

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

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

**ITA No.53/CTK/2017  
Assessment Year : 2005-06**

M/s. Jaya Mangala Construction,At: Bhejaput, PO:Damanjodi, Dist: Koraput	Vs.	ITO, Ward -1, Jeypore,
PAN/GIR No. AAEFJ 8318 C		
<b>(Appellant)</b>	..	<b>( Respondent)</b>

Assessee by : Shri P.K.Mishra, AR  
Revenue by : Shri D.K.Pradhan , DR

**Date of Hearing : 12 /07/ 2017  
Date of Pronouncement : 28 /07/ 2017**

**ORDER**

This is an appeal filed by the assessee against the order of CIT(A)-  
1, Bhubaneswar, dated 16.9.2016 for the assessment year 2005-06.

2, The assessee has raised the following grounds of appeal:

"1. For that the impugned orders passed by the Learned A.O as well as learned C.I.T.(A) are not just and proper under the facts and in the circumstances of the case and hence are liable to be quashed in the interest of justice.

2. That, the impugned order of Reassessment is without jurisdiction and without the Authority of law, as such the same needs to be quashed in the interest of justice.

3. For that, the learned A.O. should not have changed the status of the Firm and should not have disallowed salary and interest to the Partners to the tune of Rs. 1,21,824.00 and the learned C.I.T.(A) should not have confirmed it. The

impugned disallowance being illegal and contrary to the facts on record is liable to be deleted in the interest of justice.

4. For that, the learned A.O. should not have disallowed Rs.77,354.00 out of the expenditures on estimate basis and the learned C.I.T.(A) should not have restricted it to Rs.20,000.00, particularly when, the total disallowance needs to be deleted in the interest of justice.

5. For that, the learned A.O. as well as the learned C.I.T.(A) have committed gross error in disallowing depreciation expenses to the tune of Rs.3,33,667.00, particular when, the claim of the Assessee is true and correct and needs to be allowed in the interest of justice.

6. For that, the learned Forums below should not have added back Rs.22,919.00, the closing bank balance as unexplained money. The impugned addition thus is liable to be deleted in the interest of justice.

7. For that, when nature of business and the gross turnover of the Assessee qualify the necessary condition of section 44AE of the Act, the learned A.O. as well as the learned C.I.T(A) has committed error in not applying section 44AE of the Act..

8. For that, the Id forums below should not have disallowed the expenditure, rather should have applied section 44AE of the Act and should have estimated the income of the assessee without changing the status of the firm.”

3. In Ground No.2 of the appeal, the grievance of the assessee is that the order of reassessment is without jurisdiction and without the authority of law, as such the same needs to be quashed.

4. Ld A.R. of the assessee filed copy of the order sheet dated 1.4.2009 and submitted that the Assessing Officer has reopened the assessment by issuing notice u/s.148 of the Act on the ground that on perusal of return, it is seen that a sum of Rs.90,000/- was allowed as remuneration to the partner. However, on verification of the same, it is found that same should have been allowed at Rs.83,239/- as per section 40(b) of the I.T.Act, 1961. As excess remuneration of Rs.6,761/- has been allowed deduction to the assessee, the income chargeable to tax has escaped assessment within the meaning of

section 147 of the Act. He submitted that this amounts to change of opinion by the Assessing Officer on the same set of facts. He submitted that after processing of the return u/s.143(1) of the Act, no new material had come to the knowledge of the Assessing Officer to evidence the fact of escapement of income chargeable to tax of the assessee and hence, the reopening of assessment was bad in law. He relied on the decision of Hon'ble Delhi High Court in the case of Atma Ram Properties Private Limited vs DCIT (2012) 343 ITR 141 (Del), wherein, it was held that in order to initiate proceedings for reassessment after four years, there should have been a failure on the part of the assessee to disclose material facts necessary for assessment. If the Assessing Officer had failed to apply legal provisions/section of the Income tax Act, 1961, the fault cannot be attributed to the assessee. The requirement is that the assessee should have failed or omitted to make full and true disclosure of material facts. The assessee is not required to disclose, state or explain the law. Hence, it was his submission that the reassessment order may be quashed.

5. Ld D.R. supported the order of the lower authorities.

6. I have heard the rival submissions, perused the materials available on record and orders of lower authorities. The reasons for reopening the assessment as recorded by the Assessing Officer on 1.4.2009 reads as under:

"The assessee filed his return of income on 31.01.2007 on total income of Rs. 11,230/- which was duly processed u/s 143(1) on dtd. 11.06.2007

resulting refund Rs. 23,991/-. On perusal of the return it is seen that a sum of Rs. 90,000/- was allowed as remuneration to the Partner. However on verification of the same, the same should have been allowed at Rs. 83,239/- as per section 40(b) of the IT Act'1961."

The same as calculation as under:-

Net Profit as per PaL Account	- Rs. 11,231/-
Add: Remuneration	- Rs. <u>90,000/-</u>
Book Profit	- Rs. 1,01,231/-
<u>Remuneration allowed</u>	
Rs. 75,000/- - 90%	- Rs. 67,500/-
Rs. 26,231/- - 60%	- Rs. <u>15,739/-</u>
- Rs. 83,239/-	

However excess remuneration allowed i.e. Rs. 6,761/-which is the income chargeable to tax is escape assessment within the meaning of u/s 147.

Issue notice u/s 148."

On perusal of above recorded reasons shows that the Assessing Officer has reopened the assessment by issuing notice u/s.148 of the Act on the ground that on perusal of return, it is seen that a sum of Rs.90,000/- was allowed as remuneration to the partner. However, on verification of the same, it is found that same should have been allowed at Rs.83,239/- as per section 40(b) of the I.T.Act, 1961. As excess remuneration of Rs.6,761/- has been allowed deduction to the assessee, the income chargeable to tax has escaped assessment within the meaning of section 147 of the Act. I find that after processing of the return u/s.143(1) of the Act, no new material had come to the knowledge of the Assessing Officer to evidence the fact of escapement of income chargeable to tax of the assessee.

7. 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.

8. 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. "*

9. 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. It is observed that the reopening has been made on the basis of very same set of material to hold that remuneration to partner of Rs.90,000/- was allowed, which was to be allowed at Rs.83,239/- as per section 40(b) 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 11.11.2010 passed u/s.143(3)/147 is also bad in law and hence I cancel the same and allow this ground of appeal.

10. As I have cancelled the reassessment order dated 11.11.2010, other grounds of appeal on merits of the additions have become infructuous and hence not adjudicated upon.

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

Order pronounced on 28 /07/2017.

Sd/-

(N.S Saini)  
**ACCOUNTANT MEMBER**

Cuttack; Dated 28 /07/2017  
B.K.Parida, SPS

**Copy of the Order forwarded to :**

1. The appellant : M/s. Jaya Mangala Construction,At: Bhejaput, PO:Damanjodi, Dist: Koraput
2. The Respondent. ITO, Ward -1, Jeypore
3. The CIT(A) -1, Bhubaneswar
4. Pr.CIT-1, Bhubaneswar
5. DR, ITAT, Cuttack
6. Guard file.  
//True Copy//

BY ORDER,

SR.PRIVATE SECRETARY  
**ITAT, Cuttack**