



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

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

IT(ss)A Nos.128 to 132/CTK/2013
Assessment Years : 2004-05 to 2008-09

ITA Nos.10 & 12/CTK/2014
Assessment Years : 2008-09 & 2009-10

S.M.Enterprises, At/Po: Balda, Joda, Dist: Keonjhar	Vs.	ACIT, Circle-1(2), Aayakar Bhavan, Rajaswa Vihar, Bhubaneswar
PAN/GIR No.AATFS 6804 M		
(Appellant)	..	(Respondent)

IT(ss)A Nos.133 to 137/CTK/2013
Assessment Years : 2004-05 to 2008-09

ACIT, Circle-1(2), Aayakar Bhavan, Rajaswa Vihar, Bhubaneswar	Vs.	S.M.Enterprises, At/Po: Balda, Joda, Dist: Keonjhar
PAN/GIR No.AATFS 6804 M		
(Appellant)	..	(Respondent)

Assessee by : Shri Sunil Mishra, AR
Revenue by : Shri M.K.Gautam, CIT DR

Date of Hearing : 20 /10/2022
Date of Pronouncement : 20/10/2022

ORDER

Per Bench

IT(ss)A Nos.128 to 132/CTK/2013 are the appeals filed
by the assessee, **IT(ss)A Nos.133 to 137/CTK/2013** are the

appeals filed by the revenue against the separate orders of the Id CIT(A)-1, Bhubaneswar dated 28.5.2013 in Appeal Nos.311/10-11, 310/11-12 & 309/11-12 for the assessment years 2004-05 to 2006-07 and dated 30.5.2013 in Appeal Nos.308/1-11/ & 304/11-12, for the assessment years 2007-08 & 2008-09, respectively.

2. Shri Sunil Mishra, Id AR appeared for the assessee and Shri M.K.Gautam, Id CIT DR appeared for the revenue.

3. It was submitted by Id CIT DR that the assessee is an iron ore raising contractor. It was the submission that the mine owner is M/s. Serajuddin & Co. M/s. Serajuddin & Co. had contracted six mining contractors for raising of iron ore. The assessee is one among the six contractors. The assessee does the raising contract work only for M/s. Serajuddin & Co. There was a search on the premises of M/s. Serajuddin & Co. on 28.5.2008. Consequent to the search on M/s. Serajuddin & Co., there was a survey on the assessee on 9.7.2008. In the course of survey, it was noticed that the assessee was not maintaining its books of account nor were any vouchers found. Consequently, there was a search on the assessee on 27.9.2008 and notice under section 153A came to be issued to the assessee on 11.3.2010. The assessee was non-compliant and did not file its return of income. It was the submission that as no books of account or vouchers were found either in the survey or in the course of search, the Assessing Officer had relied upon the statement recorded from the Director of the assessee company as

also the Chartered Accountant of the assessee company Shri Sajan Kumar Agrawal as also relied upon the statements of various other persons for the purpose of making the assessment. It was the submission that in the statement, the C.A has mentioned that only noting on a sheet of paper regarding expenditures were provided by the assessee to him. It was the submission that as it was noticed that the assessee was raising substantially higher bills than what was actually required on M/s. Serajuddin & Co. and the assessee was returning 50 to 60% of the said higher billed amount to M/s. Serajuddin & Co. in cash, the Assessing Officer completed the assessment by adopting the turnover of the assessee as adopted on M/s. Serajuddin & Co., and granting the assessee a reduction of 30% towards expenses. The balance 70% of the turnover was treated as the income of the assessee and out of the said 70%, 50% to 60% of the total receipts was protectively assessed in the hands of the assessee and substantially in the hands of M/s. Serajuddin & Co. The balance was treated as substantive income of the assessee. It was the submission that the Id CIT(A) in para 5.2 of his order estimated the income of the assessee at 10% of the total receipts of the assessee from M/s. Serajuddin & Co. It was the submission that the assessee having not co-operated in the assessment proceedings, the estimation done by the AO was liable to be upheld and that of the Id CIT(A) reversed.

4. In reply, Id AR submitted that in the course of search on M/s. Serajuddin & Co., no cash had been found nor was any investment or any undisclosed assets found. It was the submission that though admittedly, shows cause notice had been issued by the AO, the statement relied upon by the AO for the purpose of assessment had not been provided to the assessee and consequently, such statement could not be relied upon. It was the submission that the assessee has not paid back any portion of the total receipts to M/s. Serajuddin & Co. It was the further submission that if it is presumed that 50% of the total receipts of the assessee has been returned to M/s. Serajuddin & Co., then the estimation of 10% by the Id CIT(A) should be only on 50% turnover of the assessee from M/s. Serajuddin & Co. It was the further submission that even assuming that the income of the assessee is to be estimated at 10% of the turnover of the assessee then on the allegation of the AO, 50% has been returned to M/s. Serajuddin & Co., and the assessee should be granted expenditure of the said 50% returned amount insofar as it would have been treated as an expenditure incurred by the assessee in the course of its business for the purpose of obtaining contract to do extraction of iron ore. It was the further submission that the assessee has not returned any amount to M/s. Serajuddin & Co., and the estimation as done by the Id CIT(A) is on the higher side as the maximum income assessed by the AO himself is only about 6%. It was the prayer that the appeals of the revenue are liable to

be dismissed and in respect of appeals of the assessee, the estimation of income done by the Id CIT(A) be reduced from 10% to 6%.

5. We have considered the rival submissions. A perusal of the impugned assessment clearly shows that there has been non-cooperation by the assessee in the course of assessment proceedings. It is also accepted fact that the AO has relied upon the statement without providing the same to the assessee for cross examination. Admittedly, no evidence can be used against the assessee without granting the assessee an opportunity to cross examine or rebut. It is also recognized that a show cause notice had been issued to the assessee and in the show cause notice the statements relied upon by the AO have not been discussed. The issue of 50% of total receipts being returned to M/s. Serajuddin & Co., comes out from the statement recorded from the partner of the assessee firm. Mohd Atiqur Rahman. Though Md Atiqur Rahman mentions that the issues are looked after by Firoj Akhtar, there is no statement recorded from the said Firoj Akhtar. It is also an admitted fact that no books of accounts and vouchers have been maintained by the assessee, which is evident from the fact that the search did not bring out any books of account. However, in the assessment order, the AO refers to profit and loss account at para 2.9 of his order. How this profit and loss account has been prepared is not ascertainable. Thus, clearly, the AO had no details with him except the turnover of the assessee, which has also been extracted from the books of

account of M/s. Serajuddin & Co. This being so, a perusal of the order of the Id CIT(A) clearly shows that he has taken into consideration all the issues to come to the conclusion in paras 5.1 & 5.2 of his order that the estimation of income of the assessee is the best method to determine the income of the assessee. We find no reason to interfere with these findings of the Id CIT(A) in respect of estimation of income insofar as neither the assessee nor the revenue has been able to dislodge the findings of the Id CIT(A).

6. Coming to the issue of percentage of the net profit as determined by the Id CIT(A) at 10%. A perusal of the order of the Id CIT(A) clearly shows that the highest percentage assessed by the AO is 6% for the assessment year 2004-05. For the assessment year 2006-07, the AO has determined the income at 4.9% in the assessment u/s.143(3) of the Act. This being so, we are of the view that the interest of justice would be served if the estimation of the percentage of net profit is taken at 8% as against 10% directed by the Id CIT(A) and we do so. The findings of Id CIT(A) in regard to adoption of estimation of income of the assessee stands upheld and the estimation of income by the Id CIT(A) at 10% stands reduced to 8%.

7. In regard to revenue's appeals in respect of deletion of the protective addition, we are of the view that no interference is called for insofar as the addition made in the hands of the assessee was only protective and same cannot be proceeded upon. We have been given to understand that the Id

CIT(A) has held the addition to be substantive in the hands of M/s. Serajuddin & Co. The addition, if at all, is on substantive basis in the hands of M/s. Serajuddin & Co. same can be challenged in the case of M/s. Serajuddin & Co. No other arguments in regard to legal ground which has been raised by the assessee, Ld AR submitted that he is not pressing the ground and has endorsed in the file to that effect. Consequently, the legal issue raised by the assessee stands rejected.

8. In the result, appeals filed by the revenue stand dismissed and the appeals filed by the assessee stand partly allowed.

ITA Nos.10 & 11/CTK2014: Asst.Years. 2008-09 & 2009-10

9. These are appeals filed by the assessee against the separate orders of the Id CIT(A)-1, Bhubaneswar, both dated 1.11.2013 against the confirmation of levy of penalty of Rs.5,000/- u/s.271F of the Act each in Appeal No.0258/11-12 and No. 0259/11-12 for the assessment years 2008-09 & 2009-10, respectively.

10. It was submitted by Id AR that the issue in these appeals is squarely covered by the decision of the Co-ordinate Bench of this ITAT in the case of Gobardhan Matia vs ACIT in ITA Nos.573 & 574/CTK/2013 order dated 22.9.2022, wherein, the Co-ordinate Bench has held in para 4 as follows:

"4. We have considered the rival submissions. The levy/confirmation of penalty is based on the facts of each case.

There is no presumption that the assessee is willfully violating the law. It is an admitted fact that notice u/s.153A has been served on the assessee and the assessee is required to file the return within 30 days. It is also an admitted fact that for obtaining of the Xerox copies of the seized document, it took more than 2-3 months. Just by obtaining of xerox copies of seized documents, the return cannot be filed. It has to be co-related, verified, examined and reconciled before the return is filed. The filing of return beyond the due date is admittedly invalid return as there is no provision for filing the return belatedly once notice u/s. 153A has been issued. This being so, we are of the view that the assessee had a valid ground for non-filing of return. Accordingly, penalty levied by the AO and confirmed by the Id CIT(A) is deleted.”

11. In reply, Id CIT DR vehemently supported the order of the AO and Id CIT(A).

12. We have considered the rival submissions. As it is noticed that the facts in assessee’s case are similar to the facts in the case of Gobardhan Matia (supra) in respect of levy of penalty under section 271F of the Act. Respectfully following the decision of the Co-ordinate Bench in the case of Gobardhan Matia (supra), the penalty as levied u/s.271F of the Act by the AO and confirmed by the Id CIT(A) stands deleted.

13. In the result, both the appeals of the assessee stand allowed.

Order dictated and pronounced in the open court on 20/10/2022.

(Arun Khodpia)
ACCOUNTANT MEMBER

Cuttack; Dated 20/10/2022
B.K.Parida, SPS (OS)

(George Mathan)
JUDICIAL MEMBER

Copy of the Order forwarded to :

1. The Assessee : S.M.Enterprises, At/Po:
Balda, Joda, Dist: Keonjhar
2. The Revenue: ACIT, Circle-1(2), Aayakar
Bhavan, Rajaswa Vihar, Bhubaneswar
3. The CIT(A)-1, Bhubaneswar
4. Pr.CIT-1, Bhubaneswar
5. DR, ITAT, Cuttack
6. Guard file.
//True Copy//

By order

Sr.Pvt.secretary
ITAT, Cuttack