IN THE INCOME TAX APPELLATE TRIBUNAL,
CUTTACK BENCH, CUTTACK

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

ITA No.64/CTK/2022
Assessment Year : 2017-18

Urmila Pradhan, At: Bada Chapoi, POL Arthanga, Kabirpur, Jajpur	Vs.	Pr. CIT, Bhubaneswar-1
PAN/GIR No.CPKPP 8640A		
(Appellant)	..	(**Respondent**)

Assessee by :S/ Shri D.Parida/C.Parida, ARs
Revenue by : Shri M.K.Gautam, CIT DR

Date of Hearing : 12 /01/2023
Date of Pronouncement : 12/01/2023

O R D E R

Per Bench

This is an appeal filed by the assessee against the order of the ld Pr. CIT passed u/s.263 of the Act, dated 22.3.2022 in Appeal No. ITBA/REV/F/REV5/2021-22/1041250337(1) for the assessment year 2017-18.

2. S/Shri D.Parida/C.Parida, ld ARs appeared for the assessee and Shri M.K.Gautam, ld CIT DR appeared for the revenue.

3. It was submitted by ld AR that the assessee is an individual, who is doing the business of retail trading in cement. It was the submission that the assessee was initially doing small trading and the turnover of the

assessee had not crossed the prescribed limit of Rs.2 crores. She had been filing her return of income disclosing the income under the provisions of section 44AD of the Act. It was the submission that during the relevant assessment year, the turnover of the assessee went very high and the assessee asked her auditor, who was handling her VAT return, to prepare the audit report. As the auditor was unable to prepare the audit report, the assessee was not able to file her return of income along with the audit report. It was the submission that notice u/s.142(1) of the Act had been issued to the assessee and again there was failure on the part of the assessee to file the return. However, the assessee had produced the computation of income and VAT returns before the AO. It was the submission that the Assessing Officer had obtained the bank account statement from the concerned bank, examined the same and had found that the assessee had total deposits of Rs.4,31,02,545/- in both cash and cheque deposit in the bank account. The Assessing officer had further found that the payments made from the bank accounts were only through RTGS/NEFT/cheques for the purchase of cement. It was the submission that this has also been recorded in the assessment record. It was the submission that as the assessee had not produced the books of account and the audit report, the Assessing Officer had estimated the income of the assessee at 8% of the turnover of Rs.4,10,77,045/-. In respect of the amount of Rs.20,25,500/- of the specified bank notes deposited by the

assessee in her bank account, the Assessing officer had treated the same as unexplained investment and had brought the same to tax by applying the provisions of section 69A. It was the submission that the assessee has filed appeal against the said assessment order before the ld CIT(A) and same is pending disposal.

4. In the meantime, the Pr. CIT, Bhubaneswar-1 had invoked his powers u/s.263 of the Act and had proposed the revision of the said assessment order on the ground that the estimation at 8% in the absence of any examination of the real state of business and nature of business is not proper and on the ground that in respect of addition of Rs.20,25,500/-, same was to be taxed under the provisions of section 115BBE of the Act. It was the submission that the Assessing Officer had examined the bank account of the assessee and had formed an opinion. It was the submission that once the opinion has been formed, it was not open to the Pr. CIT to impose his opinion over that of the Assessing Officer on issues which have been considered by the Assessing Officer. It was the prayer that the order passed u/s.263 of the Act is liable to be quashed,.

5. In reply, ld CIT DR has filed written submission as follows:

> " This is the assessee's appeal against the revision order dated 22.03.?022 passed by the Pr. CIT, Bhubaneswar-l. It was noticed that the A.O. had made an addition of Rs.20,25,500/- u/s.69A on account of cash deposits in his bank account with Bank of Baroda (during demonetization period). However he failed to apply the provisions of section 115BBE of the Income Tax Act. Thus there was

an erroneous application of law by the A.O. in the present case. The A.O. also did not take cognizance of the fact that turnover in the present case was more than Rs.4 crores but no tax audit report or audited books of account were filed by the ld. AR of the assessee. The A.O. applied NP@8% on the total credits in the bank account which is applicable to cases which fall under section 44AD (presumptive scheme of taxation). The Pr. CIT has categorically held that the A.O. has passed the assessment order without applying proper law and application of mind.

ii.) The Hon'ble Supreme Court in the case of Malabar Industries Ltd. vs. CIT 243 ITR 83) has held in para-7 that an incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous. In the same category fall orders passed without applying the principles of natural justice or without application of mind. The findings of the Hon'ble Supreme Court in para-10 are reproduced as under:

`"10. In the instant case, the Commissioner noted that the ITO passed the order of nil assessment without application of mind. Indeed, the High Court recorded the finding that the ITO failed to apply his mind to the case in all perspective and the order passed by him was erroneous. It appears that the resolution passed by the board of the appellant-company was not placed before the Assessing Officer. Thus, there was no material to support the claim of the appellant that the said amount represented compensation for loss of agricultural income. He accepted the entry in the statement of the account filed by the appellant in the absence of any supporting material and without making any inquiry. On these facts, the conclusion that the order of the ITO was erroneous is irresistible. We are, therefore, of the opinion that the High Court has rightly held that the exercise of the jurisdiction by the Commissioner under section 263(1) was justified."

The Hon'ble Supreme Court further held in para-8 that the scheme of the Act is to levy and collect tax in accordance with the provisions of the Act and this task is entrusted to the Revenue. If due to an erroneous order of the Income-tax Officer, the Revenue is losing tax lawfully payable by a person, it will certainly be prejudicial to the interests of the Revenue.

iii.) Coming to the decision of Hon'ble Orissa High Court in the case of Orissa State Police Housing & Welfare Corporation Limited (139 tilonann.com 207), it has been rendered on different facts. In the

cited case, the profit element in Work-in- Progress(WIP) was directed to be added especially when the profit from such WIP had already been included in the income of the assessee. It was noticed that the AO had in fact called for the details of the closing WIP which had been furnished by the Assessee and had examined it. If the CIT was of the view that the AO had not examined this issue at all, it could then lead to the conclusion that the order of assessment was erroneous. That was not, however, the case there. On the other hand, the CIT simply decided that even for verification of the correctness of the submission of the Assessee, the matter had to be remanded to the AO. Under these circumstances, the Hon'ble Jurisdictional High Court had taken a view that the order u/s.263 of the Act was not sustainable. The observations of the Hon'ble High Court in para-14 are reproduced as under:

"14. Section 263 of the Act requires the CIT, after hearing the Assessee, to pass an order by making "such enquiry as he deems necessary". The purpose of such an enquiry would be to arrive at a subjective view that the order of the AO was erroneous in so far as it is prejudicial to the interest of Revenue. Even if such enquirv may not be mandatory. there has to be some basis on which the CIT can form such a view. In the present case, the basis for forming a view that the profit element in the WIP was not accounted for by the Assessee is absent in the order of the CIT".

Thus the Hon'ble Orissa High Court has itself held in para-l4 that even if such enquiry may not be mandatory but there should be some basis to form such a view. The cases where there is incorrect application of law, the Pr. CIT is not required to carry out any sort of enquiry.

iv.) In view of above facts & circumstances, the decisions of the Hon'ble ITAT, Cuttack in the cases of M/s. Earth Minerals Co. Ltd. (supra), Saroj Kumar Mishra (supra) and Jagruti Welfare Organization (supra)will not apply to the present case."

6. It was the submission that in respect of addition of Rs.20,25,500/-, the Assessing Officer had applied the regular rate of tax. It was the submission that the addition had been made u/s.69A of the Act and it was compulsory that the said amount was liable to be taxed by applying the

provisions of section 115BBE of the Act. It was the submission that thus clearly, there was error in respect of application of law and this is amenable for revision u/s.263 of the Act. It was the further submission that the Pr. CIT has categorically held that applying blanket 8% net profit is not permissible in view of the fact that the turnover of the assessee exceeded the prescribed limit of 44AD. It was the submission that the Pr. CIT was right in giving this direction insofar as various Courts have categorically held that if the turnover exceeds the prescribed limit of 44AD, then the rate prescribed u/s.44AD was not to be applied. It was the submission that the Pr. CIT has categorically mentioned that the Assessing Officer was to examine the real state of business and nature of business. It was the submission that this is not a case of directing the application of the opinion of the Pr. CIT over that of the AO but it was a case of wrong application of law by the AO, which is the subject matter of revision by the Pr. CIT. It was the submission that the order of revision u/s.263 is liable to be upheld.

7. We have considered the rival submissions. A perusal of the facts in the present case clearly shows that the addition of the specified denomination notes to the extent of Rs.20,25,500/- has been brought to tax by the AO by applying the provisions of section 69A of the Act. A perusal of the assessment order also clearly shows that the Assessing Officer has not applied the provisions of section 115BBE when taxing the said amount.

Thus, clearly, the AO has erred in respect of application of law and consequently, the Pr. CIT was very well within his jurisdiction to revise the assessment order to correct the error in the application of law, which, admittedly, has caused the assessment order to be erroneous and prejudicial to the interest of the Revenue. Consequently, on this issue, the order of the Pr. CIT is sustained.

8. Coming to the issue of estimation of 8% as done by the AO and the direction issued by the Pr. CIT to examine the issue denovo, admittedly, a blanket application of net profit at 8% by the AO when the turnover far exceeds Rs.40 lakhs is erroneous, insofar as there are various case laws, which held that when the turnover exceeds the prescribed limit in respect of 44AD, the rate prescribed u/s.44AD is not to be applied. Admittedly, the Assessing Officer has obtained the turnover from the bank account of the assessee. Admittedly, the Assessing officer accepts that the payment from the bank account are by RTGS/NEFT/Cheques only for the purchase of cement, which has been sold by the assessee. When this is so, nothing prevented the Assessing Officer from treating the bank account as the books of account of the assessee and determining the income of the assessee. Even if the AO did desire to estimate the income of the assessee, it has been held in catena of decisions of the Hon'ble Supreme Court that estimation should be done on the basis of comparable case. It is an admitted fact that the assessee is a retail dealer in cement. Nothing

stopped the AO from estimating the income of the assessee by taking a comparative study of other cases of retail dealers of cement. This being so, we are in agreement with the findings of the Pr. CIT that the estimation as done by the AO at 8% in the case where the turnover far exceeds Rs.2 crores is erroneous. In these circumstances, the findings of the Pr. CIT stands confirmed.

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

Order dictated and pronounced in the open court on 12/01/2023.

Sd/-	sd/-
(Arun Khodpia)	**(George Mathan)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Cuttack; Dated 12/01/2023
B.K.Parida, SPS (OS)

<u>Copy of the Order forwarded to</u> :

1. The Appellant : Urmila Pradhan, At: Bada Chapoi, POL Arthanga, Kabirpur, Jajpur
2. The Respondent: Pr. CIT, Bhubaneswar-1
3. The CIT(A)-1, Bhubaneswar
4. DR, ITAT, Cuttack
5. Guard file.

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By order

Sr.Pvt.secretary
ITAT, Cuttack