

**IN THE INCOME TAX APPELLATE TRIBUNAL CUTTACK**

**'SMC' BENCH, CUTTACK**

**BEFORE SHRI N.S SAINI, ACCOUNTANT MEMBER**

**ITA No. 363/CTK/2015: Assessment Year : 2010-2011**

**ITA No. 364/CTK/2015: Assessment Year : 2010-2011**

Asha Manjari Mishra, 191, Kharavel Nagar, Unit-III, Bhubaneswar.	Vs.	ACIT, Circle 2(1), Bhubaneswar.
PAN/GIR No. ABKPM 7704 J		
<b>(Appellant)</b>	..	<b>( Respondent)</b>

Assessee by : Shri G.Nayak, AR

Revenue by : Shri D.K.Pradhan, DR

**Date of Hearing : 15 /03/ 2017**

**Date of Pronouncement : 15/03/ 2017**

**ORDER**

ITA No.363/CTK/2015 is filed by the assessee against the order of CIT(A)-2, Bhubaneswar, dated 22.5.2015, in confirming the levy of penalty of Rs.5,69,730/- u/s.271(1)(c) of the Act for the assessment year 2010-11.

2.. ITA No.364/CTK/2015 is filed by the assessee against the order of CIT(A)-2, Bhubaneswar, dated 21.5.2015, for the assessment year 2010-11, in the matter of assessment u/s.143(3) of the Act.

3. First, we take up the appeal in ITA No.364/CTK/2015.

4. The grievance of the assessee is that the CIT(A) erred in confirming the action of the Assessing Officer in sustaining the addition of Rs.6,91,203/- as speculation income, Rs.1,34,733/- as income from mutual fund and Rs.10,62,223/- as agricultural income made by the Assessing Officer.

5. I have heard the rival submissions and perused the orders of lower authorities and materials available on record.

6. The brief facts of the case are that the assessee claimed to have earned short term capital gain from sale of shares of Rs.8,59,461/-. On verification, the Assessing Officer found that the shares were purchased and sold by the assessee on the same date. He noted from the contract note of Oasis Securities Pvt Ltd., that all the purchases were made on 9.1.2010 and sales were also made on the same date. He also found that the shares purchased were not actually delivered. He held that the nature of transaction was speculation income and not short term capital gain.

7. On appeal, the CIT(A) held that the short term capital gain of Rs.8,59,461/- comprising of profit on sale of investment in commodity lies of Rs.6,91,203/-, profit on sale of Mutual Funds of Rs.1,68,258/-. He held that the profit in trading in Mutual Fund of Rs.1,34,733/- was to be treated as business income and profit of Rs.6,91,203/- earned from speculation income in commodities is to be treated as speculation income under the head "profits and gains from business/profession".

8. Ld Authorised Representative of the assessee submitted that the CIT(A) was not justified in treating the sale of investment in commodities of Rs.6,91,203/- as speculation income under the head "profits and gains from business/profession" and profit on sale of Mutual Fund of Rs.1,34,733/- as "business income". He submitted that the assessee was an investor and not a trader in shares and commodities in sale and, therefore, the gain was short term capital gain of the assessee.

9. Ld Departmental Representative supported the orders of lower authorities.

10. I find that the Assessing Officer has stated that the purchase and sale of shares in commodity were made on the very same date without delivery. This finding of the Assessing Officer has not been controverted by the Ld Authorised Representative of the assessee by bringing any positive material on record. If the argument of the A.R. of the assessee is to be accepted that the assessee was an investor and not a trader, then no investor would sale the shares on the very same date of the purchase or within 2 to 3 days of the purchase. Therefore, I do not find any good and justifiable reason to interfere with the order of the CIT(A), which is hereby confirmed and the ground of appeal of the assessee is dismissed.

11. The only other remaining ground of the assessee is that the CIT (A) was not justified in confirming the addition of Rs.10,62,223/- as agricultural income.

12. The Assessing Officer observed that the assessee claimed agricultural income of Rs.6,49,773/-. On verification of records, it is seen that the agricultural land was taken on lease by the assessee by the assessee later than sales made. The gross receipts of the assessee were Rs.10,62,223/- . From the lease agreement of the land with Shri Ramakanta Acharya admeasuring 8.034 acres, it is seen that the lease agreement was made on 5.10.2009. The lease agreement makes no mention of any standing sugarcane crops. Sugarcane takes minimum of 4-6 months to ripen and be used as seed. He observed that the sales had been made even before the lease was executed. In case sales have been made after the lease was signed, they were just 2 months after the lease was signed. The assessee was required to produce copy of contract agreement for supply of seeds. The assessee filed copy of agreement for crushing season 2010-11, which was later than the previous year relevant to the current assessment year. Thus, the Assessing Officer concluded that the contract to supply sugarcane seeds have been signed in the next year but the assessee has shown agricultural income from sugar factory Nayagarh for Rs.10,62,223/- and after deduction of expenditure of Rs.4,12,450/- shown agricultural income of Rs.6,49,773/-. Hence, he held that the assessee could not substantiate the expenditure made against the income received and made addition of Rs.10,62,223/- to the income of the assessee.

13. On appeal, the CIT(A) confirmed the action of the Assessing Officer observing that the credit introduced in the name and guise of agricultural income was income from unexplained sources of the assessee.

14. Ld Authorised Representative of the assessee reiterated the submissions before the lower authorities.

15. Ld Departmental Representative supported the orders of lower authorities.

16. I find that the assessee has brought no positive material on record to controvert the findings of the Assessing Officer as well as the CIT(A). Hence, I find no reason to interfere in the order of the CIT(A), which is hereby confirmed and ground of appeal of the assessee is dismissed.

17. In the result, the appeal filed by the assessee is dismissed.

18. In ITA No.363/CTK/2015, the grievance of the assessee is that the CIT(A) erred in confirming the levy of penalty of Rs.5,69,730/- u/s.271(1)(c) of the Act.

19. At the outset, Ld Authorised Representative of the assessee submitted that in the penalty order, the Assessing Officer has stated in para 5 at page 3 of the order that penalty proceedings u/s.271(1)(c) for concealment of income and for furnishing inaccurate particulars of income was initiated in respect of the additions made amounting to Rs.18,88,159/-. He submitted

that the Hon'ble Supreme Court in the case of CIT vs. SSA's. Emarld Meadows dated 11<sup>th</sup> January, 2017 passed in Special Leave to Appeal (CC No.11485/2016) has held that Omission by the AO to explicitly specify in the penalty notice as to whether penalty proceedings are being initiated for furnishing of inaccurate particulars or for concealment of income makes the penalty order liable for cancellation. Hence, he submitted that penalty of Rs.5,69,730/- imposed by the Assessing Officer u/s.271(1)(c) is, therefore, liable to be cancelled.

25. The Departmental Representative could not controvert the above submission of Id Authorised Representative of the assessee.

26. I find that the facts in the present appeal are not in dispute and the Assessing Officer in the order passed u/s.271(1)(c) dated 30.9.2013 levied penalty of Rs.5,69,730/- observing at page 3 para 5 as under:

"Proceedings u/s.271(1)(c) of I.T.Act for concealment of income and for furnishing inaccurate particulars was also initiated in respect of the additions made. "

Therefore, the facts of the present appeal are identical to the facts of the case before the Hon'ble Supreme Court in the case of SSA's. Emarld Meadows(supra) and, therefore, the decision of Hon'ble Supreme Court squarely applies to the case of the assessee. Hence, respectfully following the same, I cancel the levy of penalty of Rs.5,69,730/- u/s.271(1)(c) and allow the ground of appeal of the assessee.

27. In the result, ITA No.363/CTK/2015 filed by the assessee is allowed.

Order pronounced in the open court on 15/03/2017 in the presence of parties.

Sd/-

(N.S Saini)

**ACCOUNTANT MEMBER**

Cuttack; Dated 15/03/2017

B.K.Parida, SPS

**Copy of the Order forwarded to :**

1. The Appellant : Asha Manjari Mishra, 191, Kharavel Nagar, Unit-III, Bhubaneswar.
  2. The Respondent. ACIT, Circle 2(1), Bhubaneswar.
  3. The CIT(A)-02, Bhubaneswar.
  4. Pr.CIT-2, Bhubaneswar.
  5. DR, ITAT, Cuttack
  6. Guard file.
- //True Copy//

BY ORDER,

SR.PRIVATE SECRETARY  
**ITAT, Cuttack**