



**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.459 & 185/CTK/2017
Assessment Year : 2009-2010

Mr Prem Prakash Senapati, At: Senapati Bhawan, Grand Road, Po/Dist:puri	Vs.	ITO, Puri Ward, Puri.
PAN/GIR No.BBPPS 2887 G		
(Appellant)	..	(Respondent)

Assessee by : Shri B.R.Panda, AR
Revenue by : Shri A. Tigga, DR

Date of Hearing : 12/04/ 2018
Date of Pronouncement : 17/04/ 2018

ORDER

Per N.S.Saini, AM

These are appeals filed by the assessee against the separate orders of the CIT(A)-2, Bhubaneswar dated 3.8.2017 and 13.1.2017, respectively for the assessment year 2009-2010.

2. In ITA No.459/CTK/2017, the assessee has raised the following grounds of appeal:

"I. For that the order of the Forums below are improper, illegal and excessive to the facts as well as in law. Hence the orders passed are contrary and bad in law, hence required to be quashed and deleted entirely.

II. For that the Ld. Assessing Officer should not have passed the order invoking Sec. 147 of the IT. Act basing on the assessment completed in case of Sri Ram Prakash Senapati, brother of the Appellant. So the action of the Ld. Assessing Officer is prejudice to the facts and in law.



Hence, the order passed U/s. 143(3)/147 of the IT. Act is liable to be quashed in toto.

III. For that the alleged cash deposit was actually related to the business deposit of the appellant. Hence the entire deposit should not be treated as undisclosed source of income, Therefore, the orders passed, in mechanical manner without considering the facts, are liable to be deleted.

IV. For that, the id. AO found that payments were made in favour of the OCL through Demand Draft towards the purchase of Cement from said account No.464010100041849, thus entire transaction remaining to business. Hence such addition of Rs.27,14,906/- in the hands of the appellant on protective basis amounts to double addition of income, thus liable to be deleted and quashed.

V) For that the accounts have been audited U/S.44AB of the IT. Act and the alleged disputed amounts have already been included in the sale figures and the Assessing Officer has not disputed the sales turnover again disputing the bank deposits flowing from the sale proceeds should not have been made and the addition made on protective basis is to be deleted.

VI) For that, Id. AO admitted in the assessment proceedings that the deposits accounted from Cement Trading business exclusively stands in the name of the appellant, hence addition made on protective basis treating as unexplained deposits is to be deleted entirely.

VII) For that since the brother of the appellant has admitted that the deposits found in the joint account belongs to the appellant and letter on the Assessing Officer has deleted the addition by giving the effect of the Ld. CIT(A) order from the income of Sri Ram Prakash Senapati. Therefore Rs.27,14,906/- should not be treated as unexplained and added on protective manner.

VIII) For that, Id. CIT(A) erred in law to confirm the order of assessment without spelling out reasons and passed a cryptic order, hence the orders are liable to be deleted in toto.”

3. The brief facts of the case are that in the present case, addition of Rs.27,14,906/- was made on account of deposit in S.B. A/c No.464010100041899 -Axis Bank, Puri in the hands of the assessee's brother, Shri Ram Prakash Senapati substantively and addition of the



same amount was made in the hands of the assessee protectively. The CIT(A) in the case of Ram Prakash Senapati restored the matter back to the file of the Assessing Officer with certain directions. The CIT(A) writes in his order that how the Assessing Officer has given effect to the order dated 14.4.2015 of the CIT(A)-2, Bhubaneswar is not known. The assessee has not shed any light on this aspect in the course of appeal hearing.

4. In the above circumstances, the CIT(A) gave direction to the assessee's Assessing Officer that if while giving effect to the order of the CIT(A)-2, Bhubaneswar, the Assessing Officer has deleted the addition in the hands of Sri Ram Prakash Senapati, then the addition in the hands of the assessee would become substantive and confirmed accordingly and if the addition in the hands of Sri Ram Prakash Senapati is confirmed by the Assessing Officer then the addition in the hands of the assessee will be deleted.

5. Being aggrieved by this order of the CIT(A), the assessee is in appeal before us raising the above grounds of appeal.

6. Ld A.R. of the assessee during the course of appeal hearing could not bring any material on record as to what happened in the hands of the Sri Ram Prakash Senapati after setting aside the matter by the CIT(A)-2, Bhubaneswar vide his order dated 14.4.2015 to the file of the Assessing Officer. His only prayer was that the addition should be deleted.

7. When questioned by the Bench that addition in the hands of the assessee was made protectively and substantive addition was made in the



hands of Sri Ram Prakash Senapati and now eventually if the addition comes to be deleted in the hands of Sri Ram Prakash Senapati, then it has to be examined and adjudicated as to whether the addition can be made in the hands of the assessee or not. Ld A.R. of the assessee submitted that the matter should be restored back to the file of the Assessing Officer for adjudicating the issue in the light of the order passed by the Assessing Officer in the case of Ram Prakash Senapati.

8. Ld D.R. also agreed with the submission of Id A.R. of the assessee.

9. In the above facts and circumstances of the case, we are of the considered view that the impugned order passed by the CIT(A) needs slight modification. The direction of the CIT(A) that if addition is deleted in the hands of Ram Prakash Senapati then addition in the hands of the assessee should be confirmed is not correct. In our considered view, if the addition in the hands of Ram Prakash Senapati comes to be deleted, then it has to be examined as to whether the addition can be made in the hands of the assessee or not. Hence, we modify the order of the CIT(A). We direct the Assessing Officer to adjudicate the issue of addition in the hands of the assessee after allowing reasonable opportunity of hearing to the assessee. With these directions, the grounds of appeal of the assessee are allowed.

10. In the result, appeal of the assessee is allowed for statistical purposes.



11. In ITA No.185/CTK/2017, the sole issue involved is that the CIT (A) erred in confirming levy of penalty under section 271B of the Act of Rs.63,215/-.

12. The brief facts of the case are that the Assessing Officer found that the assessee has not filed return of income for the assessment year 2009-2010 and, therefore, issued notice u/s.148 of the Act on 8.8.2012 to the assessee, in response to which, the assessee filed the return of income showing total income at Rs.2,53,140/-. The Assessing Officer found that the turnover of the assessee during the impugned assessment year is Rs.1,26,43,200/- and, therefore, the assessee was required to get its account audited u/s.44AB of the Act. On a show cause issued by the Assessing Officer, the assessee filed tax audit report on 28.6.2013. The Assessing Officer thereafter issued notice u/s.271B for failure to audit accounts and furnishing such report of audit in time. The assessee contended that the tax audit was done within due date, however, filed the report on 28.6.2013 and, therefore, the penalty u/s.271B is not leviable. The Assessing Officer was not satisfied with the submission of the assessee and levied penalty of Rs.63,216/- u/s.271B of the Act for not furnishing the return of income within due time prescribed u/s.139(1) of the Act.

13. Before the CIT(A), the assessee reiterated the submissions and relied on the following judgments:

- i) Calcutta Chrome Type Pvt Ltd vs ITO, 80 ITR 627.
- ii) Anchor Pressing Pvt Ltd vs CIT, 136 ITR 505 (All)



- iii) Bangalore Steel Distributors vs ITO, 49 ITD 668 (Bang)
- iv) CIT vs. Iqbalpur Co-operative Chrome Development Union Ltd, 23 DTR 60 (Utt)
- v) Rupali Dying and Printing Works, 86 Taxman 124
- vi) Kartika Enterprises, 114 Taxman 46.

14. Before us, Id A.R. reiterated the submissions made before the lower authorities.

15. On the other hand, Id D.R. supported the orders of lower authorities.

16. We have heard the rival submissions, perused the orders of lower authorities and materials available on record. The undisputed facts in the present case are that the Assessing Officer observed that the assessee has not filed the return of income for the impugned assessment year and, therefore, issued notice u/s.148 of the Act to the assessee on 8.8.2012, in response to which, the assessee filed return of income showing total income at Rs.2,53,140/-. The Assessing Officer found that the turnover of the assessee during the assessment year under consideration was Rs.1,26,43,200/- and, therefore, the assessee was required to get its account audited u/s.44AB of the Act and file the audit report within the due date prescribed u/s.139(1) of the Act. He observed that the assessee did not file tax audit report u/s.44AB of the Act for the impugned assessment year 2009-2010 before the due date of filing of return of income 139(1) of the Act. In response to show cause, the assessee submitted the tax audit report on 28.6.2013 and submitted that the audit of accounts were got done within the due date u/s.139(1) of the Act but



the same was not filed with the department and, therefore, it was not exigible to penalty u/s.271B of the Act. The arguments of the assessee were found to be not convincing by the Assessing Officer and, therefore, he invoking the provisions of section 271B of the Act levied penalty of Rs.63,216/-.

17. On appeal, the CIT(A) also confirmed the order of the Assessing Officer.

18. Before us, the contentions of the assessee is the same as were made before the lower authorities.

19. We find that the CBDT Circular No.03/2009 dated 21.5.2009 provides as under:

“7. Following clarifications are also issued in respect of certain issues arising from furnishing the returns in the above-mentioned forms:

- (i) An assessee should obtain the report of audit from an accountant under section 44AB of the Act on or before the due date of the furnishing of the return and should fill out the relevant columns of the returns forms on the basis of such report. However, the report of audit should not be attached with the return or furnished separately any time before or after the due date. The assessee should retain the report with himself. If called for any income tax authority during any proceeding under the Act, it shall be incumbent upon the assessee to furnish/produce the same in original. No penalty under section 271B shall be initiated or levied for not furnishing the tax audit report on or before the due date. However, if the audit report has not been obtained before the due date, provisions of section 271B shall continue to be attracted.”

20. We find that the audit report was obtained within section 139(1) time limit is not in dispute. It is also not in dispute that the copy of audit report was furnished to the Assessing Officer as and when the Assessing



Officer called for the same. The revenue has not brought no material on record to show that the assessee has violated the above quoted circular of CBDT. In these circumstances, following the above quoted circular of the CBDT, in our considered view, penalty levied u/s.271B of the Act in the instant case is untenable. Therefore, we delete the penalty of 63216/- levied u/s.271B of the Act and allow the appeal of the assessee.

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

Order pronounced on 17 /04/2018.

Sd/-

(Pavan Kumar Gadale)
JUDICIALMEMBER

sd/-

(N.S Saini)
ACCOUNTANT MEMBER

Cuttack; Dated 17/04/2018
B.K.Parida, SPS

Copy of the Order forwarded to :

1. The appellant: Mr Prem Prakash Senapati,
At: Senapati Bhawan, Grand Road,
Po/Dist:puri
2. The Respondent. ITO, Puri Ward, Puri.
3. The CIT(A)-2, Bhubaneswar
4. Pr.CIT-2, Bhubaneswar
5. DR, ITAT, Cuttack
6. Guard file.
//True Copy//

BY ORDER,

SR.PRIVATE SECRETARY
ITAT, Cuttack