आयकरअपीलीय अधिकरण, जयपुरन्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL,
JAIPUR BENCHES,"A"JAIPUR

डा॰ एस. सीतालक्ष्मी,न्यायिक सदस्य एवं श्री राठोड कमलेश जयन्तभाई, लेखा सदस्य के समक्ष
BEFORE: DR. S. SEETHALAKSHMI, JM & SHRI RATHOD KAMLESH JAYANTBHAI, AM

आयकरअपील सं./ITA No.214 to 216/JP/2022
निर्धारणवर्ष/Assessment Years :2012-13, 2015-16 & 2016-17

Harish Jain 2-PA-8, Vigyan Nagar, Kota-324005.	बनाम Vs.	PCIT (Central), Jaipur.
स्थायीलेखा सं./जीआईआर सं./PAN/GIR No.: AEHPJ 4764 K		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

आयकरअपील सं./ITA No. 217 to 223/JP/2022
निर्धारणवर्ष/Assessment Years :2012-13 to 2018-19

Ram Kishan Verma 33-A, Talwandi, Kota-324005.	बनाम Vs.	PCIT (Central), Jaipur.
स्थायीलेखा सं./जीआईआर सं./PAN/GIR No.: ADDPK 1093 R		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

आयकरअपील सं./ITA No. 281 to 283/JP/2022
निर्धारणवर्ष/Assessment Years :2013-14 to 2015-16

Manoj Kumar Sharma 4-G-20, Talwandi, Kota-324005.	बनाम Vs.	PCIT (Central), Jaipur.
स्थायीलेखा सं./जीआईआर सं./PAN/GIR No.: AFOPS 0623 J		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओरसे/Assesseeby :ShriMahendraGargieya (Adv.)&
Shri Devang Gargiya (Adv.)
राजस्व की ओरसे/Revenue by: ShriJames Kurian (CIT)

सुनवाई की तारीख/Date of Hearing : 03/11/2022
उदघोषणा की तारीख/Date of Pronouncement: 25/11/2022

आदेश/ORDER

PER BENCH:

These bunch of appeals filed by the different assessee which are directed from the separate orders of the learned Principal of Commissioner of Income Tax (Central, Jaipur [hereinafter referred to as "PCIT"] passed u/s. 263 of the Act, which in turn arise from the separate orders passed by the Assistant Commissioner of Income Tax, Central Circle, Kota u/s 143(3)r.w.s. 153A of the Income Tax Act, 1961 (in short "Act") as detailed here in below:-

Sl.No.	Appeal No.	Name of assessee	A.Y.	CIT(A) Order dt.	Delay
1-3.	ITA No. 214 to 216/JP/2022	Shri Harish jain	2012-13, 2015-16 & 2016-17	25.03.2022	6
4-10.	ITA No. 217 to 223/JP/2022	Shri Ram Kishan Verma	2012-13 to 2018-19	23.03.2022	6
11-13.	ITA No. 281 to 283/JP/2022	Shri Manoj Kumar Sharma	2013-14 to 2015-16	25.03.2022	51

2. Since the issue involved in these assessee's appeal for all the years and assessee are almost identical therefore, all these appeals were heard

together with the agreement the parties and are being disposed off by this consolidated order.

3. At the outset, the ld. AR has submitted that the matter pertaining to Shri Ram Kishan Verma in ITA no. 217/JPR/2022may be taken as a lead case for discussions as the issues involved in the lead case are common and inextricably interlinked or in fact interwovenand the facts and circumstances of other cases are exactly identical in other assessment year and even grounds are also identical. The ld. DR did not raise any specific objection against taking that case as a lead case. Therefore, for the purpose of the present discussions, the case of ITA No. 217/JPR/2022 is taken as a lead case of each party. Based on the above arguments we have also seen that for all these appeals are similar on facts and arguments were similar and therefore, were heard together and are disposed by taking lead case facts, grounds and arguments from the folder in ITA No. 217/JPR/2022.

4. At the outset of hearing, the Bench observed that there isdelay of 6days in filing the appeal by the assessee for which the ld. AR of the

assessee filed an applications dated 12.07.2022for condonation of delay with following prayers.

> *"At the outset, there is no delay as such in filing the present appeal in as much as the order of CIT dated 23.03.2022 was in fact, received/served upon the assessee at his residence on 01.04.2022, accordingly, the last date of filing of the appeal would be 30.05.2022. It may however, be clarified that in the Appeal Memo Form 36 the date of receipt has wrongly been shown as 25.03.2022 in as much as though the appellant received the same on the mail dated 25.03.2022 however, thereafter the assessee remained under a bona fide belief that the limitation will start only from the date of the physical receipt of the impugned order, which in this case, was 01.04.2022"*

5. During the course of hearing, the ld. DR fairly not objected to the assessee's application for condonation of delay and prayed that court may decide the issue as deem fit and proper in the interest of justice.

6. We have heard the rival contentions and perused the materials available on record. The prayer as mentioned above by the assessee for condonation of delay of 6 days has merit and we concur with the submission of the assessee. Thus, the delay of 6days in filing the appeal by the assessee is condoned in ITA No. 217 to 223/JP/2022, 214 to 2016/JP/2022 &ITA No. 281 to 283/JP/2022.

7. Before moving towards the facts of the case we would like to mention that the assessee has assailed the appeal in ITA No. 217/JPR/2022 on the following grounds;

> *"1. The ld. Pr. CIT, Jaipur erred in law as well as on the facts of the case in invoking the provisions of S. 263 of the Act and therefore, the impugned order dated 23.03.2022 passed u/s 263 of the Act kindly be quashed.*
> *2. The ld. Pr. CIT, Jaipur erred in law as well as on the facts of the case in assuming jurisdiction u/s 263 of the Act by wrongly and incorrectly holding that the AO failed to initiate penalty proceedings u/s 271(1)(c) of the Act hence, the assessment order passed by the AO on dated 30.12.2019 u/s 143(3), was erroneous and prejudicial to the interest of revenue. The very assumption of jurisdiction is contrary to the provisions of law and facts on record. Hence, the proceedings so initiated u/s 263 of the Act and the impugned order dated 23.03.2022 deserves to be quashed.*
> *3. The appellant prays your honour indulgences to add, amend or alter of or any of the grounds of the appeal on or before the date of hearing."*

8. The fact as culled out from the records is that the assessee has filed the return of income on 19.07.2018 declaring total income at Rs. 71,22,29,910/- and agriculture income of Rs. 3,22,500/-. Search and seizure proceeding were carried out by the Investigation Wing of the department at the residential and business premises connected with "Resonance Group, Kota" on 07.08.2017, u/s 132 of the Income Tax Act, 1961. Thereafter, as part of Resonance Group, this case was taken up for block assessment and assessment order u/s 143(3) r.w.s. 153A dated

30.12.2019 was passed determining this income at Rs. 74,74,45,650/- and agriculture Income of Rs. 3,22,500/-. In the assessment order, penalty was initiated by noting that penalty u/s 271(1)(c) of the Income Tax Act is initiated for concealment of income by way of issue of notice u/s 274 r.w.s. 271(1)(c) of the Act issued accordingly.

9. On culmination of the assessment the ld. PCIT on examination of the assessment records observed that the Assessing Officer had failed to correctly initiate penalty. Hence, a show cause notice was issued to the assessee on 03.03.2022 through online portal (having DIN ITBA/REV/REV1/2021-22/1040310385(1). In the said show cause notice the ld. PCIT stated that the penalty in this case needed to have been initiated u/s. 271(1)(c), being a case relating to A. Y. 2012-13 when this was the law. The same has however, been erroneously initiated u/s. 271AAB(1A) of the Act which came into statute w.e.f. 15.12.2016. The ld. PCIT therefore, of the view that the said erroneous action of the Assessing Officer has caused prejudice to the Revenue.

10. Against this detailed show cause notice the assessee has filed a detailed reply vide his letter dated 05.03.2022 and after recording the reply of the assessee in his order the ld. PCIT gave his finding which is reiterated here in below:

> "6. I have examined the facts at hand and have studied the position of law. I have studied the reply of the taxpayer. The error caused by the Assessing Officer resulting in prejudice to Revenue has been detailed in the show cause notice issued to the taxpayer as reproduced of this order. An examination of order of the Assessing Officer makes it clear to me that he did not take a conscious decision relating to non-initiation / incorrect initiation of penalty, as detailed in the show cause notice. He had always wanted to initiate the penalty under the rightly applicable provisions of the Income Tax Act, 1961. It was an inadvertent error on AO's part whereby the penalty which had to be initiated, and which he had wanted to initiate, was not done. Clearly, this error has caused prejudice to Revenue. I do not agree with the proposition of the taxpayer that the Assessing Officer had consciously chosen not to initiate / levy the penalty in question.
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> This is a case of incorrect initiation of penalty.
>
> It has been brought forth that penalty which needed to have been initiated remained uninitiated in the assessment order. If penalty is not initiated at the time of assessment order, then the same cannot be initiated once the assessment order has been passed. Accordingly, the error relating to non-initiation/incorrect initiation of penalty by the Assessing Officer has caused prejudice to the interests of Revenue.
>
> Accordingly, in exercise of powers conferred upon me as per provisions of section 263 of the Income Tax Act 1961, I direct the assessing officer to initiate and levy penalty under the requisite sections as detailed in the show cause notice as reproduced earlier, after arriving at due satisfaction independently. Needless to say, that the assessing officer will initiate penalty based upon, his own satisfaction, and will give full opportunity to the taxpayer before proceeding to levy the penalty, which he chooses to levy (or not levy). As such, in my view, the taxpayer will not unduly suffer. Penalty will be levied or not levied, based upon the satisfaction of the assessing officer. For the proposition that the taxpayer will not suffer (as he will be given due opportunity at the time of levy or non-levy of penalty), I rely upon order of Hon'ble Supreme Court in the case of Rampyari Devi Saraogi versus

Commissioner of Income Tax, reported in 67 ITR 84 (Supreme Court) (3rd last paragraph thereof maybe seen for this proposition).
I wish to make it clear that I am not disturbing the assessment that has already been made. I am only passing an order for initiation / levy of penalty as detailed above, that too based upon independent satisfaction of the assessing officer, who will duly consider the replies of the taxpayer."

11. Aggrieved from the said order of the PCIT the assessee has marched this appeal on the grounds as mentioned here in above and the against the grounds raised the ld. AR of the assessee submitted a paper book containing following documents which reads as under:-

S. No.	Particulars	Page No.
1.	Copies of Assessment Order for A.Y. 12-13 to A.Y. 18-19 (Relevant extracts only, full copy of the assessment order is already as part of appeal set)	1-21
2.	Copies of show cause notices issued u/s 274/271AAB(1A) for A.Y. 12-13 to A.Y. 17-18.	22-27
3.	Copies of show cause notices issued u/s 274/271(1)(c) for A.Y. 12-13 to A.Y. 16-17.	28-32
4.	Copies of show cause notices issued u/s 274/271AAC(1) for A.Y. 18-19.	33
5.	Copies of show cause notices issued u/s 274/270A for A.Y. 17-18 to A.Y. 18-19.	34-35

The ld. AR of the assessee has relied upon the following judgments which reads as under:-

- CIT vs KeshrimalParasmal (1986) 27 Taxmann 447 (Raj.)
- Smt. Rekha Shekawat V. Pr. CIT (2022) 36 NYPTTJ 987 (JP)
- Suresh Kumar Dapkara v. PCIT (Central), Jaipur in ITA No. 141/JP/2022 / A.Y. 2018-19
- Addl. CIT v. J.K. D'Costa (1982) 133 ITR 7 Delhi
- CIT vs Rakesh Nain Trivedi (2016) 282 CTR 205 (P & H)
- CBDT Circular No. 09/DV/2016
- CIT v/s C.R.K. Swami (2002) 254 ITR 158 (Mad)
- Shri Dheeraj Singh Sisodiya v/s The PCIT (Central), Jaipur (ITA No. 132/JP/2022) dated 10.08.2022

12. The ld. AR of the assessee in addition has also filed a detailed written submission which is extracted here in below:

> Submissions:
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> 1. Legal Position on Sec.263 – Judicial Guideline: Before proceeding, we may submit as regards the judicial guideline, in the light of which, the facts of this case are to be appreciated.
>
> 1.1 The pre-requisites to the exercise of jurisdiction by the Commissioner u/s 263, is that the order of the Assessing Officer is established to be erroneous in so far as it is prejudicial to the interest of the Revenue. The Commissioner has to

be satisfied of twin conditions, namely (i) The order of the Assessing Officer sought to be revised is erroneous; and (ii) it is prejudicial to the interests of the Revenue. If any one of them is absent i.e. if the assessment order is not erroneous but it is prejudicial to the Revenue, Sec.263 cannot be invoked. This provision cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer; it is only when an order is erroneous as also prejudicial to revenue's interest, that the provision will be attracted. An incorrect assumption of the fact or an incorrect application of law will satisfy the requirement of the order being erroneous. The phrase *'prejudicial to the interest of the revenue'* has to be read in conjunction with an erroneous order passed by the AO. Every loss of Revenue as a consequence of the order of the AO cannot be treated as prejudicial to the interest of the Revenue. For example, if the AO has adopted one of the two or more courses permissible in law andit has resulted in loss of revenue, or where two views are possible and AO has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interest of the Revenue, unless the view taken by the AO is totally unsustainable in law. Kindly refer Malabar Industrial Co. Ltd. v/s CIT (2000) 243 ITR 83 (SC).

1.2 Also kindly refer CIT v/s Max India Ltd. (2007) 295 ITR 282 (SC) wherein it is held that
"The phrase "prejudicial to the interests of the Revenue" in section 263 of the Income Tax Act, 1961, has to be read in conjunction with the expression "erroneous" order passed by the Assessing Officer. Every loss of revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interests of the Revenue. For example, when the Assessing Officer adopts one of two courses permissible in law and it has resulted in loss of revenue, or where two views are possible and the Assessing Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the Revenue, unless the view taken by the Assessing Officer is unsustainable in law."

Ratio of these cases applies on the facts of the present case in principle.

3. Beyond the Scope of Revisional Power u/s 263 – To give directions to initiate penalty:

3.1 It is submitted that no doubt,the Pr. CIT / CIT"*may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the Assessing Officer is erroneous in so far as it is prejudicial to the interests of the revenue…..".* Thus, from a bare perusal of provision it is evident that the law contemplates existence of any proceeding and also essentially order passed therein which, if examined by the Pr. CIT / CIT and is found to be erroneous and prejudicial then only he can invoke S.263. In other

words, the existence of the proceedings and passing of the order therein are the condition precedent, in absence of which, one cannot think of invoking S.263. If the AO has not initiated any proceeding during the course of assessment proceedings and till the conclusion of the assessment order, no proceedings can now be contemplated / conceived by the Pr. CIT for the purposes of S.263 which, otherwise are non-existent. Thus, for the purposes of S.263, the law never contemplated revision and examination of non-existent proceedings / non-existent order.

3.2Whereas the revisional jurisdiction of the CIT starts only after the conclusion of assessment proceedings, resulting into assessment order, therefore, as a sequel thereto, it is not open to CIT to exercise the revisional powers to create a non-existent proceeding under S. 263 by holding the assessment proceeding as erroneous in so far as prejudicial to the interest of revenue. Since Sec. 263 regulates the revisional powers of the CIT hence, the strict fulfillment of the requirements of a jurisdictional provision cannot be compromised.

3.3 Pertinently, the CBDT in its circular No. 09/DV/2016(Departmental view) dated 26.04.2016 (DPB 26-27) is also of this view that a mere mention in the assessment order is of no value and no initiation even following a Kerala HC decisionGhrahLaxmiV Addl. CIT inthe context of S.271D and 271E. the relevant extract from the circular are as under:

> *"The statement in the assessment order that the proceedings under Section 271D and E are initiated is inconsequential. On the other hand, if the assessment order is taken as the initiation of penalty proceedings, such initiation is by an authority who is incompetent and the proceedings thereafter would be proceedings without jurisdiction. If that be so, the initiation of the penalty proceedings isonly with the issuance of the notice issued by the Joint Commissioner to the assessment to which he has filed his reply."*

4.1 There must be some order: In this case, the only proceeding and consequent order, is the assessment order and not the penalty proceedings because the same were not existing hence no proceedings u/s 263 could be invoked.There must exist some order, which is sought to be revised by the CIT.If there is no order, question of revising the order does not arise. He cannot pass an order u/s 263 to pass an order, where there is none. If the AO has not initiated penalty proceedings (as agreed by the ld. CIT also) there is no order which could be revised. In the instant case, admittedly there is no order in so far as penalty proceedings are concerned. If there is no order, there is no question of its being erroneous or pre-judicial.

4.2 Another very important indication can be taken from S.263 (2) which states as:

(2) No order shall be made under sub-section (1) after the expiry of two years from the end of the financial year in which the order sought to be revised was passed.
Thus, S.263 itself pre-supposes passing of an order which must be in existence to be revised as a condition precedent, which admittedly does not exist in the present case. The ld. CIT however considers the assessment order passed on 30.12.2019 as the subjected order to be revised which is a misconception of law.

4.3 It may be clarified whether the AO has initiated penalty proceedings at all or it is a case of wrong initiation of penalty, in both the situations the CIT has got no jurisdiction at all because no order has been passed by the AO (till the examination by the CIT u/s 263) in the proceedings under examination. The CIT cannot find fault in the mere proceedings alone but passing of an order in those proceedings, is a condition precedent. Therefore, non-initiation of/wrong initiation of penalty proceedings cannot be much emphasized or stressed upon because there is no order at all in those proceedings hence there cannot be any question of finding any error/prejudice therein u/s 263.On exactly similar controversy this Hon'ble ITAT has quashed order u/s 263 in the cases of Suresh Kumar and Dheeraj Singh Sisodiya.

4.4Rule of Consistency to be maintained:
The Rule of Consistency mandatorily requires that in absence of any material change in the facts and circumstances, the earlier decision rendered by the ITAT in the case of the same assessee must be followed. Kindly refer para-38 of Godrej & Boyce Manufacturing Co. Ltd. v/s DCIT &Anr. (2017) (2017) 394 ITR 449/295 CTR 121(SC) wherein held that:

> *"----While it is true that the principle of res judicata would not apply to assessment proceedings under the Act, the need for consistency and certainty and existence of strong and compelling reasons for a departure from a settled position has to be spelt out which conspicuously is absent in the present case. In this regard we may remind ourselves of what has been observed by this Court in RadhasoamiSatsang vs. Commissioner of Income-Tax[6].*
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> *"We are aware of the fact that strictly speaking res judicata does not apply to income tax proceedings. Again, each assessment year being a unit, what is decided in one year may not apply in the following year but where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year."*

The earlier decision in the case of CIT V K.J. Business Centre (2009) 24 DTR 99 (Del) and RadhswamiSatsang vs CIT (1992) 193 ITR 321 (SC) at Pg-329 has been relied upon.

5. Assessment &Penalty proceedings are separate and distinct:

5.1Moreover, the law is well settled that penalty proceedings are separate and distinct from the assessment proceedings and there is no identity between the two. For a penalty AO must bring more material to establish positive concealment. Kindly refer Anwar Ali 76 ITR 696 (SC),Durga Kamal Rice Mills vs. CIT 265 ITR 25 (Cal.), CIT vs. Ishtiaq Hussain 232 ITR 673/148 CTR 367 (APP), T. Ashok Pai (2007) 292 ITR 11 (SC) and CIT &Anr. v. Manjunatha Cotton and Ginning Factory 359 ITR 565 (Karn).

5.2 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 S.263 is concerned, it refers to that particular proceeding which is being considered by the CIT. 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.

6. Recording of satisfaction by the AO (not by the CIT)-condition precedent: A bare perusal of sec. 271(1)(c)/271AAB (1A) requires an AO [or CIT(A) but not CIT(Admin] to derive 'satisfaction' during the course of the proceedings pending before him.The language of s. 263 is not capable of and does not empower the CIT to set aside an assessment order to ask AO to have satisfaction, post assessment to initiate a distinct penalty proceeding.In this case the AO initiated penalty proceedings after his own satisfaction. The CIT cannot impose his own satisfaction upon satisfaction recorded by the AO. Non-initiation/wrong initiation of penalty proceedings, both, while framing assessment is not a legally valid ground for invoking revisionalpowers.The CIT narrated wrong facts. The AO initiated penalty proceedings u/s 271(1)(a) also.

7. Penalty proceedings already stands barred by limitation: Another indicator provided in S. 275 which has put a bar of limitation for imposing penalty and u/s 275(1)(b), the prescribed period is expiry of two years from the end of the financial year in which the proceedings, in the course of which action for imposition of penalty has been initiated, are completed. Thus, as and when either the AO/CIT(A), in the course of any proceedings, records satisfaction and initiates penalty proceedings, from the end of the financial year in which such initiation takes place, penalty proceedings are required to be completed within a period of two years. On the expiry of the limitation period, a right is vested in the assessee which, cannot be taken away merely by exercising of revision powers u/s 263 unless there is a clear indication showing a different legislative intent on a plain reading of provision of S.270(1)(c), 271AAB r/w 263. Therefore, the AO cannot be compelled to act beyond the prescribed period of limitation by extending such limitation on exercise of revisional powers.

8. Assessment order already merged: There is one more reason why the CIT should not be permitted to invoke revisional powers for initiation of penalty proceedings. Sec. 271(1) specifically empowers the AO or the appellate authority to record satisfaction. It is well-settled that once an appeal has been preferred against an order of assessment the entire assessment is open before the appellate authority. The appellate authority is entitled to do all that the AO could have done. The powers of the appellate authority are co-extensive and co-terminus with the powers of the AO. It is equally well-settled that the CIT cannot exercise revisional jurisdiction qua proceedings before an appellate authority. The order of assessment does not have any independent existence and stands merged with the order of the appellate authority. Hence, to read s. 263 as being applicable only in case of an AO for the purposes of initiation and levy of penalty and not being applicable to the appellate authority, cannot be the legislative intent. To the contrary, the inherent indication under s. 271(1) makes it clear that the Pr. CIT / CIT does not have any powers to direct either of the authorities, the AO or the appellate authority, to initiate and levy penalty.
The section requires the AO or the appellate authority to be satisfied in the course of 'any proceedings'. This means, any proceedings before either of the specified authority. The Pr. CIT / CIT cannot create proceedings. If he is not permitted to direct the appellate authority (and this is an accepted position) he cannot be permitted to substitute jurisdiction/powers of only the AO by his satisfaction by creating proceedings where none exist—assessment having already been completed.
9. Covered issue: The law is well settled by the various decisions of the Hon'ble Supreme Court, High Courts and Tribunals that the CIT acting u/s 263, cannot direct the AO to initiate penalty proceedings us 271(1)(c).

9.1.1 The issue involved is no longer Res Integra in as much as identical issue is directly covered by the binding decision in case of CIT vs KeshrimalParasmal [1986] 27 Taxmann 447 (Raj) (DPB 1-3), holding that:

> *"In J.K. D'Costa's case (supra), it was held that the Commissioner was not entitled to set aside the assessment order passed by the ITO on the ground that there was no mention of initiation of penalty proceedings in the order and that he could not direct the ITO to make fresh assessment to initiate penalty proceedings. The Supreme Court has dismissed the special leave petition in the said case in Special Leave Petition (Civil) Nos. 11391 and 11392 of 1981, dated 2-3-1984 [1984] 147 ITR (St.) 1. As the position was concluded and settled by the Supreme Court, the question which was sought to be referred could not be said to be a substantial question of law arising out of the Tribunal's order. It was only a question of academic nature."*

9.1.2 This Hon'ble bench has taken the same view in the context of penalty proceedings not initiated by the AO u/s 271AAC in the order passed u/s 263 in the case of Smt.RekhaShekawat V Pr. CIT (2022) 36 NYPTTJ 987 (Jp) (para 3DPB 4-9), holding as under:

"In ground No. 3, the assessee has challenged the assumption of jurisdiction under s. 263 for not initiating penalty proceedings under s. 271AAC of the Act. The learned CIT held that the additional income was also subject to penalty under s. 271AAC of the Act and accordingly set aside the subject assessment order.
3.2 After hearing both the parties and perusing the materials available on record as well as judicial pronouncements cited by both the parties, we at the outset have no hesitation to hold that the issue involved is no more res integra in as much as the Hon'ble Rajasthan High Court in the case of CIT vs. KeshrimalParasmal (1985) 48 CTR (Raj) 61 : (1986) 27 Taxman 447 (Raj), held as under :
X XXX
There are several other decisions cited by the learned Authorised Representative of the assessee for which no contrary decision was brought to our notice. Hence, we are of the considered view that the learned Principal CIT acted beyond jurisdiction in holding that the additional income was subject to penalty under s. 271AAC of the IT Act. Thus, ground No. 3 of the assessee is allowed.
4. In the result, the appeal of the assessee is allowed"

9.1.3 The recent decision of this Hon'ble ITAT in case ofSuresh Kumar Dapkara v. PCIT (Central), Jaipur in ITA No. 141/JP/20-22/A.Y. 2018-19 vide order dated 02.06.2022 (Para 6 DPB 10-17)is also a direct decision on the facts of given case.

9.1.4 Similarly, in one more very recent decision ofDheerajSinghSisodiya v. PCIT (Central),Jaipur in ITA no. 132/JP/2022 dated 10.08.22(Para 7 DPB II 39-50), and the facts of both the cases are almost similar to the facts in present case.

7. We have heard the rival contentions, perused the material available on record, assessment order and impugned order and the case laws cited before us. Admittedly, the AO has initiated penalty proceedings u/s 271 AAB(1A) with the observations that the amount of investment made by the assessee for purchase of motorcycle in cash i.e. Rs.1,25,000/- is added to his total income treated as unexplained investment u/s 69 and tax is charged as per provisions of section 115BBE of the I.T. Act. The assessee has offered Rs.1,25,000/- for taxation during search proceedings in statement u/s 132(4), however, the assessee has not included Rs.1,25,000/- in the return filed u/s 153A, therefore, penalty proceedings

u/s 271AAB(1A) is initiated accordingly. The Ld. AR argued that the AO has taken conscious decision to initiate the penalty proceedings u/s 271AAB(1A) of the Act. It may be noted that both u/s 271(1)(c) and u/s 271AAB it is the AO who is to satisfy himself whether on the additions made, penalty proceedings is required to be initiated or not and also the section under which it is to be initiated. The mandate under section 263 of the Act do not give any power to CIT to impose his satisfaction over the satisfaction of AO as to whether the penalty proceedings are to initiated or not and if initiated under which section/clause. In our view, on examination of assessment record, the PCIT cannot direct initiation of penalty proceedings because penalty proceedings are not part of assessment proceedings. Thus, the PCIT's revisionary decision relating to non-initiation/incorrect initiation of penalty which without holding that assessment order passed by the AO as erroneous and prejudicial to the interest of revenue is vague and bad in law.

Notifying both the cases, penalties were initiated by AO under wrong/incorrect provisions of law (as per PCIT), and as against the correct provisions suggested by PCIT.

9.1.5Earlier also, a similar view was taken in the case of Agencies Rajasthan V AO ITA No. 196/JP/2020 AY 2015-16 vide order dated 11.09.2020

9.2The case of Addl. CIT v. J.K. D'Costa [1982] 133 ITR 7 (Delhi)(DPB 18-21) has been followed in ACIT v. Achal Kumar Jain (1983) 142 ITR 606 (Delhi)and CIT v. Nihal Chand Rekyan [2000] 242 ITR 45 (Delhi) and in Addl. CIT v. Sudarshan Talkies (1993) 200 ITR 153 (Delhi); also by Hon'ble Madras High Court in CIT v. C. R. K. Swami (2002) 254 ITR 158(Cal) (DPB II 28-29); Sarda Prasad Singh v. CIT (1998) 173 ITR 510 (Gauhati),wherein it has been consistentlyheld that if the CIT finds, while examining the records of an assessment order under S. 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 CIT cannot pass an order u/s 263 pertaining to penalty.

9.3 The Hon'ble Supreme Court has dismissed Special Leave Petition against the Delhi High Court decision in Addl.CIT v. J. K. D'Costa [(1984) 147 ITR (St) 1) dated 02.03.1984].

9.4In the case of CIT v. Dr. Suresh G.Shah (289) ITR 110 (Guj) following its earlier judgement in the case of CIT v. ParmanandM.Patel (2005) 198 CTR (Guj) 641/278 ITR 3 (Guj), Hon'ble Gujarat High Court has held that while exercising powers under S. 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.

ParmanadM.Patel(supra), the High Court has held that the CIT is not empowered to record satisfaction by invoking s.271(1)(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.

9.5 CIT vs. Rakesh Nain Trivedi (2016) 282 CTR 205 (P&H) (DPB 22-25)
"Revision—Erroneous and prejudicial order—Failure of AO to initiate penalty proceedings—Where the CIT finds that the AO had not initiated penalty proceedings under s. 271(1)(c) in the assessment order, he cannot direct the AO to initiate penalty proceedings under s. 271(1)(c) in exercise of revisional power under s. 263—CIT vs. Subhash Kumar Jain (2011) 335 ITR 364 (P&H) followed; CIT vs. Surendra Prasad Agrawal (2005) 194 CTR (All) 161: (2005) 275 ITR 113 (All) dissented from."

9.6 Easy Transcription & Software (P) Ltd. (2017) 185 TTJ 504 (Ahd)
"Revision—Jurisdiction of CIT—Jurisdiction to direct AO to initiate penalty proceedings under s. 271(1)(c)—It is not open to CIT to exercise the revisional powers to create a non-existent proceeding under s. 263by holding the assessment as erroneous in so far as prejudicial to the interest of Revenue—Sec. 263 is a substantive provision and howsoever clear the legislative intent may be, the requirements of a substantive provision cannot be bypassed as the legislative casus omissius cannot be supplied by interpretational fiat—Arriving at 'satisfaction' is the foundation of initiation of proceedings under s. 271(1)(c) which was to be recorded by AO in the course of assessment proceedings—Consequently, once the assessment is concluded, the CIT becomes functus officio as regards initiation of penalty under s. 271(1)(c)—Non-initiation of penalty proceedings under s. 271(1)(c) while framing assessment is not a good ground for invoking revisional powers under s. 263—Sec. 271(1)(c) read in conjunction with s. 263, gives an unmistakable impression that while in the wake of amendment under s. 271(1)(c) w.e.f 1st June, 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—CIT is not competent to direct the AO to redo the assessment with a view to initiate and levy penalty under s. 271(1)(c) in respect of erroneous claim of deduction under s. 10B."

9.7Also refer Shri NandkumarBhalchandraBhondve in ITA No.943/PN/2014 dated 17.08.2016.

10. In any case if the contention of the ld. CIT is accepted that the AO always wanted to initiate under a correct provision of law but he committed an inadvertent error. Even assuming so then it might be legally covered by S.154

rectification of mistake being a mistake than an error and invoking of S.263 was not permissible.The remedial provisions u/s 147,154,263 operate into different fields and cannot be used interchangeably. CIT V Amitabh Bachchan(2016) 286 CTR 113 (SC)wherein it was held as under:

> *"9. Under the Act different shades of power have been conferred on different authorities to deal with orders ofassessment passed by the primary authority. While s. 147 confers power on the Assessing Authority itself to proceed against income escaping assessment, s. 154 of the Act empowers such authority to correct a mistake apparent on the face of the record. The power of appeal and revision is contained in Chapter XX of the Act which includes s. 263 that confer suomotupower of revision in the learned CIT. The different shades of power conferred on different authorities under the Act has to be exercised within the areas specifically delineated by the Act and the exercise of power under one provision cannot trench upon the powers available under another provision of the Act. In this regard, it must be specifically noticed that against an order of assessment, so far as the Revenue is concerned, the power conferred under the Act is to reopen the concluded assessment under s. 147 and/or to revise the assessment order under s. 263 of the Act. The scope of the power/jurisdiction under the different provisions of the Act would naturally be different. The power and jurisdiction of the Revenue to deal with a concluded assessment, therefore, must be understood in the context of the provisions of the relevant sections noticed above. While doing so it must also be borne in mind that the legislature had not vested in the Revenue any specific power to question an order of assessment by means of an appeal."*

11. Decisions cited by the PCIT and DR-Not applicable: The ld. PCIT, Jaipur cited some decisions, however, those were rendered in altogether different legal and factual context and hence were completely distinguishable.With reference the decisions cited by the ld. DR on 22.09.2022, it is submitted that the ld. DR has taken support of some decisions being dealt with hereunder, however, needless to say that once a decision of Hon'ble Jurisdictional High Court (RHC) is available in KeshrimalParasmal (supra), the subordinate authorities including the ITAT has to follow Hon`ble Rajasthan High Court only as per the law of binding precedents. Needless to say that Article 141of the Constitution of India mandates that all the subordinate authorities acting under the jurisdictional High Court are abide by its decisions.There apart, the said RHC decision has been considered in number of later decisions of various Hon'ble High Courts and decision cited by ld. DR has been dissented with.

11.1Otherwise also Surendra Prasad Agarwal (supra) was given long back in 2005 and similarly JawaharBhattacharjee is also a comparatively old decision as thereafter, several High Courts & ITAT have rendered decisions till the year 2022 in favour of assessee.

11.2Further the case of JawaharBhattacharjeehas nothing to do with the controversy involved in as much as that was a case relating to the scope of power of CIT u/s 263 in the context of S.54F. Hence not at all applicable.
11.3The case of CIT V Surendra Prasad Agarwal (2005) 142 Taxman 653 (All) has been considered and dissented with in para 7 of Rakesh Nain Trivedi (supra) dated 29.10.2015 (DPB 22-25). Even the majority of the High Courts being the High Courts of Delhi, Gujarat, Guwahati, M.P., Madras and Rajasthan have taken similar view with or without following Apex Court decision in CIT vs. J.K. D'Costa (1984) 147 ITR 1 (St.)whereinSpecial Leave Petition was dismissed affirming the Delhi High Court decision in Addl. CIT vs. J.K. D'Costa(1982) 133 ITR 7 (Del). Kindly refer Para 6-7 of Rakesh Nain (supra).
11.4 Further reliance on the case of Mallelil Industries (P.) Ltd (2022) 139 taxmann.com 7 (Kerala) is also wrongly placed in as much as that was a case where the assessment order u/s 143(3) was set aside by the ld. CIT u/s 263 and pursuant thereto re-assessment was framed u/s 263 r/w 143(3) wherein the AO imposed penalty and is under challenge and order u/s 263 is not under challenge. Para 11 & 12 strongly support the assessee. Moreover it is a Single Bench decision. In that context the decisions in the cases of KeshrimalParasmal (supra), Rakesh Nain Trivedi (supra) were found distinguishable which are not the facts in the present case. As submitted earlier, this Hon'ble bench in Suresh and Dheeraj Singh has considered the situation of wrong initiation also.Hence the said decision is not applicable.
11.5 Debatable Issue
In any case, alternatively, the issue involved may be highly debatable and therefore the view favorable to the assessee must be adopted as the law is well settled. In the case of CIT V Vegetable Product(1973) 488 ITR 192 (SC).
12. Lastly, we strongly rely our written submissions filed before the ld. PCIT.
Non-initiation of penalty proceedings itself shows that the AO was of the view that it is not a fit case for initiation of penalty and hence he did not initiate the penalty. Thus, non-initiation of penalty proceedings ipso facto would not lead to a conclusion that the order of the AO is erroneous in any manner. Hence, this ground for revision deserves to be dismissed.
In view of the above legal and factual position, the impugned order u/s 263 is completely beyond the scope of Sec. 263 and therefore, deserves to be quashed."

13. The ld. AR in addition to the paper book and written submission filed, also vehemently argued that the by invoking the provision of section 263 of the Act, the ld. PCIT has exceeded the jurisdiction. He

read the bear provision of section 263 of the Act, the same is extracted here in below for the sake of ease

> **Revision of orders prejudicial to revenue.**
> **263.** (1) The [88][Principal Chief Commissioner or Chief Commissioner or Principal Commissioner] or Commissioner may call for and **examine the record of any proceeding under this** Act, and **if he considers that any order passed therein by the Assessing Officer** [89]**[*or the Transfer Pricing Officer, as the case may be,*] 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 inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, [90]**[***including,—***
> *(i) an order enhancing or modifying the assessment or cancelling the assessment and directing a fresh assessment; or*
> *(ii) an order modifying the order under section 92CA; or*
> *(iii) an order cancelling the order under section 92CA and directing a fresh order under the said section*].

14. As it is evident from the order of the PCIT that he himself admitted that he has not disturbed the assessment that has been made and only passing an order for initiation of levy of penalty by the assessing officer. He further submitted that the initiation, non-initiation or incorrect initiation of penalty cannot be subject matter of provision of section 263 of the Act, as the said proceeding are separate proceedings whereas in the case instated of examining the records of the assessment ld. PCIT is trying to direct the AO to levy the penalty on a particular section. To drive home this contention the ld. AR of the assessee relied upon the decision of the

jurisdictional High Court in the case of CIT Vs. Keshrimal Parasmal, the relevant extract is reproduced here in below :

> 8. Thus, the position boils down to this that the view taken in *J.K. D'Costa's* case (*supra*) has been confirmed by the Supreme Court and according to *J.K. D'Costa's* case (*supra*) the Commissioner is not entitled to set aside the assessment order passed by the ITO on the ground that there was no mention of initiation of penalty proceedings in the assessment order and the Commissioner in the proceedings under section 263 cannot direct the ITO to make fresh assessment to initiate penalty proceedings. As the position stands concluded and settled by the Supreme Court, the question which is now sought to be referred by the Commissioner cannot be said to be a substantial question of law arising out of the Tribunal's order. It is only a question of academic nature.

15. The ld. AR of the assessee further submitted that even though there is a mention of the initiation of the penalty in the order u/s. 271(1)(c), but finally the notice is issued by the assessing officer as per his wisdom and for that the ld. PCIT cannot direct the AO. To drive home to this contention the ld. AR of the assessee relied upon the circular No. F.No.279/Misc./M-116/2012-ITJ dated 26.04.2016 where in the board has categorically accepted that the fact that the limitation commences at the level of the authority competent to impose the penalty who have issued the notice. Thus, this power rest with the assessing officer and the PCIT has no jurisdiction to direct the ld. AO in this matter. Further, the ld. AR of the assessee submitted that this issue in no longer res integra and to drive his contention he relied upon the finding of the Punjab and Haryana high Court

in the case of CIT vs. Rakesh Nain Trivedi, the relied upon finding is reproduced here in below:

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 *Subhash Kumar Jain* case (*supra*) agreeing with the view of High Courts of Delhi in Additional *J.K.D.'s Costa* case (*supra*), *CIT* v. *Sudershan Talkies* [1993] 201 ITR 289 (Delhi) and *CIT* v. *Nihal Chand Rekyan* [2000] 242 ITR 45/[2002] 123 Taxman 353 (Delhi), Rajasthan in *CIT* v. *KeshrimalParasmal* [1986] 157 ITR 484/27 Taxman 447 (Raj.), Calcutta in *CIT* v. *Linotype & Machinery Ltd.* [1991] 192 ITR 337 (Cal.) and Gauhati in *Surendra Prasad Singh* v. *CIT* [1988] 173 ITR 510/40 Taxman 346 (Gau.) whereas dissenting with the diametrically opposite approach of Madhya Pradesh High Court in *Addl. CIT* v. *Indian Pharmaceuticals* [1980] 123 ITR 874 (MP.), *Addl. CIT* v. *Kantilal Jain* [1980] 125 ITR 373/[1981] 5 Taxman 92 (MP.) and *Addl. CWT* v. *NathoolalBalaram* [1980] 125 ITR 596/3 Taxman 170 (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 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."
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. KeshrimalParasmal [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'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. NathoolalBalaram (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.

16. Based on the above contentions the ld. AR of the assessee submitted that the order passed u/s. 263 by the PCIT is without jurisdiction and required to be quashed as legislature has not empowered the ld. PCIT to direct the AO to initiate the penalty. The AO always wanted to initiate under a correct provision of law but he committed an inadvertent error, even assuming so then it might be legally covered by section 154 rectification of mistake being a mistake than an error and invoking of provision of section 263 not permitted. There are other remedial provision u/s. 147, 153, 263 operate into different fields and cannot be used interchangeably. For this contention he relied upon the decision in the case of CIT Vs. Amitabh Bachchan where in it was held as under:

"9. Under the Act different shades of power have been conferred on different authorities to deal with orders of assessment passed by the primary authority. While s. 147 confers power on the Assessing Authority itself to proceed against income escaping assessment, s. 154 of the Act empowers such authority to

correct a mistake apparent on the face of the record. The power of appeal and revision is contained in Chapter XX of the Act which includes s. 263 that confer suomotupower of revision in the learned CIT. The different shades of power conferred on different authorities under the Act has to be exercised within the areas specifically delineated by the Act and the exercise of power under one provision cannot trench upon the powers available under another provision of the Act. In this regard, it must be specifically noticed that against an order of assessment, so far as the Revenue is concerned, the power conferred under the Act is to reopen the concluded assessment under s. 147 and/or to revise the assessment order under s. 263 of the Act. The scope of the power/jurisdiction under the different provisions of the Act would naturally be different. The power and jurisdiction of the Revenue to deal with a concluded assessment, therefore, must be understood in the context of the provisions of the relevant sections noticed above. While doing so it must also be borne in mind that the legislature had not vested in the Revenue any specific power to question an order of assessment by means of an appeal."

17. Lastly, the ld. AR relying on the judgement of this bench on the similar issue in the case of Shri Dheeraj Singh Sisodiya Vs. PCIT in ITA no. 132/JP/2022 similar view as advanced here in above is taken and following judicial consistency the view taken is required to be followed in this case too.

18. Au contraire, the ld. DR supported the order of the PCIT and submitted the factual report of the ld.AO in this matter vide his letter dated 02.11.2022, the same is extracted here in below:-

"A.Y. 2012-13 to AY 2018-19: In the above case, the assessment proceedings have been completed by this office on 30.12.2019 for the A.Y. 2012-13 to 2018-19 & assessee has duly responded all the notices issued during the course of assessment proceedings well in time. Notices under

section 274 read with section 271AAB1A) of the IT Act, 1961 have also been issued to the assessee on 30.12.2019 for the AY 2012-13 to 2018-19 fixing the case for hearing on 29/01/2020 & sent on his registered email (harish resonance.ac.in) through ITBA portal. The notices under section 274 read with section 271AAB(IA) of the IT Act, 1961 for the AY 2012-13. 2013-14, 2016-17, 2017-18 & 2018-19 have duly been delivered through ITBA portal on his registered mail however the notices under section 274 read with section 271AAB(IA) of the IT Act, 1961 for the AY 2014-15 and AY 2015-16 have not been delivered on the registered mail id of the assessee. Further, the assessment order, penalty notice & demand notices were also served manually to the authorized representative of the assessee on 31.12.2019 (copy enclosed) in these A.Ysie AY A.Y. 2012-13 to 2018-19.

In response to the notices under section 274 read with section 271AAB(IA) of the IT Act. 1961 dated 30/12/2019 for the AY 2012-13 to 2017-18 the assessee has filed his reply electronically on ITBA Portal on 24/01/2020 in these assessment years which is enclosed herewith for your kind ready reference however the assessee has not filed reply in response to said notice for the A.Y. 2018-18.

Further, the notices u/s under section 274 read with section 271AAB(IA) of the IT Act, 1961 for the AY 2012-13 to 2018-19 have also been issued to the assessee on 10/11/2020. In response to the said notices, the assessee has also filed the reply electronically on 23/11/2020 in for the AY 2012-13 to 2017-18 and attached the copy of previous reply as furnished in response to notice dated 30/12/2019 (copy enclosed) however the assessee has not filed reply in response to the said notice for the AY 2018-19.

Thus, it can be seen from above facts that notices u/s under section 274 read with section 271AABIA) of the IT Act, 1961 for the AY 2012-13 to 2018-19 have duly been served to the assessee and the assessee has also responded in compliance to the notices u/s 271AAB(IA) of the Act for the AY 2012-13 to 2017-18. The case history / noting of the case extracted from ITBA portal in the AY 2012-13 to 2017-18 is enclosed herewith for your kind ready reference. However despite of delivery of the said notice u/s 271AAB(IA) of the IT Act for the AY 2018- 19. the assessee has not filed reply in response to the said notice.

The status of penalty proceedings u/s 271AAB(1A) of the IT Act, 1961 are still pending in the system in the AY 2012-13 to AY 2018-19.Further, in

response to order u/s 263 of the IT Act, passed by the Worthy PCIT (Central), Rajasthan. Jaipur, the fresh notices u/s 271(1)(c) of the IT Act for the AY 2012-13 to 2016-17 and notice u/s 270A of the Act for the AY 2017-18 & notice u/s 271AAB(IA) of the Act for the AY 2018-19 were issued to the assessee 29.06.2022 fixing the case for hearing on 14.07.2022 & served upon his registered email (harish@resonance.ac.in) through ITBA portal, which are also pending at this level & limitation of passing penalty order shall be expired on 31.12.2022 in these A.Ys."

19. The ld. DR has also relied on the following judicial decision to drive home to his contentions on the issue:-

- (1968) 67 ITR 84 118 (Hon'ble Supreme Court) Hon'ble Supreme Court of India, Rampyari Devi Saraogi v/s Commissioner of Income Tax, May 1, 1967.
- Hon'ble High Court of Madhya Pradesh- Indore bench, Addl. CIT v/s Indian Pharmaceuticals, October 3, 1978.
- (2009) 109 taxman 99 (Hon'ble Supreme Court) (2000) 234 ITR 83 (Hon'ble Supreme Court) 159 CTR 1, 10.02.2000, Hon'ble Supreme Court of India, Malabar Industrial Co. Ltd. v/s Commissioner of Income Tax.
- (2005) 142 taxman 653 (Allahabad) Hon'ble High Court of Allahabad Commissioner of Income Tax v/s Surendra Prasad Agrawal, September 1, 2004.
- (2012) 24 taxmann.com 215 (Gauhati) Hon'ble High Court of Guahati Commissioner of Income Tax, vs Jawahar Bhattacharjee, February 7, 2012.

20. The ld. DR in addition also relied upon the provision of section 292BB, the same is reiterated here in below:

Notice deemed to be valid in certain circumstances.

> **292BB.** Where an assessee has appeared in any proceeding or co-operated in any inquiry relating to an assessment or reassessment, it shall be deemed that any notice under any provision of this Act, which is required to be served upon him, has been duly served upon him in time in accordance with the provisions of this Act and such assessee shall be precluded from taking any objection in any proceeding or inquiry under this Act that the notice was—
> (*a*) not served upon him; or
> (*b*) not served upon him in time; or
> (*c*) served upon him in an improper manner:
>
> **Provided** that nothing contained in this section shall apply where the assessee has raised such objection before the completion of such assessment or reassessment.

21. Based on the above provision of the act he submitted the law has empowered the authority to correct the mistake in issuance of notice. Thus, the direction given by the PCIT is correct and to drive home to this contention the ld. DR has relied upon the finding of the Apex Court in the case of Rampyari Devi Saraogi vs. CIT [67 ITR 84], the same is reproduced here in below:

> It is not necessary to further detail the reasons given by the Commissioner because on the face of the record the orders were prejudicial to the interest of the revenue, and even if the facts which the Commissioner introduced regarding the enquiries made by him had been indicated to the assessee, the result would have been the same. The assessee, in our view, has not in any way suffered from the failure of the Commissioner to indicate the results of the enquiries, mentioned above. Moreover, the assessee will have full opportunity of showing to the Income-tax Officer whether he had jurisdiction or not and whether the income assessed in the assessment orders which were originally passed was correct or not.
>
> It may be further mentioned that the assessee did not appeal to the Appellate Tribunal against the order passed under section 33B. The reason given by the learned counsel for not filing an appeal was that he could not raise before the Appellate Tribunal the constitutional question which was raised before the High

> Court and he could not pursue two remedies concurrently. But, in our view, there was nothing to prevent the assessee from filing the appeal and asking the Appellate Tribunal to go only into the question of the lack of opportunity given to the assessee.
>
> In the result the appeal fails and is dismissed with costs.

22. In the rejoinder the ld. AR of the assessee submitted the decision relied upon by the PCIT and ld. DR are rendered in the different legal and factual context and hence were completely distinguishable, whereas he has supported the contention with the direct decision of the jurisdictional high court on the same set of facts.

23. We have considered the rival contention and perused the orders of the lower authorities, material available on record, arguments advanced by both the parties and also gone through the judicial decision relied upon by both the parties to drive home to their respective contentions. The limited issue before us that the ld. AO has mentioned in the assessment order that "Penalty u/s. 271(1)(c) of the Income Tax Act is initiated for concealment of income by way of issue of notice u/s. 274 r.w.s. 271(1)(c) of the Act. Penalty notice u/s. 274 r.w.s. 271(1)(c) of the Act issued accordingly. I am satisfied that the assessee has not included the income offered during the search in statement u/s. 132(4) hence penalty proceeding u/s. 271AAB(1A)

is initiated. Penalty notice u/s. 274 r.w.s. 271AAB(1A) of the Act issued accordingly." Against this finding of the ld. AO the PCIT taken a view that the assessing officer had failed to correctly initiate penalty. Hence the ld. PCIT has noted penalty erroneously initiated penalty u/s. 271AAB(1A) of the Act which came into statue w.e.f. 15.12.2016.The ld. PCIT has noted that ld. AO did not take conscious decision relating to non-initiation / incorrect initiation of penalty. The ld. AO wanted to initiate the penalty under the rightly applicable provisions of the Act. It was an inadvertent error on AO's part whereby the penalty which had to be initiated and which he had wanted to initiate was not done. The ld. PCIT, thus viewed that this error has caused prejudice to Revenue. He did not agree with the submission of the assessee and thus in exercise of powers conferred upon him u/s. 263 the ld. PCIT directed the AO to initiate and levy penalty under the requisite sections as detailed in the show cause notice given in the proceedings u/s. 263 of the Act. Based on this he noted that the taxpayer will not unduly suffer as penalty will be levied or not levied is to be based on the satisfaction of the assessing officer. He further noted that the he is not disturbing the assessment that has been completed and only passing an order for initiation / levy of penalty. The bench has noted that there is

no error on the part of the assessing officer in computing the taxable income of the assessee for the year under consideration the only error as pointed out by the PCIT is that though the ld. AO has recorded his finding in the order for initiation of penalty u/s. 271(1)(c) but has issued the notice u/s. 271AAB(1A). Since that the section came in to statute from 15.12.2016 the levy of penalty should be u/s. 271(1)(c) of the Act. The ld. AR of the assessee submitted that even though this may be the error on the part of the ld. AO or his conscious decision, the provision of section 263 of the Act does not empower the PCIT to correct that mistake and that is error / mistake does not come under the scope of provision of section 263. The bench also noted from the factual report of the ld. AO that the notices were already issued and served upon the assessee u/s. 271AAB(1A), the ld. AO submitted that except for A. Y. 2018-19 assessee has submitted reply for all the years from 2012-13 to 2017-18 and the proceeding in this regard is pending in the system. The ld. AO has also reported that the proceeding-initiatedu/s. 271(1)(c) pursuant to proceeding u/s. 263 is also pending. We have also persuaded the provision of section 292BB of the Act and decisions relied upon by the ld. DR supporting the action of the ld. PCIT. We have noted that the provision of section 292BB empowers the ld. AO to

take remedial action under that section where the proceedings are pending before him and in fact the same is pending before him as reported by him in his factual report submitted.

24. Now the mute question before us is that whether the PCIT can correct the mistake of non-initiation or incorrect initiation of penalty under provisions of section 263 of the Act or not. For this we have gone through the competing contentions raised by both the parties before us. Before us revenue has relied upon certain judgements as listed here in above, we have considered all these judgements and found that all the decisions relied upon by the revenue are on different provisions of the act and provisions of section 292BB is for the AO but not at the help of the PCIT in the proceeding u/s. 263 and it is for the assessing officer to be considered before the proceeding before him. Against the submission of applicable judgement placed on record by the ld. AR of the assessee, ld. DR did not pinpointed any controverting judgements against the various direct and binding judgment presented for service in this case. The bench also noted that the pre-requisites to the exercise of jurisdiction by the Commissioner u/s 263, is that the order of the Assessing Officer is established to be

erroneous in so far as it is prejudicial to the interest of the Revenue. The Commissioner has to be satisfied of twin conditions, namely (i) The order of the Assessing Officer sought to be revised is erroneous; and (ii) it is prejudicial to the interests of the Revenue. If any one of them is absent i.e. if the assessment order is not erroneous but it is prejudicial to the Revenue, Sec.263 cannot be invoked. This provision cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer; it is only when an order is erroneous as also prejudicial to revenue's interest, that the provision will be attracted. An incorrect assumption of the fact or an incorrect application of law will satisfy the requirement of the order being erroneous. The phrase 'prejudicial to the interest of the revenue' has to be read in conjunction with an erroneous order passed by the AO. Every loss of Revenue as a consequence of the order of the AO cannot be treated as prejudicial to the interest of the Revenue. The revisional jurisdiction of the PCIT starts only after the conclusion of assessment proceedings, resulting into assessment order, therefore, as a sequel thereto, it is not open to PCIT to exercise the revisional powers to create a non-existent proceeding under S. 263 by holding the assessment proceeding as erroneous in so far as prejudicial to

the interest of revenue. The provision of section 263 regulates the revisional powers of the PCIT hence, the strict fulfillment of the requirements of a jurisdictional provision cannot be compromised. On the issue the CBDT in its circular No. 09/DV/2016(Departmental view) dated 26.04.2016 (DPB 26-27) is also of this view that a mere mention of the penalty in the assessment order is of no value. The notice is to be issued by the competent officer who is powered under the act. The only proceeding and consequent order, is the assessment order and not the penalty proceedings because the same were not existing hence no proceedings u/s 263 could be invoked to correct the section under which the penalty can be levied or not by the AO. There must exist some order, which is sought to be revised by the PCIT.If there is no order, question of revising the order does not arise. He cannot pass an order u/s 263 to pass an order, where there is none. In the instant case, admittedly there is no order in so far as penalty proceedings are concerned. If there is no order, there is no question of its being erroneous or pre-judicial as submitted there are other provision such as 147, 154, 292BB or filling an appeal etc.It may be clarified whether the AO has initiated penalty proceedings at all or it is a case of wrong initiation of penalty, in both the situations the PCIT has got

no jurisdiction at all because no order has been passed by the AO till the examination by the PCIT u/s 263 in the proceedings under examination. The PCIT cannot find fault in the mere proceedings alone but passing of an order in those proceedings, is a condition precedent. Therefore, non-initiation of/wrong initiation of penalty proceedings cannot be much emphasized or stressed upon because there is no order at all in those proceedings hence there cannot be any question of finding any error/prejudice therein u/s 263.There is one more reason why the PCIT should not be permitted to invoke revisional powers for initiation of penalty proceedings. Sec. 271(1) specifically empowers the AO or the appellate authority to record satisfaction. It is well-settled that once an appeal has been preferred against an order of assessment the entire assessment is open before the appellate authority. The appellate authority is entitled to do all that the AO could have done. The powers of the appellate authority are co-extensive and co-terminus with the powers of the AO. It is equally well-settled that the PCIT cannot exercise revisional jurisdiction qua proceedings before an appellate authority. The order of assessment does not have any independent existence and stands merged with the order of the appellate authority. Hence, to read s. 263 as being applicable only in

case of an AO for the purposes of initiation and levy of penalty and not being applicable to the appellate authority, cannot be the legislative intent. To the contrary, the inherent indication under s. 271(1) makes it clear that the Pr. CIT / CIT does not have any powers to direct either of the authorities, the AO or the appellate authority, to initiate and levy penalty. The section requires the AO or the appellate authority to be satisfied in the course of 'any proceedings'. This means, any proceedings before either of the specified authority. The Pr. CIT / CIT cannot create proceedings. If he is not permitted to direct the appellate authority (and this is an accepted position) he cannot be permitted to substitute jurisdiction/powers of only the AO by his satisfaction by creating proceedings where none exist— assessment having already been completed. The identical issue is directly covered by the binding decision in case of CIT vs KeshrimalParasmal [1986] 27 Taxmann 447 (Raj) (DPB 1-3), holding that:

> **5.** On the other hand, Mr. R. Balia, the learned counsel appearing for the assessee, has stoutly opposed the submission and urged that no referable question of law arises out of the order of the Tribunal dated 26-11-1982, for the special leave petition by the department against the judgment in *J.K. D'Costa's* case (*supra*) was dismissed by the Supreme Court in *CIT* v. *J.K. D'Costa* [Special Leave Petition (Civil) Nos. 11391 and 11392 of 1981 dated 2-3-1984]. In [1984] 147 ITR (St.) 1, it is stated as under :
>
> "*Revision : Commissioner in revision in assessment order whether can direct initiation of penalty proceedings.* - Their Lordships P.N. Bhagwati and A.N. Sen, JJ. dismissed, as not being a fit case in which the question arising in the special

leave petition should be decided, a special leave petition by the department against the judgment dated 27-4-1981 of the Delhi High Court in IT Reference No. 82 of 1974, reported in 133 ITR 7, whereby the High Court, on a reference, held that the Commissioner in a *suo motu* revision under section 263 of the Income-tax Act, 1961, of an assessment proceeding, was not entitled to set aside the assessment order on the ground that there was no mention of initiation of penalty proceedings in the assessment order, and to direct the ITO to make fresh assessment and to initiate penalty proceedings : *CIT* v. *J.K. Da Costa* : Special Leave Petition (Civil) Nos. 11391-11392 of 1981."

Thus, the position boils down to this that the view taken in *J.K. D'Costa's* case (*supra*) has been confirmed by the Supreme Court and according to *J.K. D'Costa's* case (*supra*) the Commissioner is not entitled to set aside the assessment order passed by the ITO on the ground that there was no mention of initiation of penalty proceedings in the assessment order and the Commissioner in the proceedings under section 263 cannot direct the ITO to make fresh assessment to initiate penalty proceedings.

As the position stands concluded and settled by the Supreme Court, the question which is now sought to be referred by the Commissioner cannot be said to be a substantial question of law arising out of the Tribunal's order. It is only a question of academic nature.

6. In this view of the matter, it cannot be said that the decision of the Tribunal rejecting the reference application by its order dated 12-8-1983 is incorrect.

7. For the reasons aforesaid, no referable question of law arises out of the order dated 26-11-1982 of the Tribunal.

8. The reference application under section 256(2) filed by the Commissioner is, therefore, dismissed.

25. Relying on the above jurisdictional high court decision this bench respectfully followed the said findings in the case Smt.RekhaShekawat V Pr. CIT (2022) in ITA NO. 7/JP/2021, Suresh Kumar Dapkara v. PCIT (Central), Jaipur in ITA No. 141/JP/2022 and in the recent decision in the case of DheerajSinghSisodiya v. PCIT (Central),Jaipur in ITA no.

132/JP/2022 dated 10.08.22(Para 7 DPB II 39-50), and the facts of both the cases are almost similar to the facts in present case and the relied upon finding is as under :

> 7. We have heard the rival contentions, perused the material available on record, assessment order and impugned order and the case laws cited before us. Admittedly, the AO has initiated penalty proceedings u/s 271 AAB(1A) with the observations that the amount of investment made by the assessee for purchase of motorcycle in cash i.e. Rs.1,25,000/- is added to his total income treated as unexplained investment u/s 69 and tax is charged as per provisions of section 115BBE of the I.T. Act. The assessee has offered Rs.1,25,000/- for taxation during search proceedings in statement u/s 132(4), however, the assessee has not included Rs.1,25,000/- in the return filed u/s 153A, therefore, penalty proceedings u/s 271AAB(1A) is initiated accordingly. The Ld. AR argued that the AO has taken conscious decision to initiate the penalty proceedings u/s 271AAB(1A) of the Act. It may be noted that both u/s 271(1)(c) and u/s 271AAB it is the AO who is to satisfy himself whether on the additions made, penalty proceedings is required to be initiated or not and also the section under which it is to be initiated. The mandate under section 263 of the Act do not give any power to CIT to impose his satisfaction over the satisfaction of AO as to whether the penalty proceedings are to initiated or not and if initiated under which section/clause. In our view, on examination of assessment record, the PCIT cannot direct initiation of penalty proceedings because penalty proceedings are not part of assessment proceedings. Thus, the PCIT's revisionary decision relating to non-initiation/incorrect initiation of penalty which without holding that assessment order passed by the AO as erroneous and prejudicial to the interest of revenue is vague and bad in law.

26. Being consistent, as there is no contrary finding serviced before us by the revenue we are of the considered view that the invocation of provision of 263 to correct the section under which the penalty is leviable or not is beyond the power vested under section 263 of the Act, when there are other options available with the ld. AO. Therefore, the appeal of the

assessee is allowed in the light of the facts, circumstances and decisions relied upon.

27. In the result appeal of the assessee in the ITA No.217/JP2022 is allowed.

28. The fact of the case in ITA No. 217/JPR/2022 is similar to the case in ITA No. as listed here in below

Sl.No.	Appeal No.	Name of assessee	A.Y.
1-3.	ITA No. 214 to 216/JP/2022	Shri Harish jain	2012-13, 2015-16 & 2016-17
4-10.	ITA No. 217 to 223/JP/2022	Shri Ram Kishan Verma	2012-13 to 2018-19
11-13	ITA No. 281 to 283/JP/2022	Shri Manoj Kumar Sharma	2013-14 to 2015-16

As we have heard both the parties and persuaded the materials available on record. The bench has noticed that the issues raised by the assessee in the above appeals are equally similar on set of facts and grounds. Therefore, it is not imperative to repeat the facts and various grounds raised by the assessee. Hence, the bench feels that the decision taken by us in ITA No. 217/JPR/2022for the Assessment Year 2012-13 shall apply

mutatis mutandis in the above listed appeals. In the results the appeal of the assessee in ITA No. 214 to 216/JP/2022, ITA No. 218 to 223/JP/2022 & ITA No. 281 to 283/JP/2022 stands allowed.

Order pronounced in the open court on 25/11/2022.

Sd/-	Sd/-
(डा॰ एस. सीतालक्ष्मी)	(राठोडकमलेशजयन्तभाई)
(Dr. S. Seethalakshmi)	(Rathod Kamlesh Jayantbhai)
न्यायिकसदस्य / Judicial Member	लेखासदस्य / Accountant Member

जयपुर / Jaipur
दिनांक / Dated:- 25/11/2022
*Santosh
आदेश की प्रतिलिपिअग्रेषित / Copy of the order forwarded to:

1. The Appellant- Harish Jain, Kota,
   Ram Kishan Verma, Kota&
   Manoj Kumar Sharma, Kota.
2. प्रत्यर्थी / The Respondent- PCIT(Central), Jaipur.
3. आयकरआयुक्त / The ld CIT
4. आयकर आयुक्त(अपील) / The ld CIT(A)
5. विभागीय प्रतिनिधि, आयकरअपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्डफाईल / Guard File (ITA No. 214 to 223& 281 to 283/JP/2022)

आदेशानुसार / By order,

सहायकपंजीकार / Asst. Registrar