



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

**BEFORE S/SHRI GEORGE MATHAN, JUDICIAL MEMBER
AND ARUN KHODPIA, ACCOUNTANT MEMBER**

ITA No.273/CTK/2015

Assessment Year : 2008-2009

M/s. L.A.Developers, HIG-47, 2 ND FLOOR, Jayadev Vihar, Bhubaneswar.	Vs.	CIT, Bhubaneswar.
PAN/GIR No.AACFL 6157 D		
(Appellant)	..	(Respondent)

Assessee by : Shri P.C.Sethi, AR
Revenue by : Shri M.k.Gautam, CIT (DR)

Date of Hearing : 02 /6/ 2022
Date of Pronouncement : 02 /6/2022

ORDER

Per Bench

This is an appeal filed by the assessee against the order u/s. 263 of the Act of the CIT, Bhubaneswar dated 9.3.2015 for the assessment year 2008-2009.

2. Shri P.C.Sethi, Id AR appeared for the assessee and Shri M.K.Gautam, Id CIT DR appeared for the revenue.

3. At the outset, the assessee has filed an application on 1.2.2022, wherein, he has mentioned that with the insertion of the Section 255(7,8 &

9) of the I.T.Act w.e.f. 1.4.2021, the Tribunal ceases its jurisdiction to hear the appeal till the notification is issued by the Central Government in the Official Gazette in accordance with section 255(8) of the I.T.Act, 1961 for which the appellant requests the Tribunal to adjourn the case till a notification is issued in the impugned matter. When the appeal came up for hearing on 2.5.2022, Id counsel for the assessee was asked whether the appeal of the assessee could be adjourned after 31.3.2023 which was the last date for issuance of the Notification u/s 255(8) of the Act. Id counsel for the assessee submitted that the appeal should not be adjourned to such a long date but the application could be disposed off in respect of whether the Tribunal has the jurisdiction to hear the appeal in view of the insertion of section 255(7,8 & 9). Consequently, the appeal was posted for hearing to today being 2nd June, 2022. Today when the matter came up for hearing, Id counsel for the assessee submitted that the Tribunal has no power to hear the appeal in physical form. It was submitted that the matter should be referred to the Hon'ble President, ITAT or the Central Government in respect of notification required u/s.255 (7,8 & 9) inserted w.e.f. 1.4.2021. On this point, the Bench raised a query to the Id counsel for the assessee as to whether this issue arises out of the order of the Id CIT. Id counsel admitted that the issues does not arise out of the order of the Id CIT, Bhubaneswar. To this, he was informed that if the issue does

not arise out of the order of the Id CIT how the Tribunal can adjudicate on that issue. Id counsel again submitted that let the matter be referred.

4. Replying to above, Id CIT DR has filed a response to the said application, wherein, he has mentioned that no such notification has been issued till now and the last date for such notification has been fixed on 31.3.2023.

5. We have considered the rival submissions of both the sides on this issue. Primarily, the issue does not arise out of the order of Id CIT and admittedly, it ought not to be considered by this Tribunal. However, as this is an issue of jurisdiction that has been raised and the Tribunal is questioned on its own jurisdiction, the following answer is being placed:

- i) The question of jurisdiction of an appellate authority cannot be raised to the appellate authority itself. It has to be raised to other competent constitutional forum.
- ii) The word used in section 255(7) is "may". The prerogative to make the provisions of section 255(7, 8 & 9) operate is exclusively in the domain of the legislature. Till such time, the notification is issued as required under section 255(8), the provisions of section 255(7) does not itself activate. The legislature in its own wisdom has option has set the date for the purpose of activating section 255(7,8 & 9) on 31.3.2023.

That prerogative with the legislature is not something that can be questioned by this appellate Tribunal.

6. Consequently, we are of the view that this issue need not be referred to the Hon'ble President, ITAT nor to the Central Government and this Tribunal has the jurisdiction to hear the appeal before it in physical form as required. With the above findings, the application filed by the assessee stands rejected.

7. Coming to the merits, the issue was against the order u/s.263 passed by the Id CIT, Bhubaneswar in the case of the assessee. It was the submission that the assessment year involved is 2008-09. The assessee had originally filed his return of income. There was a search on the premises of the assessee on 15.1.2007. The assessee had filed his return u/s.153C on 30.10.2009. The original assessment came to be completed u/s.143(3) of the Act on 31.12.2009. The said assessment was reopened by issuance of notice u/s.148 of the Act on 24.8.2011. The assessee filed a letter on 15.2.2013 to submit that the return originally filed u/s.139 may be treated as return u/s.147 of the Act. The reopened assessment came to be completed on 30.3.2013. Subsequently, a show cause notice u/s.263 of the Act came to be issued by Id CIT, Bhubaneswar on 9,.2.2015, wherein, the Id CIT had proposed to cancel/modify the assessment order u/s.143(3)/147 of the Act dated 30.3.2013 in so far as the AO did not make any prudent enquiry in respect of the difference in the valuation of current assets and

current liabilities shown in the balance sheet as on 31.3.2008 vis-à-vis the same shown in the cash flow statement filed before the Assessing Officer. It was the submission that the assessee had filed his reply dated 25.2.2015, wherein, the assessee had challenged the action of the Id CIT. Ld A.R. has submitted that the return had been accepted by the AO and balance had been disclosed in the return has also been accepted by the AO while passing the original assessment order u/s.143(3) of the Act on 31.12.2009. It was the submission that it was mentioned that "the said balance was also considered by the AO while making subsequent assessment u/s.143(3)/147 of the Act, for which, no addition has been made as the disclosure made in the return for consideration of work in progress, sundry creditors, loans and advances and current liabilities has been considered by the AO in both the cases i.e. in making assessment u/s.143(3) read with section 153A of the Act dated 31.12.2009 and u/s.143(3)/147 of the Act dated 30.3.2013". It was the submission that as all the details had been produced before the AO and as no addition has also been contemplated much less the show cause notice issued in the reopened assessment, it cannot be said that there was an error in the order of the Assessing Officer, which call for invoking the powers of revision u/s.263 of the Act. It was the submission that even if the AO proposes to make the addition in the reopened assessment, it would have been on the basis of change of opinion and if the AO cannot make the addition in the reopened assessment on

account of change of opinion, same cannot be done u/s.263 of the Act as it would also be on the basis of change of opinion. It was the submission that the order u/s.263 is liable to be quashed.

8. In reply, Id CIT DR submitted that the AO has not considered the details even though the details were before him and, therefore, it is an erroneous order, which was liable to be revised by invoking the powers u/s.263 by Id CIT. It was the further submission that the fact that the AO had not gone into this issue in the reopened assessment itself is an act which is erroneous and prejudicial to the interest of the revenue and Id CIT has rightly invoked his power u/s.263 of the Act. It was the further submission that if an assessment is validly reopened by the AO, then the AO could after reopening the assessment entered into other areas of other issues in the said reopened assessment and the only requirement is that the assessee should be put to notice in respect of other issues that are being proposed to be examined. He drew our attention to section 147 of the Act for this purpose. It was the further submission that there was glaring difference in the balance sheet and in the cash flow statement and it ought to have drawn the attention of the AO and the AO ought to have examined and made necessary addition. Failure on the part of the AO makes the assessment order erroneous and prejudicial to the interest of the revenue. It was the further submission that no reconciliation had been filed by the assessee before the Id CIT in respect of huge difference between the

figures in the cash flow statement and the figures in the balance sheet. He further relied on the decision of Hon'ble Bombay High Court in the case of Sesa Starlite Ltd vs CIT, (2021) 123 TAXMANN.COM 217 (Bombay), wherein, the Hon'ble High Court held as follows:

'31. The material on record does indicate that the AO, in this case, sought for information from the Assessee with regard to its claim for deduction under section 10B of the IT Act *vide* its communication dated 2/12/2009. However, according to us, this by itself can never be regarded as sufficient. What is further necessary is that the AO actually applies his mind to the information that may be supplied by the Assessee and considers such information and thereafter forms an opinion whether the Assessee is actually entitled to deduction under section 10B of the IT Act for the relevant assessment year. There is a distinction between merely calling for information on a particular issue and considering such information with due application of mind if and when such information is actually provided by the Assessee."

9. It was the submission that just because the details had been called for by the AO it does not mean that the AO has applied his mind to this issue. The fact that there is no discussion on the issue clearly shows non-application of mind by the AO and, there was no opinion formed by the AO on the issue. It was the submission that the order of the Id CIT passed u/s.263 is liable to be upheld.

10. We have heard the rival submissions. A perusal of the order u/.s.263 of the Act in the present case clearly shows that the main crux of the arguments by Id AR before the Id CIT is that what the AO could not do u/s.147 of the Act could not be done in the guise of revision proceedings

u/s.263 of the Act. To this extent, we are in full agreement with Id AR of the assessee. But the question here is, what is it that the AO could not do u/s.147 of the Act. When the details were before the AO and the AO has not adjudicated on the issue when such glaring difference are there, especially when he has made valid reopening, it cannot be said that the AO did not have power to go into the said issue as pointed out by Id CIT DR. A reading of section 147 of the Act shows that the word used in section 147 "or any other allowance or deduction for such assessment year". It also used the words " assess or reassess such income or recompute the loss or the depreciation allowance". In the present case, the difference between the cash flow statement and balance sheet was very much available to the AO to be processed in the reopened assessment. Failure on the part of the AO to examine the same and form an opinion on the issue established that, when the difference was so glaring, has clearly made the order erroneous and consequently prejudicial to the interest of the revenue. This being so, as the AO has not applied his mind to the information that has been supplied by the assessee nor he has considered such information nor formed an opinion in respect of such information, the Id CIT, Bhubaneswar was right in invoking his powers u/s.263 of the Act in revising the assessment order passed u/s.143(3)/147 of the Act dated 30.3.2013 in the case of the assessee.

11. A query was raised to Id AR as to what happened to the consequential order passed in pursuance to order u/s.263 of the Act, to which, Id AR submitted that consequential order has been passed and the appeal had been filed to the Id CIT(A). The Id CIT(A) has dismissed the same exparte. Further appeal had been filed to the Tribunal and the Tribunal had also exparte restored the issue back to the file of Id CIT(A). A very interesting fact on this issue established that even before the Id CIT(A), the appeal was dismissed for non-compliance. The Tribunal in the interest of natural justice had restored the issue to the file of the Id CIT(A) so that the assessee could be granted the opportunity to substantiate its case. This clearly shows that the assessee is not interested in showing the reconciliation but is attempting to use technical reasons to avoid the responsibility.

12. In the result, appeal of the assessee stands dismissed.

Order dictated and pronounced in the open court on 2 /6/2022.

Sd/-
(Arun Khodpia)
ACCOUNTANT MEMBER
Cuttack; Dated 2 /06/2022
B.K.Parida, SPS (OS)

sd/-
(George Mathan)
JUDICIAL MEMBER

Copy of the Order forwarded to :

1. The Appellant : M/s. L.A.Developers, HIG-47, 2ND
FLOOR, Jayadev
Vihar, Bhubaneswar
2. The Respondent. CIT,
Bhubaneswar.
3. The CIT(A)-, Bhubaneswar
4. CIT-, Bhubaneswar
5. DR, ITAT, Cuttack
6. Guard file.
//True Copy//

By order

Sr.Pvt.secretary
ITAT, Cuttack