**) S. 271(1)(c) confers discretionary jurisdiction on the AO or the CIT(Appeals) to initiate penalty proceedings. The provision does not empower any other authority to exercise discretion. Even while being a superior authority, the administrative CIT is not a designated authority to form satisfaction prior to amendment of S. 271(1)(c) effective from 1-6.2002. The CIT is thus not permitted substitute satisfaction arrived at by AO, in exercise of revisional powers. In the absence of powers conferred to invoke the penalty provision, the CIT could not direct the AO to do so in colourable exercise of powers.*

*(**B**) The satisfaction for default committed as stipulated under clause (c) to S. 271(1)(c) has to be arrived at 'in the course of any proceedings' and not subsequent thereto. Thus, the stage of forming satisfaction is before conclusion of the proceedings under the Act.*

*(**C**) Section 271(1)(c) requires the specified authority to be satisfied in the course of 'any proceedings' which means any proceedings before any of the authority. The CIT cannot create proceedings.*

*(**D**) The assessment and penalty proceedings are separate and distinct proceedings. Therefore, the CIT cannot set aside the assessment order for the sole purpose of initiation of penalty proceedings in exercise of revisional jurisdiction. As a corollary, assessment order can not be set aside to initiate and impose penalty notwithstanding the fact the imposition of penalty is lawful.*

14. A reading of later judgment of Gujarat High Court in J P Construction(supra) would show that the Hon'ble Court has remanded the matter only in respect of proposition (A) enumerated above. As a necessary implication, other propositions continue to apply

and have not faded into insignificance. Under S. 263, the CIT concerned can examine the record of any proceedings and order passed consequent thereto can be set aside on fulfillment of conditions as stipulated therein. In the instant case, the proceeding and consequent order is assessment order. As noted by jurisdictional High Court, penalty proceedings are separate and distinct. There is no identity between the two. Penalty proceedings can be initiated during the currency of assessment of proceedings till the conclusion of assessment proceedings. Except for a legal bar that penalty proceedings cannot be initiated subsequent to the conclusion of assessment proceedings, there is no other perceptible dependence qua the assessment order. As a sequel thereto, in our considered view, it is not open to CIT to exercise the revisional powers to create a non existent proceedings under S. 263 by holding the assessment proceeding as erroneous in so far as prejudicial to the interest of revenue. Pertinent to say, section 263 creates, defines and regulates the revisional powers of the CIT concerned and is thus a substantive provision. Hence, the strict requirements of a jurisdictional provision can not be compromised. We are alive to the situation that in the absence of the revisional power, the revenue is probably deprived of any remedy to cure the lapse committed by the AO in appropriate cases. This however, will not alter the position of law spelt in this regard. Howsoever, clear the legislative intent may be, the requirements of a substantive provision cannot be bypassed to give effect to such intent. It is trite that legislative casus omissus cannot be supplied by judicial interpretive process.

15. The action of CIT under S. 263 is required to be struck down for other reason also. As noted above, arriving at the 'satisfaction' is the foundation of action under S. 271(1)(c) of the Act. Admittedly, the CIT is a designated authority to form satisfaction post amendment. Nevertheless, the impugned 'satisfaction' towards default enumerated in 271(1)(c) is required to be formed not later than the conclusion of proceeding before it i.e. assessment proceeding in the instant case. Thus the designated authorities would become functus officio once the proceedings are concluded. Admittedly, the assessment proceedings were concluded and post facto satisfaction is not permissible. The penalty proceedings being distinct and separate, the assessment per se can alone be reviewed in accordance with law. However, the completed assessment cannot be set aside to enable the subordinate authority to initiate a separate and distinct proceeding in conflict the scope of authority vested under S. 263. The Commissioner in exercise of his revisional powers cannot arrogate to himself a status to surrogate the other authorities and supplant their roles under the Act. The Commissioner is not a substitute of the other statutorily prescribed fora with codified functions dischargeable in terms of the prescribed procedure in the situations comprehended thereby. When read in conjunction with the decision of Parmanand Patel (supra), the language of Section 263 is not capable of and does not admit of a construction to empower the CIT to set aside an assessment order to initiate a distinct penalty proceeding. The legislature, in our view, has allowed this position to be sustained so far except expanding the scope of authority under S. 271(1)(c) to include administrative CIT within its ambit.

16. Before we proceed to conclude the issue, we also take note the decision in the case of CIT vs. Surendra Prasad Agrawal 275 ITR 113(All.); Indian Pharmaceuticals (1980) 123 ITR 874(MP); RA Himmatsingka & Co. 340 ITR 253(Pat.); Sara Enterprises (Mad.) 224 ITR 169 etc. referred to and relied upon on behalf of the revenue. In all these cases, it was held that the CIT administration is entitled to invoke S. 263 to cancel the assessment where the penalty was either dropped or the AO omitted to initiate the penalty proceedings. However, in the same vain, we notice that there are many decision in favour of the Assessee on the same subject namely CIT vs. Saraya Distillery 115 ITR 34 (All.); Addl. CIT vs. J.K, D'Costa (1981) 133 ITR 7(Del.) [SLP dismissed against the aforesaid decision] which were referred to and followed in other decisions of Hon'ble Delhi High Court. The Hon'ble Gujarat High Court has taken note of varied decisions of different High Courts while determining the issue in favour of the assessee. The propositions laid

down by the Hon'ble Gurarat High Court will prevail over the contrary propositions. We simultaneously take note the decision of Hon'ble Patna High Court in the case of R.A. Himmatsingka & Co. vs. CIT (2010) 340 ITR 253 (AY 2004-05) relied upon by revenue wherein the it was explained that expression 'proceedings' employed in section 263 is wider than the expression 'assessment'. However, in our view, nothing turns on this. The decision was rendered in a case where the penalty proceedings were duly initiated and later dropped which was subject matter of S. 263. Judicial utterances were made in the context of the case therein.

17. To sum up, in the light of various propositions culled out from decision of Hon'ble Gujarat High Court in Parmanand Patel (supra) we are disposed to hold that non initiation of penalty proceedings under S. 271(1)(c) while framing assessment is not a good ground for invoking revisional powers conferred under S. 263 of the Act. To reiterate, when proceeded in strict requirement of the provision, the CIT can not, after the conclusion of the assessment proceedings, make up mind or arrive at the required affirmative conclusion towards initiation of penalty proceedings in substitution of the lapse committed by the AO. Section 271(1)(c) read in conjunction with S. 263 of the Act, gives an unmistakable impression that while in the wake of amendment under S. 271(1)(c) w.e.f 1-6-2002, it may be lawful for the administrative CIT to impose penalty, that by itself would not be sufficient to hold that the CIT is entitled to exercise revisional powers by treating the assessment order as erroneous and prejudicial to the interest of revenue. There must exist an order, which is sought to be revised by the Commissioner. If there is no order, question of revising the order does not arise. In the instant case, there is no order in so far as penalty proceedings are concerned. The proceedings in respect of assessment and penalty are different and distinct notwithstanding the precondition that later has to be initiated in the course of former proceedings. Though expression 'assessment' is used in the Act with different meanings in different context, in so far as Section 263 is concerned, it refers to that particular proceeding which is being considered by the Commissioner. It is not possible to expand the scope of assessment proceeding and assessment, which is subject matter of revision, for the purposes of initiating a new and distinct penalty proceedings of onerous nature. Failure of AO to initiate or impose penalty cannot be a factor capable of vitiating the assessment order in any respect. An assessment, in our considered view, cannot be said to be erroneous or prejudicial to the interest of revenue owing to such failure with respect to initiate a distinct proceedings with a view to evaluate imposition of penalty therein. In view of the forgoing discussion, the Pr. CIT/ CIT is not competent to direct the AO to redo the assessment with a view to initiate and levy penalty in respect of erroneous claim of deduction under S. 10B."

7. It was essentially held in the aforesaid case that; (i) Assessment and Penalty proceedings are separate and distinct. Except initiation, they are not dependent on assessment order. (ii) It is not open to CIT to exercise the revisional powers to create a nonexistent proceedings under S. 263 by holding the assessment proceeding as erroneous in so far as prejudicial to the interest of revenue. (iii) 'Satisfaction' required by s.271(1)(c) of the Act cannot be formed post conclusion of assessment proceedings. (iv) There must exist an order, which is sought to be revised by the Commissioner. If there is no order, question of revising the order does not

arise. In the instant case, there is no order in so far as penalty proceedings are concerned.

8. In the light of the ratio of the decision extracted hereinabove, we find merit in the plea of the assessee towards inherent lack of authority of Pr.CIT to exercise jurisdiction conferred under s.263 of the Act for the purposes of initiation of penalty proceedings under s.271(1)(c) of the Act. The revisional order is accordingly set aside and quashed.

9. In the result, the appeal of the assessee is allowed.

This Order pronounced in Open Court on 10/10/2019

Sd/-	Sd/-
(RAJPAL YADAV)	(PRADIP KUMAR KEDIA)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Ahmedabad: Dated 10/10/2019

True Copy

S. K. SINHA

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. राजस्व / Revenue
2. आवेदक / Assessee
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाइल / Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण, अहमदाबाद ।