

आयकर अपीलीय अधिकरण, कटक न्यायपीठ, कटक

**IN THE INCOME TAX APPELLATE TRIBUNAL CUTTACK BENCH, CUTTACK
BEFORE SHRI C.M. GARG, JM & SHRI MANISH BORAD,
AM**

आयकर अपील सं./ITA No.300/CTK/2016

(निर्धारण वर्ष / Assessment Year :2009-2010)

Rabindra Kumar Mohanty, C/o Dr. Basudev Mishra, Plot No.3C/1, 1 st Floor, Near Raj Bhawan Square, Unit-8, Bhubaneswar- 751012	Vs	ITO, Ward-2(2), Bhubaneswar
PAN No. : ABXPM 8506 B		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)
निर्धारिती की ओर से /Assessee by	:	Shri Natabar Panda, Advocate
राजस्व की ओर से /Revenue by	:	Shri S.C.Mohanty, Sr.DR
सुनवाई की तारीख / Date of Hearing	:	26/10/2021
घोषणा की तारीख/ Date of Pronouncement	:	21/12/2021

आदेश / O R D E R

Per Bench:

The captioned appeal filed at the instance of assessee is directed against the order passed by the Ld. Commissioner of Income Tax(Appeals)-2, Bhubaneswar (in short 'the CIT(A)'), dated 22.02.2016 for the assessment year 2009-2010.

2. This appeal ITANo.300/CTK/2016 was dismissed by this Tribunal vide order dated 30.08.2017 on account of non-appearance on the part of the assessee. Thereafter the assessee took the matter before the Hon'ble High Court and the Hon'ble High Court in W.P.(C) No.2487 of 2019, vide

judgment dated 18.03.2020 has restored the matter to the Tribunal to decide on merit. The relevant observations of the Hon'ble Jurisdictional High Court are as under :-

12. Applying the principles laid down in the aforesaid cases to the facts of the present case, we are of the considered opinion that the Tribunal could not have dismissed the appeal filed by the appellant for want of prosecution and it ought to have decided the appeal on //8// merits even if the appellant or its counsel was not present when the appeal was taken up for hearing.

13. In view of the above analysis, the Rules and the provisions of the Act would pave way for the Tribunal to reconsider its decision. The writ petition is allowed and we direct the Tribunal to restore the appeal and decide the appeal on merit after giving both the parties an opportunity of being heard.

The writ petition is accordingly disposed of. No order as to cost.

3. Now, this appeal has been listed for hearing before this Tribunal. The assessee has filed the following grounds of appeal :-

- 1. For that, the impugned orders as passed by the Learned Forums below are not just and proper in the facts and in circumstances of the case, hence liable to be quashed in the interest of justice.*
- 2. For that, the impugned order of Reassessment dated 30-06-2014 so passed by the learned A.O. is without jurisdiction and without the Authority of law, as such, the same being not sustainable in the eye of law needs to be quashed in the interest of justice.*
- 3. For that, the learned C.I.T.(A) should have quashed the impugned order of Reassessment, instead of confirming the same, particularly when, the impugned Reassessment is nothing but just a change of opinion and contrary to the settled principles of law decided by this Hon'ble Tribunal.*
- 4. For that, the learned A.O. as well as the learned C.IT.(A) have committed gross error in making addition of undisclosed gross receipts, treating the same as income,*

instead of adding the profit embodied therein. The impugned addition being unsustainable, needs to be deleted in the interest of justice.

5. *For that, the learned C.IT.(A) should not have confirmed the addition of gross receipts of Rs.66,43,421.00 made by the learned A.O. treating the same as income of the Assessee.*
6. *For that, the learned C.IT.(A) should have directed the learned A.O. to give credit of total TDS of Rs.9,37,880.00, while computing the total income in the interest of justice.*
7. *For that, the learned A.O. should not have ignored to give credit of total TDS of Rs.9,37,880.00 while computing the total income and taxability instead of giving credit of part of TDS, particularly when, the total TDS is well within his knowledge, while completing the Assessment.*
8. *For that, the learned C.I.T(A) as well as the leaned A.O. have committed gross error in computing the interest U/s.234B of the Act before giving credit of TDS. The impugned computation of interest being wrong is liable to be deleted in the interest of justice.*
9. *For that, the Appellant craves leave of this Hon'ble Tribunal to urge other grounds of Appeal if any at the time of hearing.*

4. Brief facts of the case are that the assessee is an individual, engaged in transportation business and filed his return of income for A.Y.2009-2010 on 30.09.2009 declaring total income at Rs.4,65,525/-. During the course of assessment Ld. AO found that the transportation receipts worth of Rs.66,43,421/- has been understated and there is excess of assets over liabilities to the tune of Rs.2,23,885/- in the balance sheet and therefore, notice u/s.148 was issued. In reply to the notice, the assessee filed written submission and requested to treat the original return of income as return of income in compliance to notice u/s 148 of the Act. The Ld.

AO reassessed the income enhancing income by adding under stated transportation activities at Rs.66,43,421/- and Rs.2,23,885/- on account of excess of assets over the liabilities.

5. Aggrieved assessee appealed before the CIT(A) and the CIT(A) only deleted the addition of Rs.2,23,885/- made by the AO on account of excess of assets over the liabilities and upheld the action of AO in exercising his jurisdiction to issue notice u/s.148 of the Act and reassessing the income of the assessee by adding the entire understated turnover to the return of income.

6. Further aggrieved, the assessee is in appeal before the Tribunal.

7. Ld. AR of the assessee vehemently argued the case and filed his written submissions, which is as follows :-

01. That the appellant above named was working as a transporting contractor during the year under appeal.

02. That the accounts for the said year was audited by a qualified Chartered Accountant and return was filed disclosing Total Income at RsA,65,525.00. A copy of the audited Profit & Loss Account & Balance Sheet for the FY: 2008-09 dated-25.09.2009 is enclosed herewith and marked as ANNEXURE-I.

03. That the assessment order for the said year was completed U/s.143(3) of the Act on 02.11.2011 rejecting the book results and estimating the Total Income @2.5% of the Gross Receipts (RsA,18,04,300.00) u/s.145(3)of the Act at Rs.10,45,110.00. A copy of the said Assessment Order is enclosed herewith and marked as ANNEXURE-2.

04. That thereafter the assessment proceeding was reopened basing on information from the Audit Team that transport bills

worth Rs.66,43,421.00 and excess of assets over liabilities worth Rs.2,23,885.00 had escaped the assessment. Hence the Learned Assessing officer (LAO) completed the assessment on a total income of Rs.79,12,414.00 by adding the above two alleged transactions. A copy of the said order of assessment u/s.1471143(3) dated-30.06.2014 is enclosed herewith and marked as ANNEXURE-3.

05. That being aggrieved with the above order of assessment the appellant filed First Appeal before the Ld. CIT(A)-2, Bhubaneswar. Along with the Appeal memo the appellant filed Statement of Facts & Grounds of Appeal. A copy of the same is enclosed herewith and marked as ANNEXURE-4.

06. That Ld. CIT(A)-2, Bhubaneswar after hearing the appellant in person allowed the appeal in part deleting the addition of Rs.2,23,885.00 on account of excess of assets over the liabilities and sustained the addition of escaped turnover of Rs.66,43,421.00. A copy of the order of Ld. CIT(A)-2, Bhubaneswar dated- 22.02.2016 passed in IT. Appeal No.02881 2015-16 is enclosed herewith and marked as ANNEXURE-5.

07. That being aggrieved with the order of the First Appellate Authority the appellant filed Second Appeal at this Forum bearing ITA No.300/CTK12016. As it luck would have been, the Second appeal was heard *ex parte* on 30.08.2017. A copy of the said order of IT A T is enclosed herewith and marked as ANNEXURE-6.

08. That appellant was ill for a quite long period and could not file petition before the Hon'ble IT AT u/s.254(2) of the Act for restoration of appeal within the time allowed under the statute.

09. That finding no other way out, the appellant filed Writ Petition before the Hon'ble High Court of Orissa vide W.P(C) No.2487 of 2019. The Hon'ble High Court while disposing of the Writ Petition on 18.03.2020 with the below observation directed the Hon'ble ITA T, Cuttack Bench to hear the above appeal of the appellant:-

"Applying the principle laid down in the aforesaid cases to the facts of the present case, we are of the considered opinion that the Tribunal could not have dismissed the appeal filed by the appellant for want of prosecution and it ought to have decided the appeal on merits even if the appellant or its counsel was not present when the appeal was taken up for hearing".

A copy of the judgment of the Hon'ble Orissa High Court dated-18.03.2020 is enclosed herewith and marked as ANNEXURE-7.

10. That when the Hon'ble ITAT on its own motion didn't fix up the above appeal for hearing, the appellant filed petitions on 08.09.2020 and 02.02.2021 for early hearing of the said appeal of the appellant.

11. That the only point remained for consideration in this appeal is that 'whether the entire escaped turnover would be added to the income of the appellant for the purpose of determination of Total Income or the rate at which the LAO estimated the net income is to be applied to determine the Total income of the appellant'.

12. That the appellant in this connection draws the kind attention of the Hon'ble Bench towards comparable case laws i.e. (a) CIT-Vrs.-Balchand Ajit Kumar reported in (2004)263-ITR-610(MP) and (b) R.R. Carrying Corporation -Vrs.- ACIT reported in (2009) 126- TT] (CTK) 240 (IT A T, Cuttack Bench). Copies of the above judgment and order are enclosed herewith and marked as ANNEXURE-8 &9.

13. That considering the facts and circumstances of the case the net income of the above named appellant may kindly be estimated in view of the case laws as discussed above and instead of addition of the entire escaped turnover only the profit element may be added to the total income of the appellant at the same rate as has been adopted by LAO for the purpose of taxation. Chance may be given to adduce other documents if any.

8. Apart from the above written submission, ld. AR of the assessee further submitted that the AO while passing order u/s.143(3) of the Act, had considered the entire figure as appearing in the Form 26AS to be the gross receipt of the assessee and by resorting to Section 145 of the Act, the AO estimated the net profit of the assessee after rejecting the books of account @2.5% and derived income at Rs.10,45,108.00. However, upon receipt of A.G.Audit objection that the entire differential receipt of Rs.72,23,004/- should have been added to the total income of the assessee, the AO served notice for reopening the completed assessment which is erroneous and without jurisdiction. It was also

submitted by the ld. AR of the assessee that having concluded that all the material facts were fully and truly disclosed by the assessee at the time of original assessment invoking of provisions of Section 147 was not valid. There was no tangible material before the AO to form the belief that the income had escaped assessment and therefore, reopening of assessment under Section 147 of the Act was invalid. Accordingly, ld. AR of the assessee submitted that the assessment

9. On the other hand, ld. Departmental Representative (DR) relied on the orders of authorities below and submitted that the proposal given by the Audit to look into the matter of understatement of income is very well justified since the assessee has not filed true and full material facts in return of income. The AO has duly applied his mind to the audit objection and then issued show cause notice to explain when all the expenses incurred in the year were reflected in the audited P & L account and no further revenue expenses are required to be allowed against the corresponding understated transportation receipt. Therefore, both the authorities below have rightly treated the entire understated transportation receipts as income of the assessee. Accordingly, the ld. DR

submitted that the both the orders passed by the authorities below deserve to be upheld.

10. We have heard rival contentions of the parties and perused the material available on record and carefully gone through the decisions refereed and relied by ld. counsel for the assessee.

10.1 We observe that ground no.1 2, & 3 are raised by the assessee challenging the validity of the reassessment proceedings carried out by the Ld. AO based on the information that transportation receipts worth of Rs. 66,43,421/- were not accounted for by the assessee in the books of account even though the tax was deducted at source and also there was a discrepancy of excess assets over liabilities to the tune of Rs. 2,23,885/-. There is no dispute to the fact that there was a difference between the turnover declared by the assessee in the books of account and the turnover appearing in form No. 26AS. Ld. counsel for the assessee has contended before us that this issue of discrepancy in turnover has already been dealt by the Ld. AO in the regular assessment proceedings u/s 143(3) of the Act vide order dated 02.12.2011 and initiation of reassessment proceedings has been made by the ld. AO merely on the basis

of audit objection and there is no other tangible material which was not dealt by the ld. AO during the course of assessment proceedings u/s 143(3) of the Act. We find force in the contention made by the Ld. counsel for the assessee. We notice that Ld. AO rejected the book results and the net profit was computed @ 2.5% of the total turnover reflected in Form No.26AS at Rs.4,18,04,400/-. Thus, it remains uncontroverted fact that the basis of reopening of assessment by issuance of notice u/s 148 of the Act dated 06.02.2014 for the alleged difference in turnover disclosed in the books of account and the turnover appearing in form No.26AS already stands dealt by the Ld. AO and therefore, it cannot be valid reason for reopening assessment proceeding.

10.2. As regards the second reason of reopening for the alleged excess assets over liabilities to the tune of Rs.2,23,885/-, we find that there is no element of escarpment of income as it is the TDS amount which was deducted on the unaccounted transportation receipts of Rs.66,43,421/-. The alleged unaccounted receipts were not accounted for in the books intentionally because these were the payments made directly to the truck Drivers and remained uninformed to the

assessee and it was known only when form no.26AS was downloaded.

10.3 We, therefore, under the given facts of the case are of the considered view that all the material facts were considered by the Ld. AO during the course of original assessment and a legally permissible view was taken Ld. AO by way of rejecting book results and estimating income @ 2.5% of the total turnover as per form No.26AS. Since there was no other tangible material before Ld. AO to form the belief that the income has escaped assessment we in view of the ratio laid down by the Hon'ble Supreme Court in the case of *CIT vs. Former Finance (2003) 264 ITR 566(SC)* and also ratio laid down by the Hon'ble Bombay High Court in the case of *Balkrishna Hiralal Wani vs. ITO (2010) 321 ITR 519(Bom)*, are of the considered view that the reopening of the assessment u/s 147 of the Act in the instant case was not valid and reassessment proceedings deserves to be quashed. Ground No.1, 2 & 3 of the assessee's appeal are allowed.

11. As far as the remaining grounds on merits are concerned although they are merely academic in nature but still we will like to adjudicated the same.

12. Ground No.4 & 5 relates to addition made for the alleged undisclosed gross receipts of Rs.66,43,421/-. We find that this alleged undisclosed gross receipts has already been considered by the ld. AO while framing the assessment u/s 143(3) of the Act wherein Ld. AO rejected the book results and estimated the income @ 2.5% of the total turnover of Rs.4,18,04,300/-. Hon'ble Madhya Pradesh High Court in the case of *CIT vs. Balchand Ajit Kumar (2004) 263 ITR 610(MP)* has held that the total sale cannot be regarded as the profit of the assessee. The net profit rate has to be adopted and if net profit rate is adopted it cannot be said that there is perversity of approach. In the instant case also the turnover of Rs.66,43,421/- which was not accounted for in the regular books of account for lack of information with the assessee during the course of financial year, the alleged understated gross receipt of transportation of Rs.66,43,421/- cannot be treated as total income and only the net profit embedded in the gross receipts should be brought to tax.

12.1 When the Ld. AO has already estimated the net profit @ 2.5% on the total turnover disclosed in the regular books, there remains no justification to treat the alleged turnover of Rs.66,43,421/- in a separate manner. Therefore, ld. CIT(A)

erred in confirming the addition for gross receipts and he ought to have taxed the assessee only to the extent of 2.5% of the alleged turnover. Thus, ground no.4 & 5 of the assessee's appeal are partly allowed.

13. Ground No.6 & 7 pertains to direction to be given to the Ld. AO to allow credit of TDS of Rs. 9,37,880/-. We find force in the contention of the ld. counsel for the assessee since it is an admitted fact at the end of revenue also that the total tax deducted at source on the transportation charges reflecting in form No.26AS is Rs. 9,37,880/-. When income of the assessee has been estimated @ 2.5% of the total turnover appearing in form no.26AS then the ld. AO ought to have given the credit of tax deducted at source of Rs.9,37,880/- against the tax liability arising on the estimated income of the assessee. We, accordingly direct the Ld. AO to allow credit of TDS of Rs.9,37,880/- appearing in form No.26AS under the PAN of the assessee. Thus, ground no.6 & 7 of the assessee's appeal allowed.

14. Ground No.8 is consequential and ground no.9 is general in nature which needs no adjudication.

15. In the result, Appeal of the assessee in ITANo.300/CTK/2016 is allowed.

Order pronounced in the open court on 21/12/ 2021.

Sd/-
(सी.एम.गर्ग)
(C.M.GARG)
न्यायिक सदस्य / JUDICIAL
MEMBER

Sd/-
(मनीष बोरड़)
(MANISH BORAD)
लेखा सदस्य / ACCOUNTANT MEMBER

कटक Cuttack; दिनांक Dated 21/12/2021

Patel, P.S.

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

1. अपीलार्थी / The Appellant-
2. प्रत्यर्थी / The Respondent-
ITO, Ward-2(2), Bhubaneswar
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