



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

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

ITA No.54/CTK/2022

Assessment Year : 2017-18

Kamal Lochan Das, At: Kuansh, PO: Kuansh, Dist: Bhadrak	Vs.	Pr. CIT-1, Bhubaneswar
PAN/GIR No.AKHPD 4168 R		
(Appellant)	..	(Respondent)

Assessee by : Shri P.K.Mishra, AR
Revenue by : Shri Suresh Shivanandan, CIT DR

Date of Hearing : 28 /9/2022

Date of Pronouncement : 28/9/2022

ORDER

Per Bench

This is an appeal filed by the assessee against the order passed u/s 263 by the Pr. CIT-1, Bhubaneswar dated 29.11.2011 in Din & Notice No.ITBA/.Rev/F/Rev1/2021-22/1037354583 (10) for the assessment year 2017-18.

2. Shri P.K.Mishra, Id AR appeared for the assessee and Shri Suresh Shivanandan, Id CIT DR appeared for the revenue.

3. It was submitted by Id AR that the assessee is an individual who is deriving income from wholesale trading in SIM Card and mobile recharging. It was the submission that the original assessment came to be completed

u/s.143(3) of the Act on 25.11.2019, wherein, the Assessing Officer had, on the ground that the assessee has not maintained proper books of account, adopted the provisions of section 44AD and applied the rate of 8% on the entire bank deposits of the assessee. It was the submission that the Assessing Officer had not given the assessee the benefit of debits in the bank account. It was the submission that the Pr. CIT invoked his power u/s 263 holding that the assessee had originally declared a turnover of Rs.63,05,410/- but the Assessing Officer has adopted the entire credits in the bank account of the assessee at Rs.1,32,67,045/- as the turnover of the assessee, it was the submission that the Pr. CIT took the view that the income of the assessee could not be estimated at 8% but the rate of 8% is to be applied to the turnover as declared by the assessee at Rs.63,05,410/- and the difference between the total credits in the bank account and the disclosed turnover should be treated as undisclosed income of the assessee. It was the further submission that the Pr. CIT also found that there was deposits of high value denomination notes during demonetization period for a total amount of Rs.3,04,000/-. It was the submission that the Pr. CIT had taken the view that this amount was also liable to be treated as income of the assessee. It was thus the submission that in case of SIM Card wholesale dealer and mobile recharger, the total turnover of the assessee is being treated as practically the income of the assessee and in addition to that further amount of the demonization SBNS deposits is also being

added. It was the submission that at the outset, the SBNs were already included in the deposits in the bank account and this was part of the business turnover of the assessee. It was the further submission that the Assessing Officer after considering the facts had taken a view that the interest of justice would be served if the entire deposits in the bank account were treated as turnover and income was estimated at 8%. It was the submission that the Pr. CIT by directing the AO to treat the difference between the deposits in the bank account and the turnover as declared by the assessee, as undisclosed income of the assessee, is attempting to impose his opinion over that of the opinion of the Assessing Officer. It was the submission that this was not permissible in an order u/s.263 of the Act. It was the further submission that in para 3.1, the Pr. CIT has admittedly given the said direction of treating the difference as undisclosed income of the assessee, he further goes on to hold that no attempt has been made to find out the peak investment. It was thus the submission that this itself showed that the Pr. CIT was also contemplating the treatment of the peak credit as the turnover of the assessee. It was the submission that the different views are possible in the assessee's case. The AO having taken one possible view, the Pr. CIT could not use his power u/s.263 for imposing a different opinion on that of the Assessing Officer. It was the prayer that the order u/s.263 of the Act is liable to be cancelled. It was the submission that after having gone through the records of assessment, the Pr. CIT has

not done any enquiry before setting aside the assessment order passed u/s.143(3) of the Act. He placed reliance on the decision of the Co-ordinate Bench of this Tribunal in the case of M/s. Earth Minerals Co Ltd vs ACIT, in ITA No.223/CTK/2019 order dated 29.8.2022, wherein, following the decision of Hon'ble Jurisdictional High Court in the case of Orissa State Police Housing & Welfare Corporation Ltd., reported in (2022) 139 taxmann.com 207 (Ori), the order passed u/s.263 has been held to be bad in law on account of the absence of any enquiry being done by the Pr. CIT before passing the order u/s.263 of the Act.

4. In reply, Id CIT DR submitted that the assessment order is prejudicial to the interest of the revenue. It was the submission that the assessment had originally been initiated under CASS on account of "Limited Scrutiny" in respect of the cash deposits during the year. It was the submission that the Assessing Officer has not mentioned even that in the assessment order. It was the submission that it was on account of high volume of the cash deposits in the bank account that Limited Scrutiny had been initiated. It was the submission that the assessment order itself is very vague. It was the further submission that the Pr. CIT had given multiple opportunities to the assessee to reply to the show cause notice but the assessee had chosen not to comply. It was the submission that in the absence of any compliance from the assessee, the Pr. CIT was left with no other option but to do

exparte order. He submitted that the order of the Pr. CIT is liable to be upheld.

5. We have considered the rival submissions. A perusal of the assessment order in the present case passed u/s.143(3) clearly shows that the Assessing Officer has adopted one view for estimating the income of the assessee at 8% on the total credits in the bank account of the assessee. It is an admitted fact that the assessee is a wholesale dealer of Simi Card and Mobile recharger. Obviously, there would be substantial debits in the bank account. It has not been looked into by the Assessing Officer. We are not going into the merits of the original assessment order passed u/s.143(3) of the Act. A perusal of the order passed u/s.263 of the Act shows that the Pr. CIT was also privy to the said bank account. Obviously, he would also have seen that there are debits in the bank account in respect of payments to various mobile companies for the purchase of SIM Card and recharge. Without considering any of the debits, which was very well available before the Pr. CIT in the 263 proceedings, to direct that the difference between the total credits in the bank account and the turnover as declared by the assessee as undisclosed income of the assessee, is in fact, an act of adding salt to the injury caused by the Assessing officer in the order passed u/s.143(3) of the Act itself. In any case, this clearly shows that no enquiry has been done by the Pr. CIT after the issuance of show cause notice on the assessee. A perusal of the order u/s.263 of the Act shows that the Pr.

CIT has set aside the assessment to be done denovo. It is also noticed that the Pr. CIT has passed on burden of enquiry to the Assessing Officer without doing any enquiry by himself. It is also noticed that the AO has taken a view in respect of assessing the income of the assessee at 8% of the total credits in the bank account being treated as turnover. This admittedly is one of the possible views. The view expressed by the Pr. CIT is another alternative view that is also possible. The set aside assessment order passed u/s.143(3) of the Act for the purpose of imposing the view of the Pr. CIT over that taken by the AO is not something permissible in an order u/s.263. In these circumstances, on account of the fact that the Pr. CIT has not done any enquiry before passing the order u/s.263, following the principles laid down by the Co-ordinate Bench of this Tribunal in the case of M/s. Earth Minerals Co Ltd (supra), the order passed u/s 263 is liable to be set aside and we do so. Further also, on account of the fact that the Pr. CIT has attempted to impose his view over that possible view taken by the AO, same is impermissible in an order u/s.263 of the Act. Consequently, the order passed u/s.263 is set aside.

6. In the result, appeal of the assessee is allowed.

Order dictated and pronounced in the open court on 28/9/2022.

Sd/-
(Arun Khodpia)
ACCOUNTANT MEMBER

sd/-
(George Mathan)
JUDICIAL MEMBER

Cuttack; Dated 28/9/2022
B.K.Parida, SPS (OS)

Copy of the Order forwarded to :

1. The Appellant : Kamal Lochan Das, At:
Kuansh, PO: Kuansh, Dist: Bhadrak
2. The Respondent: Pr. CIT-1,
Bhubaneswar
3. The CIT(A)-1, Bhubaneswar
4. DR, ITAT, Cuttack
5. Guard file.
//True Copy//

By order

Sr.Pvt.secretary
ITAT, Cuttack