

आयकर अपीलीय अधिकरण न्यायपीठ, नागपुर में ।
IN THE INCOME TAX APPELLATE TRIBUNAL BENCH, NAGPUR

(Through Virtual Hearing at Raipur)

**BEFORE SHRI RAVISH SOOD, JUDICIAL MEMBER
AND
SHRI JAMLAPPA D BATTULL, ACCOUNTANT MEMBER**

आयकर अपील सं. / ITA No. 28/NAG/2021

निर्धारण वर्ष / Assessment Year : 2011-12

Pradeep Dattatraya Banginwar,
At- Trimurti Sales, Datta Chowk,
Yavatmal-445 001.
PAN : ABCPB5111C

.....अपीलार्थी / Appellant

बनाम / V/s.

The Pr. Commissioner of Income Tax-II,
Nagpur.

.....प्रत्यर्थी / Respondent

Assessee by : Shri P.M. Gandhi, CA
Revenue by : Shri Vitthal Bhosale, DR

सुनवाई की तारीख / Date of Hearing : 17.02.2022

घोषणा की तारीख / Date of Pronouncement : 06.04.2022

आदेश / ORDER**PER RAVISH SOOD, JM:**

The present appeal filed by the assessee is directed against the order passed by the Principal Commissioner of Income Tax, Nagpur-2 (for short "Pr. CIT") u/s. 263 of the Income-tax Act, 1961 (for short "the Act"), dated 24.02.2021, which in turn arises from the order passed by the A.O under Sec. 147 r.w.s 143(3) of the Act, dated 01.12.2018 for assessment year 2011-12. Before us the assessee has assailed the impugned order on the following grounds of appeal :

"1. Based on the facts and circumstances of the case, order passed by the Learned PCIT-II, Nagpur is bad in law and needs to be set aside.

2. Based on the facts and circumstances of the case and in law, the assessment order passed by the ACIT-Wardha Range, Wardha is neither erroneous nor pre-judicial to the interest of the revenue as the re-assessment order u/s. 147 of the I.T. Act, 1961 was passed after the verification of reasons recorded for re-opening of assessment and hence, there is no situation which of invoking provisions of section 263 of the I.T Act, 1961.

3. Assessee craves leave to add, alter or amend any of the grounds of appeal."

2. Succinctly stated, the assessee had on 18.10.2011 filed his return of income for the assessment year 2011-12, declaring an income of Rs.27,86,400/-. On the basis of information received by the Assessing

Officer that the assessee had raised bogus claim of Long Term Capital Gain (LTCG) of Rs. 14.75 lac on sale of one lac shares of M/s Comfort Intech Ltd., a penny stock company, his case was reopened u/s. 147 of the Act. Notice u/s. 148 of the Act was issued to the assessee. In compliance, the assessee filed his return of income declaring an income of Rs.27,86,400/- i.e., as originally returned. On request copy of the 'reasons to believe' on the basis of which the case of the assessee was reopened u/s. 147 of the Act were made available to him by the Assessing Officer. Objections were filed by the assessee as regards the validity of the jurisdiction that was assumed by the AO for reopening of his case on the basis of misconceived "reasons to believe". It was the claim of the assessee that he had not earned any exempt LTCG of Rs. 14.75 lac (supra) on sale of shares of M/s Comfort Intech Ltd., but had rather disclosed an income of Rs. 10,69,635/- on account of Short term capital gain (STCG) from sale of shares of the said scrip which was offered by him for tax in his return of income. Observing, that the aforesaid claim of the assessee was in order, the Assessing Officer vide his order passed u/s. 147 r.w.s 143(3) of the Act, dated 01.12.2018

accepted his returned income and did not make any addition as regards the issue on the basis of which his case was reopened by him.

3. After culmination of the reassessment proceedings the Pr. CIT called for the records of the assessee. Observing, that the Assessing Officer in the course of assessment proceedings had not verified the details of purchase and sale of shares, numbers of shares, copy of de-mat account which would have revealed the date on which shares were received by the assessee in his de-mat account, as well as not examined as to whether or not the assessee had regular dealings with the broker and the source of purchase of shares in question etc., the Pr. CIT was of the view that the summarily accepting of the share transactions of the assessee as genuine by the A.O had rendered his order passed u/s. 143(3) r.w.s 147 of the Act, dated 01.12.2018 as erroneous in so far it was prejudicial to the interest of the revenue u/s. 263 of the Act. Backed by his aforesaid observations the Pr. CIT called upon the assessee to explain as to why the assessment order may not be revised u/s. 263 of the Act. The multi-facet explanation of the assessee i.e, both as regards the validity of the jurisdiction assumed by

the Pr. CIT u/s. 263 of the Act, as well as those advanced by him in order to support the genuineness of the share transactions in question, however, did not find favor with the Pr. CIT who vide his order passed u/s. 263 of the Act, dated 24.02.2021 held the assessment order passed by the Assessing Officer as erroneous in so far it was prejudicial to the interest of the revenue u/s 263 of the Act. Accordingly, the Pr. CIT set-aside the assessment order to the file of the AO with a direction to re-assess the income afresh i.e, after examination of the relevant details on the basis of a proper enquiry as may be relevant and necessary.

4. The assessee being aggrieved with the order passed by the Pr. CIT u/s. 263 of the Act, dated 24.02.2021 has carried the matter in appeal before us.

5. We have heard the Id. Authorized Representatives of both the parties, perused the orders of the lower authorities and the material available on record, as well as considered the judicial pronouncements that have been pressed into service by them to drive home their

respective contentions. As is discernible from the records, the case of the assessee was reopened by the Assessing Officer u/s. 147 of the Act on the basis of the following 'reasons to believe' (as were made available to the assessee by the AO vide an annexure to his Notice u/s 142(1), dated 12.10.2018), which reads as under (relevant extract) :

"You have shown Long Term Capital Gain in penny stock of M/s. Comfort Intech Ltd by showing sale of 1,00,000 shares for Rs.14,75,000/- which is not based on real investment practice."

6. As observed by us hereinabove, the assessee in his reply had submitted before the Assessing Officer that he had not earned any exempt LTCG of Rs. 14.75 lac (supra) from sale of shares of M/s. Comfort Intech Ltd., but on contrary had disclosed an income of Rs.10,69,635/- (supra) i.e STCG from sale of shares of the said scrip in his original return of income. Observing, that the aforesaid claim of the assessee was in order and STCG on sale of shares of M/s. Comfort Intech Ltd. of Rs. 10,69,635/-(supra) was duly credited by the assessee in his profit & loss account for the year under consideration that was filed a/w his original return of income, the Assessing Officer

found favor with the aforesaid claim of the assessee and accepted the income returned by him as such.

7. After having given a thoughtful consideration to the issue in hand, we are of the considered view, that as claimed by the Ld. AR, and rightly so, the very basis for reopening of the case of the assessee by the AO is found to be absolutely misconceived and incorrect. On a perusal of the 'reasons to believe' which have purposively being culled out by us hereinabove, the case of the assessee was reopened for the reason that the bogus exempt LTCG of Rs. 14.75 lac (supra) shown by the assessee on sale of one lac shares of M/s. Comfort Intech Ltd., a penny stock company, was not based on real investment practice. However, the aforesaid "reason" on the basis of which the case of the assessee was reopened was absolutely misconceived and fallacious. On a perusal of the assessment record, as observed by the Assessing Officer in the course of the assessment proceedings, the assessee had not claimed any exempt LTCG of Rs.14.75 lac (supra) on sale of shares of M/s. Comfort Intech Ltd., but on the contrary it had disclosed STCG

of Rs.10,69,635/- (supra) on the sale of shares of the said scrip and had offered the same for tax in his return of income.

8. Backed by the aforesaid factual position there is no gainsaying that the very basis for reopening the case of the assessee i.e., booking of bogus exempt LTCG of Rs. 14.75 lac (supra) on sale of one lac shares of M/s Comfort Intech Ltd. is not only incorrect, but in the true sense can safely be held as non-existent. Observing, that the "reason to believe" on the basis of which the case of the assessee was reopened was factually incorrect, the Assessing Officer, had therein vide his order passed under Sec. 147 r.w.s 143(3), dated 01.12.2018 accepted the returned income of the assessee as such. At this stage, we may herein observe, that though the reopening of the assessee's case on the basis of misconceived and fallacious "reasons to believe" would be fatal to the very existence of the order of reassessment that was passed by the AO under Sec. 143(3) r.w.s.147 of the Act, dated 01.12.2018, however, as the income of the assessee as was originally returned by him was accepted by the AO vide his reassessment order, therefore, most probably for the said reason the assessee had not

challenged the validity of the same by carrying the matter any further in appeal. Be that as it may, as the reassessment order passed by the AO under Sec. 143(3) r.w.s 147 of the Act, dated 01.12.2018 is in itself based on invalid assumption of jurisdiction by the AO, therefore, the said material fact had rightly been pressed into service by the Id. AR for impressing upon us that a non-est assessment i.e, an assessment which has no sanctity of law could not have been revised by the Pr. CIT vide his order passed under Sec. 263, dated 24.02.2021. In so far the observation of the Pr. CIT that the failure on the part of the Assessing Officer in not carrying out necessary verifications, viz. verifying the details of purchase and sales of shares; number of shares; copy of de-mat account which would have revealed the date on which shares were received by the assessee; as to whether the transaction in question was the only one transaction; as to how the shares offered vide right issues were purchased from the broker; a/w necessary verifications as regards the source of the purchases etc. had rendered the assessment order passed by him u/s. 143(3) r.w.s.147 of the Act, dated 01.12.2018 as erroneous in so far it was prejudicial to

the interest of the revenue, we are afraid the same cannot be accepted. We, say so, for the reason that now when the very basis for reopening of the assessee's case under Sec. 147 of the Act is admittedly found to be incorrect or, in fact non-existent, then, the said fact would continue to remain so qua the jurisdiction assumed by the Pr. CIT to revise the said order in exercise of his revisional jurisdiction u/s 263 of the Act. On the basis of our aforesaid observations, we are of the considered view that now when the very foundation for assumption of jurisdiction by the Assessing Officer is found to be misconceived and fallacious, then, it was not permissible for him to have proceeded any further and gathered the information i.e., details of purchase and sales of shares, numbers of shares, copy of demat account, transactions of the assessee with broker, manner in which the shares offered by right issues were purchased from the broker, genuineness of the transactions etc. Backed by our aforesaid observations, we are unable to persuade ourselves to subscribe to the view taken by the Pr. CIT who bypassing the material fact that the very assumption of jurisdiction by the Assessing Officer for reopening

the case of the assessee was mis-conceived, had however held his order to be erroneous in so far it was prejudicial to the interest of the revenue u/s 263 of the Act. Our aforesaid view that an invalid re-assessment order cannot be revised by the Pr. CIT in exercise of his jurisdiction u/s 263 of the Act is supported by the orders of the coordinate benches of the Tribunal in the case of, viz. (i). M/s Charbhujia Marmo (India) Pvt. Ltd. Vs. PCIT, ITA 4749/Del/2019; dated 31.12.2019 ; and (ii). M/s Supersonic Technologies Pvt. Ltd. Vs. PCIT-8, New Delhi, 69 ITR 585 (Del). We, thus, in terms of our aforesaid observation that now when the very foundation of the impugned revisional proceedings i.e, the reassessment order passed by the AO under Sec. 143(3) r.w.s.147 of the Act, dated 01.12.2018 is in itself based on an invalid assumption of jurisdiction by the AO and thus, not sustainable in the eyes of law, therefore, the Pr. CIT could not have assumed jurisdiction u/s 263 and validated the said reassessment order by restoring the same to the file of the AO with a direction to reassess the income of the assessee afresh, therefore, set-aside the order passed by the Pr. CIT passed u/s.263 of the Act, dated

24.02.2021. Thus, the **Ground of appeal No.1** raised in appeal by the assessee is allowed in terms of our aforesaid observations.

9. As we have quashed the order passed by the Pr. CIT u/s.263 of the Act, dated 24.02.2021 in terms of our aforesaid observations, therefore, we refrain from adverting to and therein adjudicating the other contentions as have been advanced by the Ld. AR as regards the merits of the case. Thus, the **Ground of appeal No.2** raised by the assessee is left open in terms of our aforesaid observations.

10. **Ground of appeal No.3** being general in nature is dismissed as not pressed.

11. In the result, appeal of the assessee is allowed in terms of our aforesaid observations.

Order pronounced in open court on 06th day of April, 2022.

Sd/-
JAMLAPPA D. BATTULL
(ACCOUNTANT MEMBER)

Sd/-
RAVISH SOOD
(JUDICIAL MEMBER)

रायपुर/ RAIPUR ; दिनांक / Dated : 06th April, 2022
**SB

आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The Pr. CIT, Nagpur-2.
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण,
नागपुर/ DR, ITAT, Nagpur.
5. गार्ड फ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

// True Copy //

निजी सचिव / Private Secretary
आयकर अपीलीय अधिकरण, रायपुर / ITAT, Raipur.

| | | Date | |
|----|--|------------|----------|
| 1 | Draft dictated on | 22.03.2021 | Sr.PS/PS |
| 2 | Draft placed before author | 22.03.2021 | Sr.PS/PS |
| 3 | Draft proposed and placed before the second Member | | JM/AM |
| 4 | Draft discussed/approved by second Member | | AM/JM |
| 5 | Approved draft comes to the Sr. PS/PS | | Sr.PS/PS |
| 6 | Kept for pronouncement on | | Sr.PS/PS |
| 7 | Date of uploading of order | | Sr.PS/PS |
| 8 | File sent to Bench Clerk | | Sr.PS/PS |
| 9 | Date on which the file goes to the Head Clerk | | |
| 10 | Date on which file goes to the A.R | | |
| 11 | Date of dispatch of order | | |