

2022 (2) TMI 880 - KERALA HIGH COURT

**MALLELIL INDUSTRIES PRIVATE LIMITED VERSUS ADDITIONAL/JOINT/DEPUTY/ASSISTANT
COMMISSIONER OF INCOME TAX**

WP(C) NO. 2643 of 2022

Dated: - 15 February 2022

Revision u/s 263 to impose a penalty u/s 271(1)(c) - whether assessment order had not recorded the satisfaction for initiating penalty proceedings? - HELD THAT:- Distinction between the proceedings under section 263 and the initiation of penalty u/s 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, then, that satisfaction is certainly expressed before conclusion of proceedings under the Act and is within his authority.

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.

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. WP dismissed.

Judgment / Order

Bechu Kurian Thomas, J.

For the Petitioner : By Advs. Sri.Anil D. Nair, Smt.Telma Raju, Smt.Edathara Vineeta Krishnan, Sri.Aravind Sreekuma

For the Respondent : By Adv. Sri.Jose Joseph, SC For Income Tax

JUDGMENT

Can an assessing officer, while considering an assessment, consequent to a remand ordered by the revisional authority under section 263 of the Income Tax Act 1961 (for short, 'the Act'), impose a penalty under section 271(1)(c) of the Act? Though an alternate remedy of appeal is available to the petitioner, the

jurisdiction of this Court under Article 226 of the Constitution of India is invoked, contending that the answer to the question posed above is in the negative, thereby rendering the entire exercise leading to the impugned order was 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 2015-16, the revised return filed by the petitioner was accepted and the assessment was completed under section 143(3) of the Act on 30.12.2016. 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 fresh assessment order. Pursuant thereto, by order dated 23.12.2019, a fresh order of assessment was issued, assessing the total income of the petitioner after disallowing the existing depreciation claimed. On 01.03.2021, 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.

"3. The Assessing Officer has failed to make even a single inquiry with regard to nature of the additional income and how the same has been accounted for in the books of accounts of the

assessee. Whether the undisclosed income is taxable under section 68, 69A or 69B etc. Virtually there is nothing on records to show even a single query raised by the DCIT or replied to by the assessee during the course of assessment proceedings. No questionnaire has been issued nor any queries with regard to return of income of the assessee were raised. Even Order sheet is also silent about such inquiries. The assessment records show that it is prima facie a summary assessment.

4. From the above it appears that the AO has not adhered to the basic principles of assessment and has completed the assessment in a hurried manner though the assessment was not even getting time barred.”

8. After the above observations, it was further mentioned in paragraph 6 of Ext.P2 as follows:

“6. The hearing was fixed for 22-10-2018. Shri Suresh Kumar CA attended the proceedings u/s.263. When confronted on the above issues on the basis of available records, he admitted that virtually no inquiries were made by the AO at the time of assessment and only a very sketchy order was passed. He stated that the assessee has no objection if the matter is revised to the file of the AO provided the assessee is given a reasonable opportunity of being heard.....

Considering the no objection of the assessee, the assessment order dated 30-12-2016 is set aside to the AO for re-assessment by passing Speaking Order and examination of impounded material and other legal issues emerging out of facts of the case.”

9. Finally, in the concluding paragraph, the following are observed:

“10. Accordingly, the order dated 21-06-2017 is set aside with the direction to pass a fresh assessment order on the above issues, expeditiously without waiting for the fag end of time baring date, after affording a reasonable opportunity to being heard to the assessee.”

10. 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. The contention that the words “on the above issues” in the concluding paragraph of Ext.P2 order indicates a limited remand, cannot be accepted. 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.

11. 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.

12. 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, Madras and Others v. S.V.Angidi Chettiar** (AIR 1962 SC 970). In the aforementioned judgment, while dealing with section 28 of Act 11 of 1922, 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. The following observations in the aforesaid judgment are significant in respect of the nature of satisfaction required while initiating proceedings for imposing penalty:

“The power to impose penalty under S.28 depends upon the satisfaction of the Income Tax Officer in the course of proceedings under the Act; it cannot be exercised if he is not satisfied about the existence of conditions specified in cls. (a), (b) or (c) before the proceedings are concluded. The

proceedings to levy penalty has, however, not to be commenced by the Income-tax Officer before the completion of the assessment proceeding by the Income- tax Officer. Satisfaction before conclusion of the proceedings under the Act, and not the issue of a notice or initiation of any step for imposing penalty is a condition for the exercise of the jurisdiction. There is no evidence on the record that the Income-tax Officer was not satisfied in the course of the assessment proceeding that the firm had concealed its income. The assessment order is dated the 10th of November, 1951, and there is an endorsement at the foot of the assessment order by the Income-tax Officer that action under S. 28 had been taken for concealment of income indicating clearly that the Income Tax Officer was satisfied in the course of the assessment proceeding that the firm had concealed its income."

13. 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, then, that satisfaction is certainly expressed before conclusion of proceedings under the Act and is within his authority.

14. 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.

15. 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.

16. 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.

Citations: in 2022 (2) TMI 880 - KERALA HIGH COURT

1. [1962 \(1\) TMI 10 - Supreme Court](#)
2. [2015 \(12\) TMI 979 - PUNJAB AND HARYANA HIGH COURT](#)
3. [2005 \(7\) TMI 72 - GUJARAT High Court](#)
4. [2003 \(9\) TMI 51 - DELHI High Court](#)
5. [2001 \(11\) TMI 56 - MADRAS High Court](#)
6. [1985 \(5\) TMI 34 - RAJASTHAN High Court](#)
7. [1981 \(4\) TMI 68 - DELHI High Court](#)