

**IN THE INCOME TAX APPELLATE TRIBUNAL
(CUTTACK BENCH, CUTTACK)**

**BEFORE SHRI N.S. SAINI, ACCOUNTANT MEMBER
and
SHRI KULDIP SINGH, JUDICIAL MEMBER**

**ITA NO.307/CTK/2016
(ASSESSMENT YEAR : 2009-10)**

**ITA NO.308/CTK/2016
(ASSESSMENT YEAR : 2010-11)**

Sri Birat Chandra Dagara, vs. ACIT, Balasore Circle
At/P.O. Rairangpur, Ward No.15, Balasore.
Distt. Mayurbhanj.

(PAN : AECPD7343D)

(APPELLANT)

(RESPONDENT)

ASSESSEE BY : Shri P.K. Mishra, AR
REVENUE BY : Shri Kunal Singh, CIT DR

Date of Hearing : 27.04.2017
Date of Pronouncement : 29 .05.2017

ORDER

PER KULDIP SINGH, JUDICIAL MEMBER :

Since common questions of facts and law have been raised in both the aforesaid appeals, the same are being disposed off by way of consolidated order to avoid repetition of discussion.

2. The Appellant, Sri Birat Chandra Dagara (hereinafter referred to as 'the assessee') by filing the aforesaid appeals sought to set aside the order dated 28.03.2016 passed by the Pr.

Commissioner of Income-tax, Cuttack Charge, Cuttack qua the assessment years 2009-10 & 2010-11 on the grounds inter alia that:-

“1. For that, the impugned order passed U/S.263 of the I.T. Act, 1961 by the Principal Commissioner of Income Tax is without jurisdiction and without any authority of law under the facts and in the circumstances of the case as none of the twin conditions are fulfilled and hence is liable to be quashed in the interest of justice.

2. For that, the learned Pro C.LT should not have set-aside the assessment for re-examination of the issue which was already examined by the A.O at the time of Assessment.

3. For that, when the Assessee has explained with evidence that the fact that the Mining Receipts were already disclosed and taxed in the hand of the partnership Firm, the learned Pro C.LT should not have set-aside the Assessment to re-examine the issue again when there is nothing in his hand to justify the fact of loss of interest of the Revenue.

4. For that the learned Principal C.I.T has committed gross error in setting-aside the order of Assessment by wrongly applying section 37 of the (l)(b) of the mining Concession Rules,1960, particularly when the said Rules has no application under the facts and in the circumstances of the case.

5. For that the Principal Commissioner should not have held that the order of assessment is erroneous and prejudicial to the interest of Revenue for violation of Mining Law, when there is no loss of Revenue.

6. For that, the -Appellant craves leave of this Hon'ble Tribunal to urge other grounds of Appeal if any at the time of hearing.”

3. Briefly stated facts necessary for adjudication of the controversy at hand are: Assessing Officer completed the assessment of the assessee for Assessment Years 2009-10 and 2010-11 on the total income of Rs.7,05,460/- and Rs.10,49,430/- respectively under section 144/147 of the Income-tax Act, 1961 (for short 'the Act'). However, CIT by invoking the provisions contained u/s 263 of the Act issued a show-cause notice dated 15.03.2016 to the assessee to explain as to why the order passed for AYs 2009-10 & 2010-11 u/s 143 (3) of the Act be not modified / cancelled u/s 263 of the Act on the ground that the assessment order has been passed without making enquiries or verification as to the income of the assessee from mining business which is erroneous and prejudicial to the interest of the Revenue.

4. Feeling aggrieved, the assessee has come up before the Tribunal by filing the present appeals.

5. We have heard the Id. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and orders passed by the revenue authorities below in the light of the facts and circumstances of the case.

6. From the facts and circumstances of the case, grounds of appeal raised by the assessee and order passed by the Revenue

authorities below, the sole question arises for determination in both the aforesaid appeals is :-

“as to whether the impugned order passed by the CIT u/s 263 of the Act is without jurisdiction as the assessment order passed in these cases u/s 143(3) was not erroneous and prejudicial to the interest of the Revenue as contended by the assessee?”

7. Undisputedly, assessment was completed in both the cases qua AYs 2009-10 and 2010-11 u/s 143 (3) and u/s 144(1)/147 respectively of the Act. However, CIT invoked the provisions contained u/s 263 of the Act by pointing out that the AO has not made any enquiry as to the issue pertaining to the assessability of the income from mining business in the hands of the assessee.

8. The ld. AR for the assessee challenging the impugned order contended that the assessee has only taken assistance of his sons in his business by forming notional partnership, himself being as a principal partner to carry out the mining work which have not been barred by any law as on date and the assessee has not transferred the mining lease to any outsider or to third party in any firm and as such, there is no illegality in the assessment orders passed by the AO.

9. However, the Id. CIT by referring to section 37(1)(b) of the Mining Concession Rules, 1960 proceeded to hold that the assessee has not followed the precedence of including mining income in the hands of his partnership concern in subsequent years because in AY 2011-12 assessee has included income from his mining business in his computation of total income. To decide the controversy at hand, we find it necessary to examine the provisions contained u/s 37(1)(b) of the Mining Concession Rules, 1960 which are reproduced as under for ready perusal :-

"37. Transfer of lease :- (1) The lessee shall not, without the previous consent in writing of the State Government and in the case of mining lease in respect of any mineral specified in 4 [Part 'A' and Part 'B'] the First Schedule to the Act, without the previous approval of the Central Government

(a) assign, sublet, mortgage, or in any other manner, transfer the mining lease, or any right, title or interest therein, or

(b) enter into or make any [bonafide] arrangement, contract, or understanding whereby the lessee will or may be directly or indirectly financed to a substantial extent by, or under which the lessee's operations or undertakings will or may be substantially controlled by, any person or body of persons other than the lessee"

10. The Id. AR for the assessee, by relying upon the decision rendered by Hon'ble jurisdictional Orissa High Court in the judgment cited as *CIT vs. Wine Chamber - 195 ITR 195*,

contended that the factum of entering into notional partnership by the assessee with his sons for getting assistance in the business does not amount to sharing of the mining lease rights as has been held by the Id. CIT (A).

11. Operative part of the judgment in the case of *CIT vs. Wine Chamber* (supra) is reproduced as under for ready perusal :-

“ Where there is no prohibition for the holder of a licence for trading in liquor from entering into partnership arrangements, he can validly enter into partnership, and such partnership is legal and is entitled to registration. Under the provisions of section 23 of the Bihar and Orissa Excise Act, 1915, what is prohibited is the letting or assigning of the licence or permit, or any portion thereof without being expressly authorized. Rule 122 (2) of the Board’s Excise Rules, 1965, deals with restrictions on the appointment of salesmen. The object of a partnership is always to carry on business. The expression “business” includes several activities out of which sale is one.

Held that, in the instant case, the licence for trading in liquor stood in the name of the individual who had obtained it. He had entered into partnership with another person but the licence had not been transferred to the fir. The firm was, therefore, entitled to registration.”

12. In the judgment in the case of *CIT vs. Wine Chamber* (supra), the Hon’ble jurisdictional High Court further returned the findings by relying upon the decisions rendered by Hon’ble Apex Court in the case of *Jer and Co. vs. CIT - (1971) 79 ITR 546 (SC)* as under :-

“ The decision of the apex court in Jer and Co.'s case [1971] 79 ITR 546 is an authority for the proposition that, where there is no prohibition for the holder of licence from entering into partnership arrangements, he can validly enter into partnership, and such partnership is legal and is entitled to registration. The Madhya Pradesh High Court in Kondra Durgaiya's case [1983] 143 ITR 315, considered the provisions of the Orissa Rules. Referring to section 23 of the Bihar and Orissa Excise Act, 1915, it was held that there is no contravention thereof if the holder entered into partnership arrangements. What is prohibited by section 23 is letting or assigning the licence or permit, or any portion thereof without being expressly authorised. In the instant case, there was no letting or assigning. The view of the Patna High Court in Md. Warasat Hussain v. CIT[1971] 82 ITR 718 and CIT v. Narpati Khan and Co. [1974] 97 ITR 645 that where the licence for trading in liquor stood in the names of only some of the partners of a firm and was not transferred to the firm, there was no illegality in the partnership. But where the licence itself is transferred to the partnership, it may result in an assignment of part of the licence, and section 23 may come into force. In the instant case, it is accepted that the licence continued to stand in the name of Ramesh Chotolal Thacker.”

13. The ratio of the judgment in the case of *CIT vs. Wine Chamber* (supra) is that in case the licence for trading in liquor stood in the name of an individual who had obtained it and he had entered into partnership with another person but the licence had not been transferred to the firm, the firm is entitled for registration. Unless licence itself is not transferred to the partnership firm, it will not result in assignment of the part of the licence. In the

instant case, Rule 37 (1) of Mining Concession Rules, 1960, prohibits assignment, subletting, mortgaging or in any other manner transfer the mining lease or any right, total or interest therein or entered into or make any arrangement, contract or understanding whereby the lease will directly or indirectly financed to a substantial extent by or under which assessee's portion or undertaking will or may be substantially controlled by any person or body of persons other than the lease.

14. Undisputedly, assessee in this case has entered into a notional partnership with his sons for getting business assistance and has not assigned, sublet, mortgage, transfer of mining lease right, title or interest therein nor there is an iota of evidence that the sons of assessee being partner in notional partnership with the assessee have directly or indirectly financed to a substantial extent and have substantially controlled the mining business of the assessee, so in the given circumstances, by following the ratio of the judgment in the case of *CIT vs. Wine Chamber* (supra), we are of the considered view that CIT has erred in invoking the provisions contained u/s 263 by misinterpreting the provisions contained u/s 37(1)(b) of the Mining Concessions Rules, 1960. No other fact or evidence has been brought on record by the CIT to

prove that the assessment order passed by the AO u/s 143(3) was erroneous and prejudicial to the interest of the Revenue.

15. In view of what has been discussed above, both the appeals filed by the assessee for AYs 2009-10 & 2010-11 are hereby allowed and impugned orders passed u/s 263 are hereby quashed.

Order pronounced in open court on this 29th day of May, 2017.

**Sd/-
(N.S. SAINI)
ACCOUNTANT MEMBER**

**sd/-
(KULDIP SINGH)
JUDICIAL MEMBER**

**Dated the 29th day of May, 2017
TS**

Copy of the order forwarded to:

- 1.Appellant - Sri Birat Chandra Dagara, At/P.O. Rairangpur, Ward No.15, Distt. Mayurbhanj.
 - 2.Respondent - ACIT, Balasore Circle, Balasore.
 - 3.CIT
 - 4.CIT (A), Cuttack.
 - 5.DR(ITAT), Cuttack.
 - 6.Guard File
- //True Copy//

BY ORDER

**SR. PRIVATE SECRETARY,
ITAT, CUTTACK**