

**IN THE INCOME TAX APPELLATE TRIBUNAL  
“A”BENCH: BANGALORE**

**BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT  
AND  
SHRI B.R. BASKARAN, ACCOUNTANT MEMBER**

ITA No.363/Bang/2021
Assessment Year: 2016-17

Siddappa B.T. No.1296, 2 <sup>nd</sup> Cross Nehrunagar Mandya 571 401  <b>PAN NO :AFQPS9766L</b>	<b>Vs.</b>	Principal CIT-3 Bangalore.
<b>APPELLANT</b>		<b>RESPONDENT</b>

<b>Appellant by</b>	:	Shri S.V. Ravishankar, A.R.
<b>Respondent by</b>	:	Shri Mudavathu Harish Chandra Naik, D.R.

Date of Hearing	:	23.03.2022
Date of Pronouncement	:	24.03.2022

**ORDER**

**PER B.R. BASKARAN, ACCOUNTANT MEMBER:**

The assessee has filed this appeal challenging the revision order dated 30.3.2021 passed by Ld. Principal CIT-3, Bengaluru for assessment year 2016-17. The assessee is challenging the validity of revision proceedings initiated by the Principal CIT.

2. The facts relating to the issue are stated in brief. The assessee is an individual and he filed his return of income on 17.10.2016 declaring total income of Rs.35,77,900/-. The assessee is engaged in the business of undertaking civil contract works. The

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assessment was completed u/s 143(3) of the Income-tax Act,1961 [the Act' for short] on 24.10.2018.

3. During the course of assessment proceedings, the A.O. noticed that the turnover reported in Form 26AS was Rs.6,21,13,105/-, whereas the assessee had declared Rs.49,69,048/- in the return of income. When questioned, the assessee submitted that he has not maintained books of accounts for civil contract business. He submitted that the Income tax portal did not accept gross receipts, when it exceeds Rs.1.00 crore. Hence the assessee has filled up the net income in the return of income. He submitted that he has estimated income before depreciation and interest @ 8% on the gross contract receipts, which worked out to Rs.49,69,048/- and deducted expenditure towards depreciation and interest there from. Accordingly, the assessee has declared net income of Rs.14.48 crores. The assessee submitted that the income has been estimated around 8% taking guidance from the provisions of section 44AD of the Act (though the said provision is not applicable to him) and depreciation and interest expenditure was deducted therefrom. In support of this exercise, the assessee relied on the decision of Hon'ble Kerala High Court rendered in the case of Sammurai Techno Trading Company Ltd. Vs. CIT (2010) 37 DTR 386.

4. The A.O. did not accept the income declared by the assessee. He expressed the view that the onus of proving income declared by the assessee as correct lies upon the assessee. Accordingly, the A.O. proposed to estimate the income of the assessee @ 10% of the gross contract receipts and deduct there from depreciation and interest expenditure claimed by the assessee. However, the assessee prayed that the income may be estimated @ 9%. Finally, the AO

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estimated the income @ 9.50% of the Gross receipts, which worked out to Rs.59,00,745/-. The AO deducted depreciation and interest on overdraft totaling to Rs.14,48,580/- and accordingly determined business income at Rs.44,52,165/- and the same has resulted in an addition of Rs.9,31,697/- to the total income declared by the assessee.

5. Since the assessee did not maintain books of accounts as required under provisions of section 44AA of the Act, it appears that the A.O. also initiated penalty proceedings u/s 271A of the Act.

6. The Ld. PCIT examined the assessment record and took the view that the action of the A.O. in granting depreciation and interest expenditure as deduction is not in accordance with provisions of section 44AD(2) of the Act. The Ld. Principal CIT also noticed that the A.O. has dropped the penalty proceedings initiated u/s 271A of the Act accepting the decision cited by the assessee, viz., decision of Hon'ble jurisdictional High Court rendered in the case of CIT Vs. Babu Reddy (2010) 38 DTR 147 (KAR). The Ld PCIT took the view that the decision rendered in the case of Babu Reddy (supra) was not applicable to the facts of the present case, since in the case of Baby Reddy (supra), the said assessee was maintaining books of account. Accordingly, the Ld PCIT took the view that the assessment order passed by the AO is erroneous and prejudicial to the interests of revenue. Accordingly, he initiated revision proceedings u/s 263 of the Act on both the issues referred above. After affording opportunity of being heard to the assessee, the Ld. Principal CIT held that the assessment order is erroneous and prejudicial to the interest of the revenue in so far as it is related to allowing deduction of depreciation and interest. He also held that the dropping of penalty proceeding initiated u/s 271A of the Act

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was clearly on wrong appreciation of the judgement of the Court. The Ld PCIT also observed that non-initiation of penalty proceedings u/s 271B of the Act is another error with consequent loss of revenue. Accordingly, the Ld PCIT passed following order:-

*“11. The discussion above clearly shows that the assessment order dated 24.10.2018 for the AY 2016-17 is erroneous and prejudicial to the interest of revenue in so far as it has led to loss of revenue. After hearing the assessee and perusing the submissions, I am of the view that this is a fit case for action u/s 263. The assessment order for AY 2016-17 is set aside with a direction to do de-novo assessment.*

Aggrieved by the order of Ld PCIT, the assessee has filed this appeal before the Tribunal.

7. The Ld. A.R. submitted that the assessing officer has duly examined the income declared by the assessee from civil contract works by raising queries. After considering the replies given by the assessee, the A.O. has taken a conscious decision to estimate the income @ 9.50% of gross receipts as against 8% estimated by the assessee and allowed deduction of depreciation and interest. In support of this submission, the Ld. A.R. took us through the queries raised by the A.O. and the replies given by the assessee. Accordingly, the Ld. A.R. submitted that the assessing officer has taken a plausible view on the matter and hence the Ld. PCIT was not justified in initiating the revision proceedings. He further submitted that it is an admitted fact that the assessee did not maintain books of accounts and hence the income from civil contract works can only be estimated. Accordingly he submitted that, even if the matter is restored to the file of A.O., there is no option but to estimate the income. The Ld A.R placed his reliance on the decision rendered by Hon'ble High Court of Karnataka in the case of CIT Vs. P. Sudhakar (2015) 61 Taxmann.com 17, wherein

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the Hon'ble High Court has quashed revision proceedings initiated in respect of assessment order, where the AO had estimated income from sub-contract works. Accordingly, the Ld. A.R. submitted that the impugned revision order is liable to be cancelled.

8. The Ld. A.R. further submitted that the provisions of section 44AD of the Act are not applicable to the assessee, as the turnover of the assessee has exceeded the limit prescribed in that section. Accordingly, he submitted that the Ld. PCIT was not justified in placing reliance to the provisions of section 44AD(2) of the Act in order to form the view that the depreciation and interest expenditure is not allowable as deduction.

9. The Ld. A.R. further submitted that the Ld. PCIT has also expressed the view that the dropping of penalty u/s 271A of the Act was clearly on a wrong appreciation of the judgement of the Hon'ble High Court of Karnataka. The Ld. A.R. submitted that the Ld. PCIT should have passed separate revision order in respect of penalty proceedings initiated u/s 271A of the Act. Accordingly, the Ld. A.R. submitted that the Ld. PCIT was not justified in combining the same in the impugned revision order.

10. The Ld. D.R., on the contrary, supported the order passed by Ld. PCIT. From the paper book filed by the assessee, we notice that the assessee has mentioned in the letter dated -6-08-2018 that he is not maintaining books of account for civil contract works business. We notice that the A.O has issued many notices u/s 142(1) of the Act asking several information and the assessee has also complied with the notices.

11. Thereafter the assessing officer has issued another notice dated 21.8.2018 with the following remarks:-

*“From your submissions made vide reference cited above, it is clear that you have not complied with the provisions of section 44AA and 44AB. You have instead sought to enter details in the meant for presumptive taxation (u/s 44AD) which is not applicable to you. It is therefore obvious that the software did not allow you to enter the turnover which was in excess of Rs.1 crore. You have sought to bypass the software by misrepresenting the suppressing your turnover figures. Instead of entering turnover of Rs.6,22,65,982/- you have entered a figure of Rs.49,69,048/- which means that you have deliberately understated the turnover by Rs.5,72,96,934/-.*

*For the purpose of this assessment, the turnover as per 26AS of Rs.6,22,65,982/- is proposed to be adopted as a starting point. In your letter referred above, you have not explained how you arrived at income of Rs.49,69,048/- before deducting depreciation and interest on over draft. You are required to explain in detail the basis for arriving at income of Rs.49,69,048/- (before depreciation & interest) giving the breakup of various direct and indirect expenses deducted and supporting evidences thereof.”*

We notice that the assessee furnished a reply dated 27.8.2018 contending that the CBDT has not prescribed books of accounts required to be maintained for the purpose of section 44AA read with Rule 6F(1) for civil contract works. The assessee also placed reliance on the decision rendered by Hon’ble Kerala High Court in the case of Sammurai Techno Trading Company Pvt. Ltd. (supra), wherein it was held that even where books of accounts are not maintained, section 44AD percentage of 8 can be guideline for estimation of income from civil works though the section 44AD is not applicable. The assessee also submitted that, in the following cases, the Ld. CIT(A) has allowed claim of depreciation and bank interest where income from contract was estimated before claim of depreciation and bank interest:-

Sl.No.	Name of the assessee	Assessment year	ITA No.
1.	G.L. Lakshmegowda	2006-07	61/CIT(Appeals)/Mys./2013-14
2.	M.S. Revanna	2012-13	98/CIT(Appeals)/Mys./2015-16
3.	P. Ravishankar	2014-15	132/CIT(Appeals)/Mys./2016-17

The assessee also placed reliance on the Board Circular No.29D(XIX-14) dated 31.8.1965 and submitted that the CBDT has clarified that in cases gross income is estimated before claim of depreciation and bank interest, the same method should be followed if necessary particulars have been furnished.

12. We notice that the A.O. again issued another notice dated 10.9.2018 u/s 142(1) of the Act, wherein he proposed to estimate income before interest and depreciation @ 10% of the turnover. Thereafter, the A.O. has completed the assessment estimating the gross income @ 9.50% of the turnover and allowed deduction of depreciation and interest.

13. From the foregoing discussions, it can be noticed that the A.O. has applied his mind on the impugned issue and has taken a conscious decision to allow deduction of depreciation and interest after estimating gross income @ 9.50% of the gross receipts. We find merit in the contentions of the assessee that the AO has taken a plausible view in this matter and hence it cannot be considered to be prejudicial to the interest of the revenue. We notice that the above said contentions of the assessee finds support from the decision rendered by Hon'ble High Court of Karnataka in the case of CIT Vs. P. Sudhakar (supra). The relevant observations are extracted below:-

*“7. The material on record discloses that, Rs. 35.38 crores is the gross bill. The assessee is working under the main contractor M/s IVRCL. They deducted a sum of Rs. 22.99 crores from the bill of the assessee on account of the materials supplied and expenditure incurred by them. Only a sum of Rs. 12.38 crores was actually paid to the assessee. On that basis a sum of Rs. 4,95,970/- was the income offered by the assessee in the return of income. However, the Assessing Authority after scrutiny of the entire material on record added a sum of Rs. 80,64,764/-. Thus, the total income was determined at Rs. 85,60,730/-. The said income with reference to the*

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*contract receipts of Rs. 13.37 crores works out to 6.4%. Therefore, the contention that it works out to 0.12% is erroneous.*

*8. Even in respect of the main contract, in respect of civil contracts 8% is taken normally as the income earned out of such contracts. When such a contractor gives the work to a sub contractor normally about 5% is taken as the income of the contractor. In the instant case it works out to 6.4%. The tenor of the order of the Commissioner under Section 263 of the Act discloses that, because the net profit shown in the Profit and Loss Account was only Rs. 4.63 lakhs which works out to 0.12% the proceedings are initiated. Factually it is incorrect. In those circumstances, in the absence of any other material which was before the Commissioner he was not justified in recording a finding that the assessing authority has not applied its mind, not verified the expenses, not verified the receipts and looked into the book and, therefore, a case for interference under Section 263 is made out cannot be accepted. The Tribunal by a considered order rightly set aside the order passed by the Commissioner relying on several judgments on the question after appreciating the entire evidence on record.*

*Under these circumstances, we do not find any justification to interfere with the said order. No merits. The substantial questions of law are answered in favour of the assessee and against the revenue.”*

14. The scope of revision proceedings initiated under section 263 of the Act was considered by Hon'ble Bombay High Court, in the case of Grasim Industries Ltd. V CIT (321 ITR 92) by taking into account the law laid down by the Hon'ble Supreme Court. The relevant observations are extracted below:

*Section 263 of the Income-tax Act, 1961 empowers the Commissioner to call for and examine the record of any proceedings under the 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, to pass an order upon hearing the assessee and after an enquiry as is necessary, enhancing or modifying the assessment or cancelling the assessment and directing a fresh assessment. The key words that are used by section 263 are that the order must be considered by the Commissioner to be “erroneous in so far as it is prejudicial to the interests of the Revenue”. This provision has been interpreted by the Supreme Court in several judgments to which it is now necessary to turn. In Malabar Industrial Co. Ltd. v. CIT [2000] 243 ITR 83, the Supreme Court held that the provision “cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer” and “it is only when an order is erroneous that the section will be attracted”. The Supreme Court held that an*

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*incorrect assumption of fact or an incorrect application of law, will satisfy the requirement of the order being erroneous. An order passed in violation of the principles of natural justice or without application of mind, would be an order falling in that category. The expression “prejudicial to the interests of the Revenue”, the Supreme Court held, it is of wide import and is not confined to a loss of tax. What is prejudicial to the interest of the Revenue is explained in the judgment of the Supreme Court (headnote) :*

*“The phrase ‘prejudicial to the interests of the Revenue’ has to be read in conjunction with an 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 an Income-tax Officer adopted one of the courses permissible in law and it has resulted in loss of revenue, or where two views are possible and the Income-tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the Revenue unless the view taken by the Income-tax Officer is unsustainable in law.”*

*The principle which has been laid down in Malabar Industrial Co. Ltd. [2000] 243 ITR 83 (SC) has been followed and explained in a subsequent judgment of the Supreme Court in CIT v. Max India Ltd. [2007] 295 ITR 282.”*

In the instant case, there are two views possible with regard to estimation of income from civil contract works and the assessing officer has taken a plausible view. Accordingly, we are of the view that the revision order passed by Ld. PCIT on this issue cannot be sustained. Accordingly, we set aside his order in directing the A.O. to do de-novo assessment.

15. With regard to the observation of Ld. PCIT that the dropping of penalty u/s 271A of the Act was on wrong appreciation of the judgement of the High Court, the Ld. A.R. contended that the Ld. PCIT should have passed separate order on this issue. However, the Ld. A.R. did not cite any authority in support of his contentions. In any case we notice that the Ld. PCIT has given opportunity to the

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assessee in this regard. Accordingly, we do not find it necessary to interfere with observations made by Ld. PCIT on the second issue.

16. In the result, the appeal filed by the assessee is partly allowed.

Order pronounced in the open court on 24<sup>th</sup> Mar, 2022.

**Sd/-**  
**(N.V. Vasudevan)**  
**Vice President**

**Sd/-**  
**(B.R. Baskaran)**  
**Accountant Member**

Bangalore,  
Dated 24<sup>th</sup> Mar, 2022.  
VG/SPS

**Copy to:**

1. The Applicant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

Asst. Registrar, ITAT, Bangalore.