

**IN THE INCOME TAX APPELLATE TRIBUNAL  
'B' BENCH : BANGALORE**

**BEFORE SMT. BEENA PILLAI, JUDICIAL MEMBER  
AND  
SHRI LAXMI PRASAD SAHU, ACCOUNTANT MEMBER**

<b>IT(IT)A No. 382/Bang/2022</b>
<b>Assessment Year : 2015-16</b>

Shri Karunakara Sanjay Panikar, A-308, Brigade Gateway, Rajajinagar, Bengaluru – 560 010. <b>PAN: AOWPP2801G</b>	<b>Vs.</b>	The Deputy Commissioner of Income Tax (Intl. Taxation), Circle – 2 (1), Bengaluru.
<b>APPELLANT</b>		<b>RESPONDENT</b>

Assessee by	:	Smt. Suman Lunkar, CA
Revenue by	:	Shri K.R. Narayana, Addl. CIT (DR)

Date of Hearing	:	21-09-2022
Date of Pronouncement	:	01-12-2022

**ORDER**

**PER BEENA PILLAI, JUDICIAL MEMBER**

Present penalty appeal is filed by assessee against order dated 28/01/2022 passed by Ld.CIT(A)-12, Bangalore for A.Y. 2015-16 on following grounds of appeal:

- “1. The learned CIT(A) has erred in assuming jurisdiction levying penalty u/s. 271(1)(c) of the Act. The impugned order as passed is bad in law, void ab initio, and without jurisdiction is liable to be quashed in toto.*
- 2. The learned CIT(A) has erred in assuming jurisdiction u/s 271(1)(c) of the Act holding that there being an enhancement of assessment. On proper appreciation of facts and the law applicable, there being no enhancement of assessment, the assumption of jurisdiction to levy*

*penalty and the consequent order levying penalty becomes bad in law and such order is liable to be quashed.*

*3. In any case, the learned CIT(A) has erred in not appreciating the fact that that the learned assessing officer had already initiated the penalty proceedings on additions made and in the absence of any enhancement of assessment, no jurisdiction to levy penalty u/s. 271(1)(c) of the Act could have been assumed by the CIT(A). The order passed is bad in law and is liable to be quashed.*

*4. In any case and without prejudice, the learned CIT(A) has erred in not specifically pointing out the ground for initiation of penalty u/s. 271(1)(c) of the Act i.e., concealment of income or furnishing of inaccurate particulars of income. In the absence of specific ground for levy of penalty, the entire proceedings become bad in law and therefore, the order passed is liable to be quashed.*

*5.1 Without prejudice, the learned CIT(A) having initiated the penalty for both the limbs i.e., for concealment of income and furnishing of inaccurate particulars of income, has erred in levying penalty u/s. 271(1)(c) of the Act on the ground of concealment of particulars of income. The action of CIT(A) in levying penalty being contrary to his own findings is to be negated and penalty as levied is to be deleted.*

*5.2 In any case, the findings / conclusions drawn by CIT(A) regarding the excess claim of indexed cost of acquisition is wholly erroneous both on facts and law and such conclusions are to be disregarded,*

*5.3 The appellant has neither concealed any particulars of income nor has furnished any incorrect particulars of income and hence the appellant is not liable for any penalty. The penalty having being levied on erroneous appreciation of facts and wrong application of law requires to be cancelled.*

*5.4 In any case and without prejudice, the levy of penalty is erroneous and excessive and is therefore liable to be deleted.*

*6. In view of the above and on other grounds to be adduced at the time of hearing it is requested that the impugned order be quashed or atleast the penalty levied be cancelled.”*

## **2. Brief facts of the case are as under:**

2.1 Assessee filed his original return of income for year under consideration on 27/09/2016 declaring total income of Rs.1,61,95,750/-. For the year under consideration, the Ld.AO

noted that the assessee had derived income from capital gains. The case was selected for scrutiny and mandatory notices u/s. 143(2) of the Act was issued to the assessee.

2.2 Various notices subsequently were issued to the assessee on various dates however, the assessee did not file any response in lieu of the same. It was informed by the email to the assessee that, the return of income filed declared capital gains of Rs.1,48,57,151/-, whereas as per AIR data in the case of the assessee available with the department, the transaction amount in the Sub-Registrar office as on the date of transaction was Rs.5,37,08,200/-.

2.3 The Ld.AO was therefore of the view that, the assessee had under declared capital gains by Rs.3,88,51,069/-. The Ld.AO subsequently issued notice in view of the time barring nature of the proceedings on 23/11/2017 informing all the proposal to complete the assessment of the assessee u/s. 143(3) r.w.s. 144 of the Act by making addition of Rs.3,88,51,069/-. The assessee still did not respond. Two more opportunities was granted by the assessee on 06/12/2017 by sending an email to the assessee. As the assessee failed to respond to the various notices issued by email to the assessee, the assessment was completed by making addition to the capital gains being income not declared in the return of income by an amount of Rs.3,88,51,069/- on 15/12/2017.

3. Aggrieved by the order of the Ld.AO, assessee filed appeal before the Ld.CIT(A).

3.1 Before the Ld.CIT(A), assessee filed following written submissions.

5. The appellant filed the statements of facts and written submission which are taken on record as under:

1. This appeal is being filed by the appellant an individual, being aggrieved by the assessment order dated 15.12.2017 for Assessment Year 2015-16, passed u/s. 144 of the Income Tax Act, 1961.
2. A notice dated 14/03/2018 was issued u/s 226(3) of the Act by the JCIT (Int'l txn) circle-2(1), Bangalore to the Chief Manager, State Bank of India, Kochi, Ernakulam where the appellant is having bank account. It is stated in the notice that a sum of Rs. 1,78,48,300/- for the Assessment year 2015-16 plus interest u/s 220(2) is due from the appellant and the bank is required to pay the amount of arrears directly to the Income tax Department at the earliest.
3. When this copy of this notice was served on the appellant, the appellant contacted the his Authorised Representative who in turn met the Assessing

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officer. The Assessing officer had told that the assessment order for the year was passed on 15/12/2017 was sent through e mail.

4. The assessed income as per the order is Rs. 5,50,46,820/- as against the returned income of Rs. 1,61,95,750/-
5. The appellant is a non resident Indian since 1995. The appellant is working with Sony Middle East and Africa FZE and is based in Dubai.
6. For the year relevant to year under appeal, the appellant filed the return of income on 27/09/2016 declaring Total Income of Rs. 1,61,95,670/- which inter alia included Long Term Capital Gain of Rs. 1,48,57,131/- on sale of property held jointly with Mrs. Savithri, mother in law of the appellant. The total sale consideration of the property sold was Rs. 5,37,08,200/- which was apportioned among joint owners as under: (page 5 of the sale deed dated 16/07/2014)

Appellant	Rs. 3,75,83,000/-
Mrs. Savithri	Rs. 1,61,25,200/-

(mother in law of the appellant)

Both the joint owners computed their part of Long term capital gain by adopting the sale consideration as above. It is pertinent to note that other joint owner Mrs. Savithri's case was also selected for scrutiny and the returned income has been accepted vide assessment order dated 08/11/2017 passed by ITO Non Corp Ward 1(5), Kochi.

7. The long term capital gain as computed by the appellant is as under:

LTCG on sale of immovable property other than residential	
Date of Acquisition	30.04.2005
Date of Transfer	16.07.2014
Sale Consideration	3,75,83,000
Less: Selling expense – Brokerage	7,51,660

<u>Acquisition details</u>	<u>Financial year</u>	<u>Cost</u>	<u>Indexed</u>	<u>Cost</u>
Acquisition of Immovable land and Development expenses	2005-06	50,60,966/-	1,04,27,423/-	
Capital Gain			2,64,03,917/-	

<u>Less: Exemptions</u>	<u>Date</u>	<u>Invested Amount</u>	<u>Exemptions</u>
54F: Purchase of Residential House	25.08.2014	91,32,240/-	65,46,780/-
54EC: Investment in bonds	28.08.2014	50,00,000/-	50,00,000/-

Taxable Capital Gains :	1,48,57,131/-
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The appellant's return was selected for scrutiny. It is stated in para 2 of the assessment order that the appellant did not respond to any of the notices sent via email mentioned in the return of income. It is submitted that none of the notices were served on the appellant. It is further stated that as per AIR data in the Sub Registry Office Maradu on transaction date 16/07/2014 the figure is Rs. 5,37,08,200/- whereas the appellant has shown the long term capital gain of Rs. 1,48,57,131/- therefore the differential sum of Rs. 3,88,51,069/-(5,37,08,200 - 1,48,57,131) has been added to the income of the appellant.

(It may be reiterated that the sum of Rs. 5,37,08,200/- is the total sale consideration as stated above)

In para 3 of the assessment order the assessing officer writes that a proposition notice dated 23/11/2017 was also emailed. This email was also not served upon the appellant. In view of the time barring nature of the proceedings and the

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alleged non compliance of the appellant to the notices issued, the assessment was concluded on best judgment u/s 143(3) r.w.s 144 of the Act.

Tax is computed accordingly and following interest is levied.

Interest u/s 234B Rs. 43,82,202/-  
Interest u/s 234C Rs. 2,61,360/-

### Submission

1. This appeal was filed by the appellant an individual on being aggrieved by the assessment order dated 15.12.2017 for Assessment Year 2015-16, passed u/s. 144 of the Income Tax Act, 1961.
2. The assessed income as per the order is Rs. 5,50,46,820/- as against the returned income of Rs. 1,61,95,750/-
3. The appellant is a non resident Indian since 1995. The appellant is working with Sony Middle East and Africa FZE and is based in Dubai.
4. For the year relevant to year under appeal, the appellant filed the return of income on 27/09/2016 declaring Total Income of Rs. 1,61,95,670/- which interalia included Long Term Capital Gain of Rs. 1,48,57,131/- on sale of property held jointly with Mrs. Savithri, mother in law of the appellant. The total sale consideration of the property sold was Rs. 5,37,08,200/- which was apportioned between joint owners as under: (as per page 5 of the sale deed dated 16/07/2014)

Appellant	Rs. 3,75,83,000/-
Mrs. Savithri	Rs. 1,61,25,200/-
(mother in law of the appellant)	Rs. 5,37,08,200/-

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5. Both the joint owners computed their part of Long term capital gain by adopting the sale consideration as above. It is pertinent to note that other joint owner Mrs. Savithri's case was also selected for scrutiny and the returned income has been accepted vide assessment order dated 08/11/2017 passed by ITO Non Corp Ward 1(5), Kochi. A copy of this assessment order is enclosed.
6. The long term capital gain computed by the appellant was as under:

LTCG on sale of immovable property

Date of Acquisition 30.04.2005

Date of Transfer 16.07.2014

Sale Consideration 3,75,83,000

Less: Selling expense – Brokerage 7,51,660

3,68,31,340

Acquisition details

	Financial year	Cost	Indexed Cost
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Acquisition of Immovable land and  
Development expenses

2005-06	50,60,966/-	1,04,27,423/-
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Capital Gain

2,64,03,917/-

Less: Exemptions

Date	Invested Amount	Exemptions
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54F: Purchase of Residential House	25.08.2014	91,32,240/-	65,46,786/-
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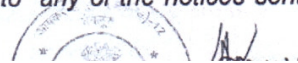
54EC: Investment in bonds	28.08.2014	50,00,000/-	50,00,000/-
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Taxable Capital Gains :

1,48,57,131/-

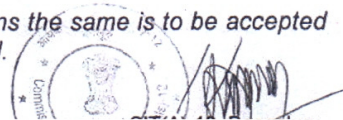
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7. The appellant's return was selected for scrutiny. It is stated in para 2 of the assessment order that the appellant did not respond to any of the notices sent via



email mentioned in the return of income. It is submitted that none of the notices were served on the appellant.

8. It is further stated in the assessment order that as per AIR data in the Sub Registry Office Maradu on transaction date 16/07/2014 the figure of consideration is Rs. 5,37,08,200/- whereas the appellant has shown the long term capital gain of Rs.1,48,57,131/-. Therefore the differential sum of Rs.3,88,51,069/-(5,37,08,200 - 1,48,57,131) is added to the income of the appellant.  
(It may be reiterated that the sum of Rs. 5,37,08,200/- is the total sale consideration as stated above got both for appellant and his mother-in-law and that while calculating the balance of capital gain the appellant had correctly adopted his share of consideration.)
9. In the assessment order passed exparte, the assessing officer has added a sum of Rs.3,88,51,069/-. The reason for addition as made the by the Assessing Officer in the assessment order is that the assessing officer has information in AIR data that there was a transaction in property for Rs.5,37,08,200/- and that the appellant has declared only Rs.1,48,57,131/- as capital gain and therefore the difference has been added to income.
10. At the outset, it is submitted that the Assessing Officer has erroneously compared gross sale consideration as per the sale deed with the net capital gain offered by the appellant. Infact, while computing the capital gain the appellant had shown his share of net sale consideration at Rs.3,75,83,000/-.
11. As stated above, the property was a joint property and the property was sold for total consideration of Rs.5,37,08,200/- of which the appellant's share was Rs.3,75,83,000/- as is apparent form Page No. 5 of the sale deed. A copy of the sale deed is enclosed.
12. The sale deed very clearly shows that two joint owners of the property had sold the property and total consideration was to be divided between the two vendors.
13. On receipt of the assessment order, the appellant filed an application u/s. 154 of the Act, for rectification of the assessment order. The Assessing Officer passed an order u/s. 154 on 22.05.2018 wherein the Assessing Officer reduced Rs.1,61,25,200/- being sale consideration attributable to the other co-owner, from the assessed income. The income as per order u/s. 154 of the Act, was Rs. 3,89,21,620/-.
14. It is to be emphasised here that while passing the original order, based on AIR information, the Assessing Officer had taken the capital gain at Rs. 5,37,98,200/- being gross sale consideration as per sale deed for both the co-owners. From this gross sale consideration, the Assessing Officer deducted the net capital gains offered to tax by appellant. This was done on an erroneous comparison of gross sale consideration with net income offered.
15. Further, as per the action of the Assessing Officer, the entire gross consideration is taxed without considering even the cost of the asset sold. Such an action of the Assessing Officer in taxing the entire gross consideration is bad in law and does not stand the test of law. On this ground above the addition as made and as sustained in the order u/s. 154 of Income-tax Act, 1961 is to be deleted.
16. The appellant had while computing the capital gains correctly taken his share of consideration and thereafter computed capital gains therefrom and exemption. The computation of capital gain as made by the appellant was duly filled on the return of income and the same was available with the assessing officer. The assessing officer has arrived at the net figure of capital gain of Rs.1,48,57,131/- from the return only. Further in assessing officer has not raised / made any assessments on the exemptions claimed by the appellant, even as the claim of exemption was available in the return of income.
17. The appellant having correctly compute the capital gains the same is to be accepted and the addition are sought to be made is to be deleted.



18. In any case, and without prejudice the appellant submits that an assessment based on AIR information is not valid in law. In the following cases, it has been so held:-
- (i) *Nozaki Finance & Investment (P) Ltd., vs. DCIT (Mumbai)* ITA No. 6166/Mum/2012 and 2136/Mum/2009.
  - (ii) *DCIT vs. MS. Deloitte Touche Tohmatsu [(ITAT (Mumbai))]* ITA. 3017/Mum/2016.
  - (iii) *DCIT vs. G. Selva Kumar* ITA No. 868/BANG/2009
  - (iv) *Ariti Raman vs. DCIT, Bangalore* ITA No. 245/Bang/2012
  - (v) *M/s. Fergunton & Co., vs. JCIT*
19. The appellant submits accordingly.

3.2 The Ld.CIT(A) observed that, the total consideration received by the assessee amounting to Rs.3,75,83,000/- was not acceptable to the Assessing Officer. The assessee filed copy of the sale deed dated 16/07/2014 according to which the total sale consideration received towards the sale of 8.36 acres of land was Rs.5,37,08,200/- out of which assessee received a consideration of Rs.3,75,83,000/- for parting with 5.85 acres of land and Smt. Savitri Vipin Chandra being the co-vendor in the sale deed received consideration of Rs.1,61,25,200/- for parting with 1.62 acres of land.

3.3 The Ld.CIT(A) accepted the sale consideration received by assessee to be Rs.3,75,83,000/- in respect of the LTCG computation. However, the Ld.CIT(A) noted that assessee claimed brokerage expenses of Rs.7,51,660/- in respect of which assessee filed evidences to support the claim. The Ld.CIT(A) rejected the brokerage expenses paid by the assessee on the ground that PAN No. were not taken from the persons to whom the brokerage was paid in cash.

3.4 The Ld.CIT(A) further noted that the property was purchased vide deed dated 23/09/2005 for Rs.23,68,000/- at measuring total area of land being 12.14 acres. The Ld.CIT(A) noted that the assessee bifurcated 5.85 acres of land and sold the same during A.Y. 2015-16 along with co-vendor being Smt. Savitri Vipin

Chandra and cost of acquisition of the land sold was arrived at Rs.11,41,090/-. The Ld.CIT(A) was of the opinion that the assessee was eligible for the proportionate cost of acquisition and allowed indexation being 1024/497.

3.5 The Ld.CIT(A) further noted that assessee claimed that land purchased underwent lot of improvement from 31/12/2005 to 14/11/2006 in respect of which, bank statement account was submitted. The Ld.CIT(A) noted that, the assessee had withdrawn Rs. 2 Lakhs during A.Y. 2006-07 and Rs. 17.50 Lakhs during A.Y. 2007-08. As assessee failed to submit the details of the work executed, purchase of any commodities / any labour payments, contract payments, cost of improvement claimed was disallowed.

3.6 The Ld.CIT(A) thus computed the long term capital gains after granting deduction claimed by assessee of the investments made u/s. 54EC amounting to Rs.50 Lakhs as under:

Consideration received on Sale of 5.85 Ares of land on 16.7.2014	3,75,83,000
Commission claimed paid of Rs.7,51,660	Disallowed
Indexed Cost of acquisition of 5.85 Ares of land on 23.9.2005	23,51,058
Cost of improvement claimed for AY 2006-07 and 2007-08	Disallowed
Cost of purchase of new house property u/s 54F	65,46,786
Investment in 54EC bond	50,00,000
Long term capital gains	2,36,85,156

3.7 The Ld.CIT(A) also initiated penalty proceedings on account of wrong particulars of income filed as well as for concealing taxable income on the issue of LTCG.

Aggrieved by the order of Ld.CIT(A), assessee filed appeal before this *Tribunal*.

4. Before this *Tribunal*, the Ld.AR submitted that while granting order giving effect to the CIT(A) order, the Ld.AO has granted relief to Rs.1,42,63,887/- and computed the net taxable income at Rs.2,46,57,773/-. She submitted that assessee has been denied the brokerage paid amounting to Rs.7,51,660/- and also denied the cost of improvement claimed the exemption claimed u/s. 54F and 54EC amounting to Rs.1,15,46,786/- in the rectification order passed by the Ld.AO dated 22/05/2018.

5. The Ld.AR submitted that assessee had not furnished any inaccurate particulars or concealed any material facts for the purpose of completing the assessment. She submitted that the Ld.AO on assumption of wrong facts made disallowances. It is submitted by the Ld.AR that the Ld.CIT(A) on verifying various submissions of the assessee granted relief partially. This itself shows that there was no concealment of facts by the assessee or filing of inaccurate particulars. The Ld.AR submitted the addition was confined only to the extent of commission paid for sale of property and indexed cost of improvement for want of PAN details of the persons to whom it was paid. She submitted that the revenue do not doubt the payment made through banking channel. She thus prayed for deleting the penalty levied in the above facts of the case.

On the contrary, the Ld.DR placed reliance on orders passed by authorities below.

We have perused the submissions advanced by both sides in the light of records placed before us.

6. In order to appreciate the submission advanced by the Ld.AR, it is necessary to read the relevant penal provision. For sake of convenience, the same is reproduced hereunder:

*"271.Failure to furnish returns, comply with notices, concealment of income, etc. (1) If the Assessing Officer or the Commissioner (Appeals) or the Commissioner in the course of any proceedings under this Act, is satisfied that any person-*

*.....  
(c) has concealed the particulars of his income or furnished inaccurate particulars of such income, he may direct that such person shall pay by way of penalty,-*

*(ii). .....*

*(iii) in the cases referred to in clause (c), in addition to any tax payable by him, a sum which shall not be less than, but which shall not exceed three times, the amount of tax sought to be evaded by reason of the concealment of particulars of his income or the furnishing of inaccurate particulars of such income*

*Explanation 1.-Where in respect of any facts material to the computation of the total income of any person under this Act,-*

*(A) such person fails to offer an explanation or offers an explanation which is found by the Assessing Officer or the Deputy Commissioner (Appeals) or the Commissioner(Appeals) to be false, or*

*(B) such person offers an explanation which he is not able to substantiate and fails to prove that such explanation is bonafide and that all the facts relating to the same and material to the computation of his total income have been disclosed by him,*

*then, the amount added or disallowed in computing the total income of such person as a result thereof shall, for the purposes of clause (c) of this sub-section, be deemed to represent the income in respect of which particulars have been concealed.*

7. As evident from the aforesaid cl.(c) of s.271(1) of the Act, the words used are '*has concealed the particulars of his income*' or, '*furnished inaccurate particulars of such income*'. In both situation of concealment and inaccuracy, the legislature has used phrase, '*particulars of income*'. The legislature has not used the words 'concealed his income'. This is the reason why various *Hon'ble High Courts* and *Hon'ble Supreme Court* held that, the penal provision would operate when there is a failure to disclose fully or truly all the material particulars of income which lead to the correct computation of income in accordance with the provisions of the Act. So when any fact material to the determination of an item as income or material to the correct computation is not filed or that which is filed is not accurate, then the assessee would be liable to penalty under s. 271(1)(c) of the Act. The expression '*has concealed the particulars of income*' and '*has furnished inaccurate particulars of income*' have not been defined either in section 271 or elsewhere in the Act. However, notwithstanding the difference in the two circumstances, it is now well established that they lead to the same effect namely, keeping off a certain portion of the income from the return. According to Law Lexicon, the word "conceal" means:

*"to hide or keep secret. The word 'conceal' is con+celare which implies to hide. It means to hide or withdraw from observation; to cover or keep from sight; to prevent the discovery of ; to withhold knowledge of. The offence of concealment is, thus, a direct attempt to hide an item of income or a portion thereof from the knowledge of the income-tax authorities."*

8. If the disclosure of facts is incorrect or false to the knowledge of the assessee, and this fact is established, then such disclosure cannot take such assessee out from the purview of the act of

concealment of particulars or furnishing inaccurate particulars for the purpose of levy of penalty. The penalty u/s 271(1)(c) of the Act is leviable if the AO is satisfied in the course of any proceedings under this Act that any person has concealed the particulars of his income or furnished inaccurate particulars of such income.

9. In the present facts of the case the Ld.CIT(A) has not made out a case where the assessee has filed any inaccurate particulars or concealed any income. Assessee has filed all relevant materials for determining the income in his hands. The Ld.CIT(A) has not unearthed any details/ evidences that has lead to enhancement of income in the hands of the assessee.

10. In fact the enhancement of income by the Ld.CIT(A) is due to disallowance made by the Ld.CIT(A) of the commission paid and the cost of improvement claimed by the assessee for the reason that the assessee did not collect the PAN of the persons to whom the payments were made. There is no doubted that the payments were made through banking channels. Merely because the assessee did not collect PAN details of the Payees, and the bills and vouchers of most of the payments, the disallowance was made.

11. In our opinion, in the present facts, assessee cannot be penalized either for *concealment of particulars of income* or *furnishing of inaccurate particulars of income*.

We therefore delete the penalty levied by the Ld.CIT(A).

**Accordingly the grounds 5.1 to 5.3 raised by the assessee stands allowed.**

**12. Ground Nos. 2-4** are on the issue of levy of penalty by the Ld.dCIT(A). As we have allowed the ground raised by the assessee on merits, we are not inclined to decide this issue.

**13. Ground Nos.1& 6** is general in nature and do not require adjudication.

**Accordingly the appeal filed by the assessee stands allowed partly.**

**In the result, the appeal filed by the assessee stands partly allowed.**

Order pronounced in the open court on 1<sup>st</sup> December, 2022.

**Sd/-**

(LAXMI PRASAD SAHU)  
Accountant Member

**Sd/-**

(BEENA PILLAI)  
Judicial Member

Bangalore,  
Dated, the 1<sup>st</sup> December, 2022.  
/MS /

**Copy to:**

- |               |                        |
|---------------|------------------------|
| 1. Appellant  | 4. CIT(A)              |
| 2. Respondent | 5. DR, ITAT, Bangalore |
| 3. CIT        | 6. Guard file          |

By order

Assistant Registrar,  
ITAT, Bangalore