

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

**BEFORE S/SHRI N.S SAINI , ACCOUNTANT MEMBER
AND PAVAN KUMAR GADALE, JUDICIAL MEMBER**

ITA No.465/CTK/2014
Assessment Year : 2010-2011

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| Income Tax Officer (Exemption), Sambalpur | Vs. | M/s. Sri Satyasai Socio Educational Trust, Plot No.247, Panitanki Road, Shakti Nagar, Rourkela. |
| PAN/GIR No. AAKTS 1525 J | | |
| (Appellant) | .. | (Respondent) |

Assessee by : Shri S.K.Agarwal, AR
Revenue by : Shri D.K.Pradhan, DR

Date of Hearing : 13/07/ 2017
Date of Pronouncement : 14/07/ 2017

ORDER

Per N.S.Saini, AM

This is an appeal filed by the revenue against the order of CIT(A)-II, Bhubaneswar, dated 22.9.2014, for the assessment year 2010-2011.

2. The revenue has raised the following grounds of appeal: .“

“1. Whether in the facts & circumstances of the case, the Ld. CIT(A) is correct in holding that remand report does throw any light and whether there was real adherence to CBDT's guidelines when in fact the AO clearly stated in his remand report that the case was manually selected for scrutiny as per scrutiny guidelines for the year 2011-12 which lays down that" cases claiming exemption as a result of registration u/s 12A or approval u/s 10(23(C) of the I.T. Act, 1962 " requires scrutiny.

2. Whether in the facts & circumstances of the case, the Ld. CIT(A) is correct in directing deletion of addition of Rs.45.99 lakhs on account of diversion of income by the assessee.

3. Whether in the facts & circumstances of the case, the Ld. CIT(A) is correct in holding that due to opportunity was not provided to the appellant to counter the contention of the AO, when the AO had given sufficient opportunity and the creditors as furnished by the assessee have denied the claim of the assessee.

4. Whether in the facts & circumstances of the case, the Ld. CIT(A) is correct in directing deletion of interest u/s 234A & 234B of the I.T.Act, 1961 levied by the AO which is stipulated statutorily."

3. Brief facts of the case are that the assessee is a trust registered under the Indian Trust Act with the aims and objectives for imparting of education to the needy and deprived people of the society and, therefore, set up a college in the name and style of Nababharat College of Engineering & Technology. The assessee could not obtain permission to run the college and consequently the donations received in cash from the students were refunded in cash. The assessee filed return of income declaring total income at Rs. Nil. The Assessing Officer, on verification of receipt & payment of the trust, found that the trust has received loans from various students in cash of Rs.51.01 lakhs out of which Rs.35.50 lakhs has been shown as cash in hand and balance amount remained with the Bank account without utilizing the same. The Assessing Officer called information u/s.133(6) of the Act from the various loan creditors out of which only six loan creditors amounting to Rs.5,02,000/- confirmed about the transaction. In respect of other loan creditors, the genuineness of the transaction could not be established. In response to show cause notice, the assessee

submitted that the amounts under suspicion represented donations received from various persons for setting up the Engineering College and the said amounts were refunded in their entirety to the respective donors. The Assessing Officer did not accept the explanation of the assessee and accepted Rs.5,02,000/- as genuine and treated the balance amount of Rs.45,99,000/- as diversion of fund and added the same to the total income of the assessee.

4. On appeal before the CIT(A), the assessee submitted the statement of facts, which were forwarded to the Assessing Officer calling for a remand report. The Assessing Officer in his remand report dated 4th July, 2013 submitted that during the remand proceedings, the assessee could not establish genuineness and creditworthiness of the sundry creditors. Hence, he treated the addition to be genuine. The remand report of the Assessing Officer was furnished to the assessee for comments and the assessee filed the counters to the remand report on 7.8.2013.

5. The CIT(A) after considering the remand report and the rejoinders to the remand report by the assessee, deleted the addition made by the Assessing Officer by observing as under:

"I have considered the substance and contents of the impugned assessment order and the submissions and contentions of the appellant as made above and decided as under:

...

On (Ground Number 2, it is evident that the impugned amount of Rs. 45.99 lakhs that was assessed as "Diversion of fund" were products of:

(i) *Loans/Advances/Credits that were seen as outstanding in the books of accounts of the Appellant as on 31.03.2009*: Consequently, these were certainly received during or before the F.Y. 2008-09 and the investigation of the sources of their introduction would need to be carried out in such respective preceding financial years as applicable. They cannot be carried out during the F.Y. 2009-10 relating to the impugned A.Y. 2010-11. The AO's actions in this regard are in violation of the statute and accounting principles- and also based on wrong understanding and misapplications of facts.

(ii) *Refunds or repayments to the creditors/parties/donors concerned that may or may not have been made post 31.03.2010*: This is clear from the fact that an identical amount of Rs. 51.01 lakhs is shown as the amount standing to the credit of United Bank of India, Bhubaneswar both in the Balance Sheet of the Appellant as on 31.03.2009 (F.Y. 2008-09) as well as in the Receipts and Payments accounts for the F.Y. 2009-10 and proposed to be applied during the said Financial Year relating to the impugned A.Y. 2010-11. In the Receipts and Payments account for the succeeding F.Y. 2010-11, Rs. 44.08 lakhs is deleted as "Donation Refund" and in the corresponding statement for the next F.Y. 2011-12, Rs. 3.75 lakhs is shown paid as "Donation paid". All of these make it clear that the impugned loans/donations/receipts related to F.Y. 2008-09 or earlier and the purported refunds/repayments related to F.Y. 2010-11, F.Y. 2011-12 or perhaps later. The AO had no pecuniary jurisdiction under the Act investigate this issue for the A.Y. 2010-11.

(iii) Besides, the Remand Report of the AO. itself states that the amount of loans/donations received related to F.Y. 2008-09. This militates against the contrary treatment meted out to the amount of Rs. 51.01" lakhs in the assessment order as evidenced by the addition made of Rs. 45.99 lakhs.

c) The addition and assessment made by the AO of Rs. 45.99 lakhs is therefore deleted as being ; /based on facts - being loans/credits received and repaid - unrelated to and inapplicable to the A.Y. 2010-11. Ground Number 2 preferred by the Appellant is consequently accepted on the merits of the issue.

d) On the issue of the levy of interest of Rs. 5,82,651, it is clear from the literal text of the provisions of Section 234A and 234B and from the various judicial ratios of Honourable Courts that proper reasons and specific directions need to be recorded in the assessment order for such levy to be valid. As pointed out by the Appellant, it has been held in the decision of the Apex Court in the case of *Commissioner of Income Tax and others v. Ranchi Club Ltd.*, reported in (2001) 247 ITR 209 that in absence of any specific direction giving reference to the section charging interest in the assessment order, no interest can be levied through a notice of demand. The issue was decided identically - that the levy of interest was unwarranted - in the case of *Assistant Commissioner of Income-tax versus S.K. Pate/Family Trust* (Tax Appeal No. 84 of 2000 decided on 19.06.2012) and in the decision of the Patna High Court in case of *Uday Mistanna Bhandar & Co. v. Commissioner of Income Tax*, reported in 137 CTR 376; 222 ITR 44 (1996).

e) No reasons or directions of the nature required as have been provided or recorded by the AO in his Assessment order. As this has not been done and since the substantive amount added of Rs. 45.99 lakhs has already been deleted above, the interest levied of Rs. 5,82,651 u/s 234A and 234B is held to be unlawful and invalid and unsubstantiated on facts. The levy is consequently deleted. Ground Number 3 preferred by the Appellant is consequently accepted.

f) The attendant issues on whether the guidelines issued by the CBDT on the issuance of notice u/s 143(2) towards scrutiny, on the confirmations, or lack of the same, in respect of the credits, on the granting of opportunity to cross-examine the naysayers and the recalcitrant, on the biased behavior of the AO in accepting third party submissions but not those of the Appellant and on his silence in the assessment order as to the alleged actual directions given by him regarding the hearing on 18.01.2013 and on the judicial decisions produced in support are principally of academic interest. As the issue has been decided on merits as above, these need not be specifically adjudicated on.

g) However, it needs to be stated that once the CBDT has issued instructions for *assumption of jurisdiction* for selection of cases for scrutiny and assessment thereof, the same have to be followed in letter and spirit by the AO. The burden lies on the authority assuming jurisdiction to show and establish that such instructions have duly been complied and satisfied in letter and spirit. The selection of a case for manual scrutiny by an AO implies assumption of pecuniary jurisdiction over the case, and cannot be arbitrarily appropriated or arrogated to himself by the AO minus powers duly conferred on him in the said regard. The Remand Report of the AO is extremely vague on this matter (it righteously speaks of "*vehement denial* that the "*assessment was not made as per law*" without coming to the point, and remains silent on whether jurisdiction was wrongly assumed) and does not throw any light of whether there was real adherence to the CBDT's guidelines on the matter. It is trying to defend what appears to be indefensible. The reason stated by the AO for carrying out the scrutiny that "*as per scrutiny guidelines, cases claiming exemption as a result of registration u/s 12 A A or approval u/s "10(23C) of the Income-tax Act require scrutiny*" fails to pass muster even at an initial examination of the relevant guidelines, and such cases are not included in the guidelines as to be selected for scrutiny. Moreover, there is no evidence that the case has been selected for scrutiny after seeking approval of the CC1T/DGIT, if clause g) of the scrutiny guidelines is to be applied. The ratio of the Honourable Andhra Pradesh High Court in the case of C1T vs. Smt. Nayana P. Dedhia 270 1TR 572 (AP) is applicable, which in turn relied upon the judgment of the Hon'ble Supreme Court in the case of UCO Bank vs. CIT 237 1TR. 889 (SC) to hold that such Circulars were binding on the income-tax authorities.

h) Third party confirmations or lack of them cannot be adopted as demonstrable proofs by themselves in holding that the amounts being examined represent concealed incomes assessable and taxable in the hands

of the assessee. Due opportunity needs to be provided to the appellant to counter these and cross-examined, if requested. These were clearly not done by the AO. Moreover, the AO has not given any consideration to the confirmations of the transactions produced by the Appellant. He has not tried to prove that these confirmations were fake or wrong or baseless or unsupported by evidence. This indicates whim and bias on the part of the AO. He has presumed, in perhaps immoderate excitement at his "discovery", that a lack of confirmation or a letter returning unserved excludes all other driving factors and states of nature and can only mean one thing, which was that the Appellant's affairs were not in order and all amounts immediately irreconcilable by him were fair game for effecting tax liability. Such presumption is illogical, unlawful and uncalled for.

i) It also needs to be said that the AO has wasted considerable time, effort and stationery in pursuing a line of investigation in A.Y. 2010-11 on issues relating to other assessment years. Thereafter the Remand Report of the AO appears to be the vague and unhelpful result in support of actions that are themselves of dubious merit, and does not help the case of Revenue. In sum, the actions of the AO display, among other things, ignorance of the statute and of accounting and legal principles, misapplication of facts, misconceived aggressive intent to add and enhance taxable income regardless of facts or the legal positions applicable, intent to confuse by concealing vital details and introducing ambiguity, and finally the adoption of statistical subterfuge - manifested in the form of additions of dubious merit and that are unlawful. Any exercise of assessment using authority conferred by the statute cannot be carried out irrationally, arbitrarily, whimsically and capriciously. The ends of law are met through judicious application of mind and action, and its pursuit must not be reduced to the level of a combat aimed at gladiatorial triumph.

8. The appeal preferred by the Appellant is consequently allowed on all Grounds filed and the AO is directed to delete the addition made of Rs. 45.99 lakhs on account of alleged diversion of Income and the levy of Interest u/s 234A and 234B of Rs. 5,82,651/-."

6. Ld DR. supported the order of the Assessing Officer and Id A.R. supported the order of the CIT(A).

7. We have heard the rival submissions and perused the orders of lower authorities and materials available on record. The CIT(A) in his order stated that an identical amount of Rs.51.01 lakhs is shown as the amount standing to the credit of United Bank of India, Bhubaneswar both in the balance sheet of the assessee as on 31.3.2009 as well as in the receipts and

payment account in F.Y. 2009-10. In the receipts and payments account for the succeeding financial year 2010-11, Rs.44.08 lakhs is deleted as 'donation refund' and in corresponding statement for the next financial year 2011-12, Rs.3.75 lakhs is shown paid as 'donation paid'. From the above, it is clear that the donations received by the assessee trust were refunded back to the donors in the succeeding assessment year. This findings of fact by the CIT(A) was not controverted by Id D.R. L d Ld D.R. could not point out any specific error in the order of the CIT(A). Hence, we find no good reason to interfere with the order of the CIT(A), which is hereby confirmed and dismiss the grounds of appeal of the revenue.

8. In the result, the appeal filed by the revenue is dismissed.

Order pronounced in the open court on 14 /07/2017 in the presence of parties.

Sd/-

(Pavan Kumar Gadale)
JUDICIALMEMBER

sd/-

(N.S Saini)
ACCOUNTANT MEMBER

Cuttack; Dated 14 /07/2017
B.K.Parida, SPS

Copy of the Order forwarded to :

1. The Appellant : Income Tax Officer (Exemption), Sambalpur
2. The Respondent. M/s. Sri Satyasai Socio Educational Trust, Plot No.247, Panitanki Road, Shakti Nagar, Rourkela.
3. The CIT(A)-II, Bhubaneswar
4. Pr.CIT-II, Bhubaneswar
5. DR, ITAT, Cuttack
6. Guard file.
//True Copy//

BY ORDER,

SR.PRIVATE SECRETARY
ITAT, Cuttack