

**IN INCOME TAX APPELLATE TRIBUNAL
“B” BENCH : BANGALORE**

**BEFORE SHRI. LAXMI PRASAD SAHU, ACCOUNTANT MEMBER
AND SHRI. SOUNDARARAJAN K, JUDICIAL MEMBER**

ITA No.1391/Bang/2024
Assessment Year : 2014-15

Shri. Kumaraswamy Gangadharaiah Kallur, C-505 Poorva Heights, Bilekahalli, Bannerghata Road, Bangalore – 560 076. PAN : ADIPK 7385 F	Vs.	DCIT, Circle –2(2)(1), Bangalore.
APPELLANT		RESPONDENT

Assessee by	:	Shri. Sandeep Chalapathy, CA
Revenue by	:	Shri. E. Shridhar, CIT(DR)(ITAT), Bangalore.

Date of hearing	:	23.01.2025
Date of Pronouncement	:	06.02.2025

ORDER

Per Laxmi Prasad Sahu, Accountant Member :

This appeal filed by the assessee is against the Order passed by PR. CIT, Bangalore – 2, vide DIN and Order No.ITBA/REV/F/REV5/2023-24/1063188555(1) dated 29.10.2024, for the Assessment Year 2014-15, challenging the Order of learned PR. CIT as under, on the following grounds of appeal:

1. That the order of the learned Principal Commissioner of Income Tax in so far it is prejudicial to the interests of the appellant, is bad and erroneous in law and against the facts and circumstances of the case.
2. That the order u/s 263 of the Act is bad in law as the order u/s 147 r.w.s 144 of the Act is neither erroneous in law nor prejudicial to the interests of the revenue.
3. That the learned Principal Commissioner of Income Tax erred in law and on facts in holding that the assessment order is prejudicial to the interests of the revenue on the ground that penalty proceeding u/s 271B of the Act is not initiated.
4. That the learned Principal Commissioner of Income Tax erred in law and on facts in holding that assessment order is set aside even though the twin conditions provided u/s 263 of the Act are not satisfied.
5. That the proceedings u/s 263 of the Act is bad in law as the direction to initiate the penalty proceedings u/s 271B of the Act cannot be made since the same is an independent proceeding and need not be initiated in the assessment order.
6. That the learned Principal Commissioner of Income Tax erred in law and on facts in not appreciating the fact that the appellant has filed the audit report along with the return of income.
7. That the order u/s 263 of the Act is bad in law as the initiation of penalty proceedings are discretionary and not mandatory and therefore, such direction cannot be issued.

Each of the above grounds is without prejudice to one another, the appellant herein seeks the leave of the Hon'ble Income Tax Appellate Tribunal, Bangalore to add, delete, amend or otherwise modify each or any of the grounds of appeal either before or at the time of hearing this appeal.

2. Briefly stated, the facts of the case are that assessee filed return of income on 28.02.2015 declaring total income of Rs.1,08,58,460/- and AO completed assessment and Order was passed under section 143(3) of the Act on 16.12.2016 accepting the return of income. Later it was noticed

that the assessee has not disclosed on record the source of expenditure through credit card transactions and the assessee has also carried out multi-commodity transactions, as per commercial practice, 10% of the peak transaction has to be invested with the broker. The assessee has not placed on record details of actual net investment explaining the source of such investment in respect of quantum of the multi commodity exchange transactions. Therefore, the case was reopened by issuing notice under section 148 of the Act and reassessment was completed under section 147 of the Act, dated 30.03.2022 and addition was made of Rs.2,16,18,182/-. Later on, the learned Pr.CIT called for the record and observed that the assessee has filed audit report in Form 3CB dated 27.01.2015. The assessee has got his accounts audited beyond the due date prescribed under section 44AB of the Act, and extended due date as per the CBDT Order under section 119 of the Act, dated 20.09.2024, the extended due date was 30.11.2014. However, the assessee has filed return of income on 28.02.2015 enclosing the audit report which is beyond the specified due date and hence the assessee is liable for penalty under section 271B of the Act. However, during the course of reassessment proceedings, the AO has not initiated penalty proceedings under section 271B of the Act in the Assessment Order. Therefore, the Order passed by the AO is erroneous and prejudicial to the interest of the Revenue. The learned Pr.CIT noted that the Order passed by the AO under section 147 r.w.s. 144B of the Act, dated 30.03.2020 is erroneous in so far as it is prejudicial to the interest of the Revenue in terms of section 263 of the Act, and reassessment Order was set aside, the AO is directed under section 263 of the Act to make fresh assessment in accordance with law and as per CBDT instructions on this subject.

3. Aggrieved from the Order of the learned Pr. CIT, the assessee has filed appeal before the Tribunal. The learned Counsel for the assessee reiterated the submissions made before the lower authorities and submitted that the learned Pr.CIT has no power to exercise his jurisdiction under section 263 of the Act in the case of penalty proceedings is not initiated by the AO while completing the assessment / reassessment as per Income Tax Act. The penalty proceeding is an independent proceeding and need not mention in assessment / reassessment Order. During the course of assessment under section 143(3) of the Act, the audit report was available with the AO and he was satisfied that the penalty should not be initiated in this case and hence there was no penalty levied under section 271B of the Act in spite of audit report furnished after extended due date of filing of return as per section 139(1) of the Act. He further submitted that in the reassessment proceedings, the learned Pr. CIT has no power to direct the AO to make penalty under section 271B of the Act since in this case, the assessee was liable to get his books of accounts audited within the due date and in the first round of proceedings there was no penalty levied under section 271B of the Act and AO accepted. The reasons for reopening under sections 147 / 148 of the Act was different from the powers exercised by the learned Pr. CIT. This issue is not emanating from the reasons recorded for initiating reassessment proceedings . Therefore, the learned Pr. CIT has no power to exercise his jurisdiction under section 263 of the Act he relied on the following judgments :

4. On the other hand, the learned DR relied on the Order of the learned Pr. CIT and submitted that the AO has to initiate penalty in the reassessment order which is a mandatory form for the AO to mention before passing the Assessment Order. Therefore, the argument advanced

by the assessee is wrong. Thus, the not mentioning by the ITO to initiate penalty proceedings during the course of assessment / reassessment renders the Assessment Order erroneous and prejudicial to the interest of the Revenue. The learned DR relied on the Order of the Co-ordinate Bench of the ITAT, Mumbai, in the case of Anjis Developers Pvt. Ltd., Vs. PR. CIT in ITA No.959/Mum/2022, dated 20.02.2023, in which the judgment of various Orders of the Hon'ble High Courts have been relied on and the Hon'ble Allahabad High Court has decided this issue in favour of the Revenue. Therefore, he requested that the Order of the learned Pr. CIT should be upheld. The case laws relied on by the learned Counsel for the assessee are not acceptable.

5. Considering the rival submissions, we noted that in the first round of assessment proceedings, the case was completed under section 143(3) of the Act. The return was filed by the assessee on 28.02.2015 along with Form 3CB of the Act, dated 27.01.2015 which was beyond the extended due date for filing of return of income under section 139(1) of the Act. The case was reopened after issue of notice under section 148 of the Act and case was completed under section 147 of the Act on the reason that the assessee has not recorded the Credit Card transactions and the source of 10% of deposit with the brokers were not explained. Accordingly, the reassessment was completed and the addition was made under section 69C of the Act. Accordingly, the total addition as made of Rs.2,16,18,182/- and the total transaction carried out by the assessee was Rs.16,27,02,200/-. Here, the dispute arises only for non initiation of penalty under section 271B of the Act, by the AO during the reassessment proceedings. We noted that the assessee had filed return of income belatedly after uploading of tax audit report in Form 3CB but in the first round of assessment

proceedings, under section 143(3) of the Act, there was no penalty initiated by the AO. However, in the reassessment proceedings, the addition was made under section 69C of the Act which is a fictional provision and the income assessed by the AO is beyond the purview of sections 28 to 44 of the Act. Therefore, the addition is not part of the turnover of the assessee which can be taxed under the head profit and gains of business or profession. Therefore, initiation of penalty by the learned Pr. CIT under section 263 of the Act holding that the Order passed by the AO in reassessment proceedings is erroneous and prejudicial to the interest of Revenue is not acceptable. Therefore, we set aside the Order of the learned PR. CIT. We also found substance in the arguments of the learned DR that AO should have initiated penalty proceedings in the reassessment order and the case law relied on by the learned DR is applicable to the facts of the present case. However, this is a reassessment proceeding. Therefore, the learned Pr. CIT has to restrict his jurisdiction only up to the reasons recorded for initiation of reassessment proceedings. The basis for additions are correlated with the reasons stated in the reassessment order and made addition under section 69 and 69C of the Act, therefore the penalty proceedings on the basis of reassessment order is beyond his jurisdiction. The provision of section 44AB of the Act are not applicable to the fictional provisions like section 68, 69, 69A, 69B, 69C & 69D. Therefore, the entire arguments of the learned DR and case law relied noted supra are not acceptable. In view of this the order passed by the ld. Pr. CIT is set aside.

6. In the result, appeal filed by the assessee is allowed.

Pronounced in the court on the date mentioned on the caption page.

Sd/-

(SOUNDARARAJAN K)
Judicial Member

Sd/-

(LAXMI PRASAD SAHU)
Accountant Member

Bangalore,

Dated : 06.02.2025.

/NS/*

Copy to:

1. Appellant
2. Respondent
3. Pr.CIT4.CIT(A)
5. DR, ITAT, Bangalore.

By order

Assistant Registrar
ITAT, Bangalore.