

IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH : BANGALORE

BEFORE SHRI B R BASKARAN, ACCOUNTANT MEMBER
AND SMT. BEENA PILLAI, JUDICIAL MEMBER

ITA No.1809/Bang/2018
Assessment year: 2014-15

Shri D.S. Patil, No.456, 3 rd Cross, 4 th Main Road, HMT Layout, Anandnagar, Bengaluru - 560 024. PAN: AEGPP 8280F	Vs.	The Principal Commissioner of Income Tax (Central), Bangalore.
APPELLANT		RESPONDENT

Appellant by	:	Shri R.E. Balasubramanyam, CA
Respondent by	:	Shri Muzaffar Hussain, Jt.CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	05.04.2021
Date of Pronouncement	:	19.04.2021

ORDER

Per Smt. Beena Pillai, JM

Present appeal has been filed by assessee against order dated 23/01/2018 passed by the Ld.Pr.CIT under section 263 of the Act, for assessment year 2014-15 on following grounds of appeal:-

The appellant objects to the order of revision of the Ld. PCIT on the grounds that,

- 1) The impugned order is opposed to the law and facts of the case in so far it is prejudicial to the interests of the appellant
- 2) The impugned order of revision is invalid and unwarranted inasmuch as the assessing officer had dropped the penalty proceedings after due application of mind and the Ld. PCIT has merely substituted his own opinion in exercising jurisdiction under section 263
- 3) The Ld. PCIT erred in setting aside the penalty proceedings under 271AAB and directing the assessing officer to pass the penalty order and in doing so
 - a) The Ld. PCIT failed to appreciate that the Ld.AO had dropped the penalty proceedings after considering both the oral submissions as well as the written submissions made by the AR of the assessee
 - b) The Ld.PCIT misdirected herself in holding that penalty under 271AAB is mandatory when no such interpretation of the statute is called for.
- 4) The Appellant prays for leave to add, modify, delete or introduce additional Grounds of Appeal at any time before the Appeal is disposed off.

Based on these and such other grounds that may be adduced from time to time, the Appellant requests the Honorable ITAT to consider the petition in the light of principles of justice, and cancel the penalty levied u/s 271AAB by Sec.263 order

2. Admittedly, there is a delay of 52 days in preferring present appeal before this *Tribunal*. In the application

seeking can donation of delay dated to June 2018 filed by assessee, it has been submitted that after receiving the order under section 263, assessee was under the impression that the redressal of the issue is available only before the Ld.AO. It has been submitted that it is only when the second opinion was sought the assessee came to know that he could have filed appeal before this *Tribunal* against the order under section 263 of the Act. Thus after making available all the relevant documents to the Ld.AR, the present appeal was filed on 23/05/2018 thereby causing a delay. It is thus prayed that the delay may be condoned in the interest of Justice and the appeal be heard on merits.

3. We have considered the application for condonation of delay and the affidavit filed by assessee in support of. We are of the view that the delay in filing the appeal before this Tribunal was due to reasonable cause and therefore the delay in filing the appeal is condoned.

Accordingly the application dated 02/06/2018 stands allowed.

4. **Brief facts of the case are as under:**

A search and seizure operation was conducted in case of M/s.Shobha Developers Ltd. on 10/10/2013. At the time

of scrutiny proceedings by assessing officer in case of M/s Shobha Developers, the Ld.AO found that seized folder and exist in A/DSP/03 does not belong or pertain to M/s.Shobha developers but to the present assessee. It was observed that the folder contained bills/vouchers of jewellery purchased in the name of assessee. A statement was recorded under section 132(4) on 10/10/2013 wherein assessee confirmed that the jewellery was found from its residents and it belonged to assessee. The Ld.AO of M/s Shobha Developers was satisfied that those documents have a bearing on the determination of total income of assessee and hence the materials were handed over to the assessing officer having jurisdiction over assessee.

5. After going through the seized material the Ld.AO in case of assessee was satisfied that the documents have a bearing on the determination of total income of assessee accordingly notice under section 153C of the Act, was issued for assessment years 2008-09 to 2013-14.

6. The Ld.AO observed that assessee had filed return of income on 07/09/2015 for year under consideration declaring gross total income of Rs.81,25,403/- and total income of Rs.80,15,400/- as salary income. Thereafter notice under section 143(2) of the Act was issued and

served on assessee. In response to statutory notices, assessee appeared before Ld.AO and filed requisite details as called for.

7. During the assessment proceedings the Ld.AO observed that assessee was in possession of gold jewellery of 996.64 g and silver articles of 2000 g and the same was valued at Rs.17,97,326/-. The Ld.AO in a statement recorded under section 132(4) of the Act recorded that assessee had not filed wealth tax returns till the date. After considering various submissions, the Ld.AO added sum of Rs.2,42,727/- as unexplained money/ jewellery etc., under section 69A of the Act. While passing the assessment order the Ld.AO initiated penalty proceedings under section 27AAB separately for concealment of income by assessee for unexplained investments.

8. Upon receipt of notice under section 271AAB, assessee filed its reply. The Ld. AO on considering the reply filed by assessee dropped the penalty proceedings under section 271AAB on 24/05/2016 by making an entry into the order sheet.

9. The Ld.Pr.CIT called for the assessment records and found the assessment order to be erroneous in so far as it was prejudicial to the interest of the revenue since the

assessing officer had dropped the penalty proceedings under section 271AAB of the Act. The Ld.Pr.CIT, accordingly issued notice under section 263 on 09/08/2017 asking the assessee to show cause as to why the action of assessing officer in dropping the penalty proceedings should not be reviewed. In response to the notice, assessee filed its reply dated 28/09/2017 by submitting that the twin conditions under section 263 of the act was not satisfied and that the proceedings initiated under section 263 of the Act was a mere revision of proceedings which cannot be invoked. It was also submitted that the penalty under section 271 AAB is not automatic as it could be initiated only in case of searched person.

10. The Ld.Pr.CIT however held that the Ld.AO dropped the penalty proceedings in a mechanical manner without any application of mind. He accordingly set aside the penalty proceedings under section 271 AAB for assessment year 2014-15 to the Ld. AO with a direction to pass the penalty order under section 271 AAB after duly considering the observations made by the Ld.Pr.CIT in the order passed under section 263 of the Act, and after allowing assessee adequate opportunity of being heard to make relevant submissions.

11. Aggrieved by the order of Ld.Pr.CIT, assessee is in appeal before us now.

12. In the present appeal the issue that requires adjudication is as to whether the Ld.Pr.CIT was justified in holding that penalty proceedings dropped by the Ld. AO under section 271AAB of the act without application of mind and thus pass an order under section 263 of the act by holding that the assessment order so passed is erroneous insofar as prejudicial to the interest of the revenue.

13. We note that the assessment order was passed under section 153C of the act and the assessee is challenging the action of Ld.Pr.CIT as penalty under section 271AAB cannot be imposed in an assessment framed under section 153C of the act. Reliance has been placed to the decision of *Hon'ble Ahmedabad bench of this Tribunal* in case of *DCIT vs Shreeji Corporation* reported in *TS-10299-ITAT-2018 (Ahmedabad)-O* assessment years 2012-13 and 2013-14, decision of *Hon'ble Panaji bench of this Tribunal* in case of *DCIT vs Volga Dressers* reported in *TS-5425-ITAT-2017 (Panaji)-O* for assessment years 2013-14 and 2014-15. Our attention is also been drawn to *coordinate bench of this Tribunal* in case of *Sudesh Kerudi*

us ITO reported in TS-8070-ITAT-2019 (Bangalore)-O for assessment year 2007-08 to 2012-13.

14. We note that this Tribunal observed and held as under:

"10. We have considered the rival submissions. We find that an identical plea was put forth by the assessee in the case of Shreeji Corporation (supra) and the Ahmedabad Bench of the Tribunal in its order accepted the stand and held as follows:-

"5. A perusal of the assessment order undisputedly points out that no search had taken place in the case of the assessee per se under s.132 of the Act. A bare reading of law codified in Section 271AAB(1) clearly provides that the AO may direct the assessee to pay a sum by way of penalty at specified percentage where undisclosed income of the specified previous year has been detected as a result of search under s.132 of the Act. Section 271AAB(1)(a) however simultaneously provides concessional treatment in the matter of penalty under s.271AAB where the assessee admits the undisclosed income in a statement under sub-section 4 of Section 132 of the Act subject to fulfillment of other conditions with which we are presently not concerned with. Therefore, it is manifest that applicability of Section 271AAB is integrally connected to search under s.132 of the Act. In the absence of search under s.132 of the Act, the assessee has no occasion to avail the concessional treatment by way of admission under s.132(4) of the Act. Thus, we find obvious merits in the observations made by the first appellate authority that provisions of Section 271AAB of the Act are not applicable to the case of the assessee. In the absence of search under s.132 of the Act, the consequential or incidental assessment proceedings under s.153C of the Act will not, in our view, entitle the AO to usurp jurisdiction under s.271AAB of the Act for the purposes of

imposition of penalty. Hence, we do not see any infirmity in the conclusion drawn by the CIT(A)."

11. *The Pune Bench of the Tribunal in the case of Volga Dresses (supra) has also taken a similar view:-*

"6. We have considered the rival submissions. A perusal of the provisions of section 271AAB shows that the opening words are "penalty where search has been initiated" a perusal of the provisions under Section 271AAB also talks of the assessee declaring any undisclosed income in the course of the search in the statement under section 132(4). Admittedly in the present case, that is in the case of the assessee firm in appeal there has been no search. Search admittedly is on the residence of one of the partner of the assessee firm. Further a perusal of the order of the learned CIT(A) also clearly shows that the learned CIT(A) has cancelled the penalty on the ground that there was no search in the case of the assessee firm. The revenue has not been able to point out as to how this finding of the learned CIT(A) is erroneous. This being so the finding of the learned CIT(A) on this issue stands confirmed."

15. The facts of the present case are also identical as there was no search in the case of present assessee before us and assessee has admittedly accepted the jewellery in a statement under section 132(4) of the act pursuant to which notice under section 153C was issued to assessee.

16. The coordinate benches have taken the view that the penalty u/s. 271AAB can be levied in the hands of a searched person only. The assessee herein is not subjected to search, meaning thereby, penalty u/s.

271AAB cannot be levied in the hands of the assessee. Even though, the AO has not cited any reason for dropping penalty proceedings, yet the fact remains that the penalty u/s. 271AAB cannot be levied in the hands of the assessee, as opined by coordinate benches. Hence, very initiation of revision proceedings is not in accordance with law and the same cannot be sustained. Even otherwise, there is possibility of two views on the issue of levying of penalty u/s. 271AAB of the Act in the hands of the assessee. Accordingly, we quash the revision order passed by the Ld.Pr.CIT.

Accordingly ground No. 3 raised by assessee stands allowed.

17. We note that ground No. 1 and 2 are general in nature and therefore do not require adjudication.

18. Accordingly appeal filed by assessee stands allowed.

Pronounced in the open court on this 19th day of April, 2021.

Sd/-
(B R BASKARAN)
ACCOUNTANT MEMBER

Sd/-
(BEENA PILLAI)
JUDICIAL MEMBER

Bangalore,
Dated, the 19th April, 2021.

/Desai S Murthy /