

**IN THE INCOME TAX APPELLATE TRIBUNAL CUTTACK
'SMC' BENCH, CUTTACK**

BEFORE SHRI N.S SAINI, ACCOUNTANT MEMBER

ITA No.360/CTK/2016
Assessment Year : 2009-10

Manas Kumar Swain, Prop. S.S.Commercial, Boneikela, Joda, Keonjhar.	Vs.	ITO, Keonjhar Ward, At/PO: Dist: Keonjhar
PAN/GIR No.BMJPS 5260 G		
(Appellant)	..	(Respondent)

Assesee by : Shri P.R.Mohanty, AR
Revenue by : Shri D.K.Pradhan, DR

Date of Hearing : 28 /06/ 2017
Date of Pronouncement : 30 /06/ 2017

ORDER

This is an appeal filed by the assessee against the order of CIT(A)-Cuttack, dated 20.6.2016 for the assessment year 2009-2010.

2. The assessee has raised the additional grounds of appeal, which read as under:

" 1 For that, the order of the forum below is arbitrary, illegal, unjustified and erroneous and has been passed on improper application of mind, being devoid of merit as such deserves to be quashed in limine.

2. For that, the revising, reopening or reconsidering the whole assessment U/s 147 by issuance of notice U/s148 in the pretext that income escaped assessment, in absence of any credible additional material evidences is not permissible on the ground that, the whole exercise amounts to review not permissible by law, particularly when the assessment is completed U/s143(3).

3. For that, the addition of an amount of Rs. 12,86,100/- to the total income for the alleged contravention of section 40A(3) is a presumption, assumption & misconception and ought to have been allowed.

4. For that, the addition of an amount of Rs. 12,86,100/- to the total income for the alleged contravention of section 40A(3) deserves to be deleted due to compelling ground realities and existence of exceptional and unavoidable circumstances.

5. For that, the appellant craves leave to add/amend/alter further grounds if any at the time of hearing of appeal."

3. Ld D.R. had no objection to the admission of additional grounds of appeal raised by the assessee. Hence, they were admitted and the parties were allowed to make their submissions thereon.

4. In Ground No.2 of the additional ground of appeal, Id A.R. of the assessee has challenged the reopening of assessment u/s.147 of the Act by issuance of notice u/s.148 of the Act on the ground that there was no credible additional material evidence available with the Assessing Officer at the time of reopening of the assessment and, therefore, the reopening of assessment is bad in law.

5. Ld A.R. submitted that the reopening of assessment has been made by the Assessing Officer on the ground that the assessee has debited Rs.72,37,631/-- towards payment of freight charges. On examination of the details of freight charges, it is found that Rs. 13,06,100/- was paid in cash by the assessee and that on a single day the amount paid in cash exceeded Rs.20,000/-. Hence, it violated the provisions of section 40A(3) of the Act and, therefore, Rs.13,06,100/- was to be disallowed as deduction to the assessee. He submitted that in the original assessment made

u/s.143(3) of the Act on 21.12.2011, the Assessing Officer had examined the issue of claim of freight charges of Rs.72,37,631/- and after examining the same concluded that all the bills and vouchers for the expenses were not produced and, therefore, the Assessing Officer made an estimated disallowance of 5% out of the total expenses and added Rs.3,61,882/-. The Assessing Officer has also observed in first para of the assessment order that the assessee had filed audited profit and loss account as required u/s.44AB of the Act in the form of 3CB and statement of particulars in Form No.3CD. The Assessing Officer has recorded that books of account and bills and vouchers were produced and verified by him. In view of above, as the Assessing Officer in the original assessment proceedings u/s.143(3) of the Act has verified the freight charges and thereafter made a considered disallowance of 5% out of the total expenses claimed by the assessee of Rs.72,37,631/- and made an addition of Rs.3,61,882/- to the income of the assessee, then on the basis of very same materials, the Assessing Officer cannot reopen the assessment by issue of notice u/s.148 of the Act as it amounts to change of opinion. Therefore, the reopening of assessment is bad in law and it was his prayer that the assessment order dated 23.7.2014 should be cancelled.

6. Ld D.R. though supported the order of the Assessing Officer could not controvert the above submission of Id A.R. of the assessee.

7. I have heard the rival submissions, perused the materials available on record and orders of lower authorities. I find from the copy of recorded

reasons for reopening of assessment by issuance of notice u/s.148 of the Act that the Assessing Officer has noted as under:

"The reasons for reopening the assessment u/s.147 of the I.T.Act, 1961 for the assessment year 2009-2010 as recorded vide order sheet entry dated is furnished below:

"The assessee is an individual derives income from execution of transport contract work. For the assessment year 2009-2010, the assessee filed return of income on 30.9.2009 showing total income of Rs.2,87,170/-. Subsequently, another return was filed on 28.3.2011 showing total income of Rs.3,88,902/-. Assessment u/s.143(3) was completed on 21.12.2011 determining the total income at Rs.6,96,610/-.

It is seen from the record that the assessee has debited a sum of Rs.72,37,631/- towards payment of freight charges. On examination of the details, it is found that out of the entire freight charges, a sum of Rs13,06,100/- was paid in cash to different persons where on a single day the amount paid in cash exceeded Rs.20,000/-. According to section 40A(3) of the I.T.Act, 1961, where the assessee incurs any expenditure in respect of which a payment or aggregate of payments made to a person in a day, otherwise than by an account payee cheque drawn on a bank or account payee bank draft, exceeds rupees twenty thousand, no deduction shall be allowed in respect of such expenditure. Therefore, the amount of Rs.13,06,100/- paid in cash towards freight charges was to be disallowed u/s.40A(3) of the Act and added to the income of the assessee.

In view of the above, I have reason to believe that income of Rs.13,06,100/- chargeable to tax has escaped assessment within the meaning of section 147 of the I.T.Act, 1961 for the assessment year 2009-2010."

8. A reading of the above recorded reasons shows that there was no new material which has come to the knowledge of the Assessing Officer to show after passing of the order u/s.143(3) of the Act on 21.12.2011 that income chargeable to tax has escaped assessment so as to trigger the reopening of assessment made u/s.147 of the Act.

9. The Hon'ble Bombay High Court in the case of CIT vs. Jet Speed Audio Pvt Ltd., (2015) 372 ITR 762 has held that the power to reopen is not a power to review an assessment order. At the time of passing assessment order, it is expected of the Assessing Officer that he will apply mind and pass an order. If the Assessing Officer had considered and formed an opinion on the material in the original assessment itself then he would be powerless to start the proceedings for reassessment.

10. Further, the Hon'ble Supreme Court in the case of CIT vs. Kelvinator of India Ltd., 320 ITR 561 (SC) has held that the concept of "change of opinion" must be treated as an in-built test to check abuse of power by the Assessing Officer. Hence, after 1st April, 1989, the Assessing Officer has power to reopen an assessment, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief. In this context, the observations of Hon'ble apex Court at page 564 are very relevant, which are reproduced as follows:

"Therefore, post-1st April, 1989, power to re-open is much wider. However, one needs to give a schematic interpretation to the words "reason to believe" failing which, we are afraid, Section 147 would give arbitrary powers to the Assessing Officer to re-open assessments on the basis of "mere change of opinion", which cannot be per se reason to re-open. We must also keep in mind the conceptual difference between power to review and power to reassess. The Assessing Officer has no power to review; he has the power to re-assess. But reassessment has to be based on fulfillment of certain pre-condition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of re-

opening the assessment, review would take place. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the Assessing Officer. Hence, after 1st April, 1989, Assessing Officer has power to re-open, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief. "

11. Thus, I find that in the instant case, there was no tangible material with the Assessing Officer before reopening of assessment to show that income chargeable to tax has escaped assessment. Further, it is observed that the issue of freight charges claimed by the assessee at Rs.72,37,631/- was examined by the Assessing Officer at the time of original assessment proceedings with the books of accounts and vouchers, etc and, thereafter an estimated disallowance of Rs.13,06,100/- was made at 5% out of total expenses claimed by the assessee on the ground of non-production of all bills and vouchers. It is observed that the reopening in the instant case has been made on the basis of very same set of material to hold that freight charges of Rs.13,06,100/- was paid in cash by the assessee and hence was to be disallowed u/s.40A(3) of the Act which is clearly a change of opinion and in view of the decision of Hon'ble Bombay High Court in the case of Jet Speed Audio Pvt Ltd and Hon'ble Supreme Court in the case of Kelvinator of India Ltd (supra), reassessment is not permissible in law. Hence, I hold that the reopening of assessment in the instant case by issuance of notice u/s.148 of the Act is bad in law and consequently, reassessment order dated 23.7.2014 passed u/s.143(3)/147 is also bad in law and hence I cancel the same and allow this ground of appeal.

12. As I have cancelled the reassessment order dated 23.7.2014, other grounds of appeal on merits of the additions have become infructuous and hence not adjudicated upon.

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

Order pronounced in the open court on 30 /06/2017 in the presence of parties.

Sd/-

(N.S Saini)
ACCOUNTANT MEMBER

Cuttack; Dated 30 /06/2017
B.K.Parida, SPS

Copy of the Order forwarded to :

1. The appellant : Manas Kumar Swain, Prop.
S.S.Commercial, Boneikela, Joda, Keonjhar.
2. The Respondent. ITO, Keonjhar Ward,
At/PO: Dist: Keonjhar
3. The CIT(A) Cuttack
4. Pr.CIT, Cuttack
5. DR, ITAT, Cuttack
6. Guard file.
//True Copy//

BY ORDER,

SR.PRIVATE SECRETARY
ITAT, Cuttack