

आयकर अपीलीय अधिकरण, कटक न्यायपीठ, कटक
IN THE INCOME TAX APPELLATE TRIBUNAL CUTTACK BENCH CUTTACK
BEFORE SHRI N.S.SAINI, AM & SHRI PAVAN KUMAR GADALE, JM

आयकर अपील सं./ITA No.447/CTK/2016
(निर्धारण वर्ष / Assessment Year :2010-2011)

M/s Sreeram Traders, Ichhapur, Sri baldev Jew, Kendrapara-754211	Vs.	CIT, Cuttack
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : ABRFS 5254 Q		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

निर्धारिती की ओर से /Assessee by : Shri S.N.Sahu, AR
राजस्व की ओर से /Revenue by : Shri Kunal Singh, CITDR
सुनवाई की तारीख / Date of Hearing : **03/10/2017**
घोषणा की तारीख/Date of Pronouncement **10/10/2017**

आदेश / O R D E R

Per Shri Pavan Kumar Gadale, JM:

The assessee has filed an appeal against the order of CIT, Cuttack, dated 30.09.2014, passed u/s.263 the Income Tax Act, 1961 for the assessment year 2010-2011, wherein the assessee has raised the following grounds :-

1. *That the order u/s. 263 passed by the learned CIT setting aside the order of the Assessing Officer, restoring the file of the AO is illegal, arbitrary, uncalled for and against the facts on record.*
2. *That the learned AO had legally completed the assessment after due scrutiny and examination of books of accounts produced before him, even learned CIT has observed that there is no suppression of asset, in Paragraph — (II) of his order therefore, he was not justified in setting aside the order of the AO which would amount to roving enquiry which is not permissible in law.*
3. *That the payment of salary to partners of Rs. 60,000/- was lawfully claimed to the Profit and Loss Account as the assessee had submitted the copy of Partnership Deed and according to Clause — 11 of the said deed a resolution was passed in the "resolution book" dated 04.04.2009 duly signed by all the partners to the effect that remuneration payable to three partners is Rs. 60,000/- and Rs. 20,000/- for per partner. Therefore, there is absolutely no violation of law and the Id. CIT is not justified in taking an adverse view citing old CBDT*

Circular dt. 25.03.1996 without spelling out as to what is the exact contest of the circular.

4. *That having been satisfied that there is no omission of asset either in the Balance Sheet or in the depreciation statement, the learned CIT is not justified in not accepting the accounts and setting aside the order of the AO on that point.*
5. *That the assessee had submitted confirmation letter of trade creditors excepting the two namely Imtaz Ahmad for Rs. 28,000/- and Sri Swodagar Pradhan for Rs. 30,863/-; which he furnished before the learned CIT as admitted in Paragraph- III of his order since the AO had taken a possible view after test check of list of Sundry Creditors he same should have been considered as not in conformity with the assessment procedure to set aside the order of the AO.*
6. *That the law is well settled that an order cannot be treated as prejudicial to the interest of the revenue when an ITO adopted of the courses permissible in law and it has resulted in loss of revenue or where two views are possible and the ITO has taken one view with which the CIT does not agree.*
7. *That other grounds if any will be urged at the time of hearing of appeal.*

2. Brief facts of the case are that the assessee is in the business of running rice mill and filed the return of income electronically for the assessment year 2010-2011 on 31.07.2010 with total income of Rs.11,904/- and the return of income was processed u/s.143(1) of the Act and subsequently the case was selected for scrutiny under and notice u/s.143(2) & 142(1) along with questionnaire was issued. In compliance to the same, Id. AR of the assessee appeared from time to time and produced the relevant documents as required by the AO. The AO on perusal of the financial statements was not satisfied with the submissions in respect of purchase as disclosed and made additions on account of unaccount purchase and other repairs and maintenance and estimated disallowance and assessed total income of Rs.16,97,570/-. Subsequently,

the CIT found that the assessment order passed by the AO is without application of mind which is erroneous and prejudicial to the interest of revenue.

3. The assessee firm has claimed partner's salary and are not quantified in the partnership deed. Similarly, the assessee purchased plant and machinery in the said financial year and the AO has not verified whether plant and machinery was put to use during the period. Ld. CIT dealt on the submissions of assessee at page 3 of the order and the assessee submitted confirmation letters from two creditors but the CIT verified the assessment records and the submissions made by the assessee in respect of the claim of remuneration u/s.40(b), and relied on the CBDT Circular and also decision of the Hon'ble Punjab and Haryana High Court in the case of Sood Bhandari & Company Vs. Central Board of Direct Taxes (2012) 204 Taxmann 340. The CIT further observed that the assessee firm should not be allowed deduction of salary and interest paid to partners when there is no agreement in respect of quantification of salary or rate of interest on capital contribution of partners and such payment was left to discretion of partners at the end of financial year. Hence, the Id. CIT found the order passed by the AO is erroneous and prejudicial to the interest of revenue.

4. The CIT verified the ledger account copy of plant and machinery and additions during the year. The CIT was satisfied with the value of machinery purchased during the year and observed that the new machinery must have been used in the business and needs verification,

similarly in respect of confirmation of two creditors the Id. CIT observed in spite of non-receipt of confirmation letters from the creditors the AO has accepted to the claim of the assessee and AO has not verified the details of sundry creditors. Considering the overall factual aspects and the assessment record and the submissions, the CIT has set aside the order and restored to the file of AO with a direction to re-examine the same in the light of the above observation and passed the order u/s.263 of the Act.

5. Aggrieved by the CIT order passed u/s.263 of the Act, the assessee has filed an appeal before the Tribunal.

6. Before us, Id. AR argued the grounds and emphasised that the AO in the original assessment has verified the books of accounts and there is no reason for CIT(A) to justify setting aside the order of AO and it is only a change of opinion, whereas in respect of partnership deed the Id. AR filed paper book containing the resolution of firm dated 4.4.2009 and copy of partnership deed and confirmation of the creditors and schedule of capital account and prayed for allowing the appeal of the assessee. Contra, Id. DR supported the orders of CIT and opposed to the grounds of assessee.

7. We have heard the rival contentions and perused the material on record and judicial decisions. Id. AR's contention that the order passed by CIT is bad in law as the AO has verified the books of accounts and formed the opinion and also verified the disputed issues which was raised in the revision proceedings. In respect of order passed u/s.263, we found that the Id. CIT has elaborately discussed on the twin conditions satisfactory being erroneous and prejudicial to the interest of revenue in

his order and the Id. AR in respect of partnership claim of remuneration drew our attention to the page 3 of the paper book clause 11 of the partnership deed regarding the remuneration clause and also board resolution dated 4.4.2009 in respect of remuneration payable to the partner. We found that the assessee has not amended the remuneration clause after resolution and has been claiming the salary whereas Id. CIT dealt on this issue and observed at para 5 as under :-

I have carefully examined the facts of the case, case record, and the submissions made on behalf of the assessee. My findings on each issue are as under. Perusal of the partnership deed shows that at clause 11 the following is noted.

"That, it is hereby agreed that in consideration of services so rendered all the partners as may agreed shall be paid monthly salary/ remuneration, as per provision of Income Tax Act increasing or reducing in the salary their sum as agreed according to permissible limit u/ s 40(b) of the IT Act 1961 as amended from time to time".

Thus it could be seen that no quantification of salary was made in the partnership deed executed on 28.12.2008. The partnership deed also do not authorize the partners to determine though resolution the remuneration payable. In the case of Sood Bhandari 66 Company Vs. Central Board of Direct Taxes (2012). 204 Taxma.nn 340, Hon'ble PImijab and Haryana High Court has observed that circular no. 739 dated 25.03.1996 issued by CBDT, consequent to amendment in Section 40(b) with effect from 01.04.1993 by Finance Act 1992 clarifactory in nature, therefore, cannot be said to be beyond powers of CBDT conferred on it U/s 119 of the Act. In view of the said circular, the payment of remuneration to partners cannot be allowed if same has not been specified but has been let to be determined by the partners at end of account period. Therefore, assessee firm should not be allowed deduction of salary and interest paid to partners when there is no agreement in respect of quantification of salary or rate of interest on capital contribution of partners and such payment was left to discretion of partners at the end of financial year. This aspect has not been examined at all by the AO in the course of the assessment proceeding which has made in the assessment order erroneous and prejudicial to the interest of revenue.

Similarly confirmation letters of creditors filed by the assessee before the Tribunal was objected by Id. DR as they are not properly confirmed the partners and the AO has not verified the use of plant and machinery. We found the AO in the original assessment has issued notice and called for the information of the creditors but assessee could not filed information and the Id. AR's submissions that they were filed in the course of revisionary proceedings. In respect of last issue of claim of depreciation on new assets the CIT considered the financial statements and found that the assessee has claimed depreciation on addition of new assets which was not verified by the AO. Prima facie the AO in the original assessment though made additions in respect of certain disallowance but has not touched upon this aspects arising in the revisionary order. We found that the Id. CIT has dealt on the disputed issue exhaustively and considered the submissions of the assessee on the remuneration to partners, claim of depreciation of assets and sundry creditors confirmation. Further Id. AR provided copy of the assessment order passed u/s.143(3)/263 of the Act dated 30.6.2015 and explained that the AO has made additions as per the directions of CIT in the de novo assessment and the same is pending disposal before the First Appellate Authority. Considering the apparent facts, material on record and the discussions made by us above, we are not inclined to interfere with the order of CIT and upheld the revision proceedings and dismiss the grounds of appeal of assessee.

8. In the result, appeal of the assessee is dismissed.

Order pronounced in the open court on this 10/10/2017. .

Sd/-

(N. S. SAINI)

लेखा सदस्य / ACCOUNTANT MEMBER

Sd/-

(PAVAN KUMAR GADALE)

न्यायिक सदस्य / JUDICIAL MEMBER

कटक Cuttack; दिनांक Dated 10/10/2017

प्र. कु. मि / PKM, Senior Private Secretary

आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant-
M/s Sreeram Traders,
Ichhapur, Sri baldev Jew,
Kendrapara-754211
2. प्रत्यर्थी / The Respondent-
CIT, Cuttack
3. आयकर आयुक्त(अपील) / The CIT(A),
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, कटक / DR, ITAT, Cuttack
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार / BY ORDER,

(Senior Private Secretary)

आयकर अपीलीय अधिकरण, कटक / ITAT, Cuttack