

आयकर अपीलीय अधिकरण, कटक न्यायपीठ, कटक
IN THE INCOME TAX APPELLATE TRIBUNAL CUTTACK BENCH CUTTACK
BEFORE SHRI S.S.GODARA, JM & SHRI L.P. SAHU, AM

आयकर अपील सं./ITA Nos.345 & 346/CTK/2019

(Through : Video Conferencing)

(निर्धारण वर्ष / Assessment Years : 2009-2010 & 2010-2011)

ACIT, Balasore Circle, Balasore	Vs.	Mr. Birat Chandra Dagara, Rairangpur, Mayurbhanj
PAN No. : AECPD 7343 D		

(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)
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राजस्व की ओर से / Revenue by	:	Shri M.K.Gautam, CIT DR
निर्धारिती की ओर से / Assessee by	:	Shri P.K.Mishra, Advocate

सुनवाई की तारीख / Date of Hearing	:	03/12/2020
घोषणा की तारीख / Date of Pronouncement	:	06/01/2021

आदेश / ORDER

Per Bench :

These two appeals filed by the Revenue against the separate orders dated 31.07.2019, passed by the CIT(A), Cuttack for the assessment years 2009-2010 & 2010-2011.

2. In both the appeals, the Revenue has challenged the order passed by the CIT(A) in deleting the addition made by the AO in the order passed u/s.263/143(3) of the Act holding that where the original order u/s.263 of the Act has been cancelled, its subsequent order u/s.263/143(3) of the Act would also follow suit as the reason for launching proceeding u/s.263/143(3) of the Act no longer survives.

3. To decide both the appeals, we shall consider the facts narrated in the appeal of the Revenue in ITA No.345/CTK/2019 for the assessment year 2009-2010.

4. Brief facts of the case are that the assessee is a mining contractor and filed his return of income for assessment year 2009-10 on 31.03.2011, showing a total income of Rs.7,05,460/-. Thereafter, the return was taken up for scrutiny assessment and the same was completed u/s. 144/147 of the IT. Act, 1961 on 23.03.2015 by assessing the income at a figure of Rs.7,15,510/-. However, the Principal Commissioner of Income-tax, Cuttack invoked the provisions of section 263 and held that the assessment order of the Assessing Officer dt. 23.03.2015 was erroneous and prejudicial to the interest of revenue. While passing the order u/s. 263 dt. 28.03.2016, the Pr. CIT, Cuttack stated that the assessee had declared the income from mining business in the hands of M/s. Nabadurga Minerals, a partnership firm in which the assessee was a partner. Thus, the Pr. CIT held that there was a contravention of section 37(1)(b) of the Mining Concession Rules, 1960, whereby the holder of a mining licence is prohibited from transferring the same to any other entity. The Pr. CIT concluded by stating that since the assessee was the holder of the mining lease, the income from mining should have been disclosed in his hands and not in the hands of M/s. Nabadurga Minerals. The Pr. CIT, accordingly, set aside the

assessment order of the AO and directed a fresh assessment to be undertaken after examining the issues raised in the order u/s. 263 of the Act. Accordingly, the Assessing Officer took up a fresh assessment of the assessee's case for assessment year 2009-10 and show caused the assessee as to why the income from the mining business shown in the hands of the partnership firm, M/s. Nabadurga Minerals should not now be assessed in his hands. The assessee replied by submitting that the Mining lease still remained with the assessee and had not been transferred or assigned to any other entity. The assessee further stated that the partnership firm had only been created for the smooth operation of the assessee's business and the creation of a firm in this manner was not barred by any law in operation. These submissions of the assessee did not find favour with the Assessing Officer who held that since the mining lease was in the name of the assessee, the entire mining income should be assessed in his hands. The observations of the AO are as under :-

“After taking into consideration the details/documents etc submitted by the assessee, it is clearly seen that the assessee himself agreed to the fact that the mining activities was to be done in the accounts of the assessee, in his individual capacity and not in the hands of M/s. Nabadurga Minerals in which the assessee is the managing partner. All the income and expenditure are credited and debited to the P & L account of M/s. Nabadurga Minerals till 31.03.2009 are not allowable as per the provision of income tax act.”

Accordingly, the AO assessed the total income of the assessee at Rs.7,07,60,432/- for assessment year 2009-10 shown by the partnership firm, M/s. Nabadurga Minerals and M/s. B.C.Dagara.

5. Aggrieved by the order of AO, the assessee appealed before the CIT(A) and the CIT(A) allowed the appeal of the assessee on legal grounds that the Tribunal has quashed the order passed u/s.263 of the Act in ITA No.307/CTK/2016, order dated 29.05.2017 without deciding on merits of the case.

6. Against the order passed by the CIT(A), the Revenue is in appeals for both the assessment years under consideration before the Income Tax Appellate Tribunal.

7. Ld. CIT DR relied on the order of AO and before us submitted that CIT(A) was not justified in holding that where the original order u/s. 263 of the I T Act, 1961 has been cancelled, its subsequent order u/s. 263/143(3) would also be cancelled as the reason for launching proceeding u/s. 263/143(3) no longer survives, without going into the detailed facts of the case and without considering the fact that the order of the Hon'ble ITAT quashing the relevant order u/s. 263 passed by the Pr. CIT has already been challenged before the High Court of Orissa and Review Petition seeking recall of the order passed by the High Court and decision on merit, has been filed. It was further contended by the ld. CIT DR that the CIT(A) was also not justified in law

in holding that the mining lease issued in favour of the assessee was not transferred to M/s. Nabadurga Minerals in contravention of Rule 37(i)(b) of the Mineral Concession Rules, 1960, ignoring the fact that 70% of the share holding in the partnership firm belongs to others and substantial financial contribution had been made by such partners, thereby clearly bringing the case of the assessee within the mischief of Rule 37(i)(b) of the Mineral Concession Rules, 1960 and hence, the AO had rightly assessed the income from mining in the hands of the assessee. Accordingly, ld. CIT DR submitted that the order passed by the CIT(A) deserves to be quashed.

8. On the other hand, ld. AR of the assessee reiterated the submissions made before the CIT(A) and submitted before us that the order u/s. 263 dt 28.05.2016 for assessment year 2009-10 had been challenged by the assessee in the jurisdictional ITAT and that the latter vide order dt. 29.05.2017 in ITA No.307/CTK/2016 had struck down the order u/s. 263 passed by the Pr.CIT, Cuttack. The ld. AR further submitted that since the order u/s. 263 of the Act no longer stood, the consequential order u/s. 263/143(3) dt. 29.12.2016 for assessment year 2009-10 would be null and void as the very foundation on which this order had been passed no longer existed with the annulment of the order u/s. 263 of the Act by the jurisdictional ITAT. It was also

submitted by the ld. AR of the assessee that considering the above, the CIT(A) has rightly deleted the addition.

9. After hearing both the sides and perusing the entire material available on record along with the orders of authorities below, we find that the CIT(A) while dealing with the issue has observed that ITAT, Cuttack vide its order dt. 29.05.2017 has already annulled the order u/s. 263 of the Act passed by the Pr.CIT, Cuttack. Accordingly, the subsequent assessment order u/s. 263/143(3) dt. 29.12.2016 would also not stand as the ITAT in its order clearly mentions that no mining lease was transferred by the assessee to any other entity in contravention of Rule 37(i)(b) of the Mineral Concession Rules, 1960. Thus, the CIT(A) held that the AO was incorrect in assessing the income of the partnership firm, M/s. Nabadurga Minerals and M/s. B .C. Dagara in the hands of the assessee. The jurisdictional ITAT, Cuttack in the case of M/s. Shree Maa Adyasakti Bastralaya, Balasore V/s. ITO, Ward-2, Balasore in ITA No. 193/CTK/2015 vide order dt. 25.10.2016 upheld this principle by holding that where the original order u/s. 263 has been cancelled, the subsequent order u/s. 263/143(3) would also not stand as the very reason for launching proceeding u/s. 263/143(3) now no longer existed. Accordingly, the CIT(A) deleted the addition made by the AO u/s. 263/143(3) of the Act after observing as under :-

"I have perused the facts of the case and also examined the order of the jurisdictional ITAT dt. 29.05.2017 in ITA No. 307/CTK/2016. The Hon'bie ITAT examined the clause 37(i)(b) of the Mineral Concession

Rules, 1960 and also placed reliance on the judgment of the jurisdictional Orissa High Court in the case of CIT Vs. Wine Chamber, 195 ITR 195 and held as follows :

"The ratio of the judgment in the case of CIT vs. Wine Chamber (Supra) is that in case the licence for trading in liquor stood in the name of an individual who had obtained it and he had entered into partnership with another person but the licence had not been transferred to the firm, the firm is entitled for registration. Unless licence itself is not transferred to the partnership firm, it will not result in assignment of the part of the licence. In the instant case, Rule 37 (1) of Mining Concession Rules, 1960, prohibits assignment, subletting, mortgaging or in any other manner transfer the mining lease or any right, total or interest therein or entered into or make any arrangement, contract or understanding whereby the lease will directly or indirectly financed to a substantial extent by or under which assessee's portion or undertaking will or may be substantially controlled by any person or body of persons other than the lease."

"Undisputedly, assessee in this case has entered into a notional partnership with his sons for getting business assistance and has not assigned, sublet, mortgage, transfer of mining lease right, title or interest therein nor there is an iota of evidence that the sons of the assessee being partner in notional partnership with the assessee have directly or indirectly financed to a substantial extent and have substantially controlled the mining business of the assessee, so in the given circumstances, by following the ratio of the judgment in the case of CIT vs. Wine Chamber (Supra), we are of the considered view that the CIT has erred in invoking the provisions contained u/s. 263 by misinterpreting the provisions contained u/s. 37(1)(b) of the Mining Concessions Rules, 1960. No other fact or evidence has been brought on record by the CIT to prove that the assessment order passed by the AO u/s. 143(3) was erroneous and prejudicial to the interest of the Revenue."

Hence, it is seen from the above that the ITAT, Cuttack vide its order dt. 29.05.2017 cancelled the order u/s. 263 passed by the Pr.CIT, Cuttack. From this it follows, that the subsequent assessment order u/s. 263/143(3) dt. 29.12.2016 would also not stand as the ITAT in its order clearly mentions that no mining lease was transferred by the assessee to any other entity in contravention of Rule 37(i)(b) of the Mineral Concession Rules, 1960. This implies that the AO was incorrect in assessing the income of the partnership firm, M/s. Nabadurga Minerals and M/s. B .C. Dagara in the hands of the assessee. The jurisdictional ITAT, Cuttack in the case of M/s. Shree Maa Adyasakti Bastralaya, Balasore V/s. ITO, Ward-2, Balasore in ITA No. 193/CTK/2015 vide order dt. 25.10.2016 upheld this

principle by holding that where the original order u/s. 263 has been cancelled, the subsequent order u/s. 263/143(3) would also not stand as the very reason for launching proceeding u/s. 263/143(3) now no longer existed.

Hence, keeping in view the comments of the preceding paragraphs, the addition made by the AO in the order u/s. 263/143(3) dt. 29.12.2016 is hereby deleted.

On careful perusal of the above observations of the CIT(A), we do not see any good reason to interfere with the same. Accordingly, we uphold the findings recorded by the CIT(A) for both the assessment years under consideration and observe that the impugned orders in both the appeals are based on the consequential assessment framed in pursuance to the order passed u/s.263 of the Act. Once the order u/s.263 of the Act has been quashed by the Tribunal, the consequential order is legally not sustainable. Thus, the CIT(A) has rightly deleted the addition and we dismiss both the appeals of Revenue.

10. In the result, both appeals of Revenue are dismissed.

Order pronounced in the open court on 06/ 01/ 2021

Sd/-
(S.S.GODARA)

न्यायिक सदस्य / JUDICIAL MEMBER

Sd/-
(L.P.SAHU)

लेखा सदस्य / ACCOUNTANT MEMBER

कटक Cuttack; दिनांक Dated 06/01/2021

Prakash Kumar Mishra, Sr.P.S.

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

1. अपीलार्थी / The Appellant-
ACIT, Balasore Circle, Balasore
2. प्रत्यर्थी / The Respondent-
Mr. Birat Chandra Dagara,
Rairangpur, Mayurbhanj
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