

## आयकर अपीलीय अधिकरण, कटक न्यायापीठ, कटक

IN THE INCOME TAX APPELLATE TRIBUNAL CUTTACK BENCH CUTTACK

श्री जार्ज माथन, न्यायिक सदस्य एवं श्री अरुण खोड़पिया लेखा सदस्य के समक्ष ।

BEFORE SHRI GEORGE MATHAN, JUDICIAL MEMBER

AND

SHRI ARUN KHODPIA, ACCOUNTANT MEMBER

आयकर अपील सं/ITA No.20/CTK/2022

(निर्धारण वर्ष / Assessment Year :2016-2017)

Rabindranath Mohanty, Gopabandhu Nagar, Jagatpur, Cuttack	Vs	Pr.CIT, Bhubaneswar-1
PAN No. : <b>AFCPM 0063 Q</b>		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

निर्धारिती की ओर से / Assessee by	:	Shri S.K.Sarang, CA
राजस्व की ओर से / Revenue by	:	Shri M.K.Gautam, CIT-DR
सुनवाई की तारीख / Date of Hearing	:	19/01/2023
घोषणा की तारीख / Date of Pronouncement	:	19/01/2023

### आदेश / ORDER

#### Per Bench :

This is an appeal filed by the assessee against the order of the Id.Pr.CIT, Bhubaneswar-1, dated 22.03.2021, passed in DIN & Order No.ITBA/REV/F/REV5/2020-21/1031664398(1) for the assessment year 2016-2017.

2. At the outset, we found that the appeal of the assessee is barred by limitation. In this regard, Id. AR has filed an application along with the affidavit for condonation of delay stating therein the sufficient reasons for delay in filing the present appeal. Ld. CIT-DR also did not object to the submission of the Id. AR. In view of the above, we condone the delay in filing the present appeal and the appeal is heard finally.

3. It was submitted by the Id. AR that the assessee is a manufacturer of polythene products and in truck running business. The return filed by

the assessee came to be taken up for limited scrutiny to examine *“whether the cash in hand shown in the return of income is correct and the cash deposit has been made from disclosed source.”* The assessment came to be completed u/s.143(3) of the Act wherein the cash in hand shown by the assessee as Rs.25,11,552/- as on 31.03.2016 was held by the AO as unexplained and not genuine. However, the AO has not made any addition to the total income in respect of the said cash in hand. It was the submission that the Id. Pr.CIT has invoked his powers u/s.263 of the Act to direct the AO to bring to tax the unexplained cash in hand and to make the addition in respect of the interest income from the income tax refund. It was the submission that in respect of the issue of the interest on the income tax refund, the assessee is not in challenge. In respect of the proposed addition of Rs.25,11,552/- representing the cash in hand as shown in the balance sheet and treated as not genuine and unexplained, it was the submission that this cash in hand was out of the opening cash balance and the receipts during the year on account of the sale of polythene products and the receipts from the tuck running business. It was the submission that the issue as to whether the said cash in hand has rightly been treated as unexplained in an appeal before the Id. CIT(A). It was the submission that the income of the assessee has already been brought to tax, insofar in the computation of the total income the income as per the profit and loss account has been considered. To treat the cash in hand as unexplained money and bring to tax in the hands of the assessee would amount to bring to tax the amount of Rs.25,11,552/-

twice insofar as it is already been considered when determining the profit and loss in the profit and loss account, insofar as it was out of the trading receipts of the assessee. It was submitted that admittedly on this ground the AO has not made the addition to the total income though he has treated the same as unexplained and non-genuine. It was the submission that it should be appreciated that the AO has not treated the said cash in hand as unexplained cash credit. It was the submission that the action of the Id. Pr.CIT in directing the AO to treat the same as income of the assessee is nothing but a change of opinion whereby the Id. Pr.CIT is attempting to force his opinion over that of the AO. This direction of the Id. Pr.CIT is liable to be quashed.

4. In reply, Id. CIT-DR submitted that the merit of the view of the AO cannot be challenged in this appeal before the Tribunal. It was the submission that the action of the AO cannot be challenged in this appeal insofar as this appeal is against the order passed u/s.263 of the Act. The AO having treated the cash in hand as unexplained and non-genuine should have taken the issue to it a logical conclusion and should have added the same to the total income. It was the submission that this is all that the Id. Pr.CIT has directed. It was the submission that this is the view of the decision of the Hon'ble Delhi High Court in the case of the CIT Vs. Nalwa Investments Ltd. [2011] 338 ITR 552 (Delhi), wherein in paras 13 & 14, it has been held as follows :-

*13. So far so good. But the relevant question, which is the core one and led CIT to pass the order under s. 263 of the Act is as to whether the AO applied his mind to the issue as to whether the dividend income could be given the character of business income*

*for the purpose of set off. We have already taken note of the order of the AO. He recorded that even a dividend income in question was shown as business income by the assessee. The AO did not agree with the same, as in the previous years this income was shown as dividend income. After saying so, the AO straightaway allowed the set off of this income against the carry forward losses. The assessment order is totally silent and there is no discussion as to how this dividend income was to be given the character of business income for the purpose of set off under s. 72 of the Act. It was for this reason that the CIT held that the AO had not conducted any inquiry. The Tribunal, instead of appreciating these facts, went into the merits of the issue which the AO is supposed to deal with. It addressed the question as to whether dividend income could be given the character of business income and then observed that the view taken by the AO was plausible without appreciating that the AO had not even taken any view on this issue, it could not be said that the AO had not applied his mind. The entire reading of the assessment order clearly demonstrates that no such view is taken at all by the AO on this aspect. It is intriguing, in the circumstances, as to from where the Tribunal came to the conclusion that the view taken by the AO was plausible or that the AO had applied his mind.*

*14. The Tribunal failed to appreciate the limited scope of appeal before it, viz., the validity of the order passed by the CIT exercising his revisionary power under s. 263 of the Act. Order of the CIT clearly revealed that he had applied his mind on the relevant aspect and had rightly noticed that the character of the said income was not investigated by the AO. This is highlighted by the CIT in para 7 of the order passed by him, which is already extracted above. Therein, the CIT recorded that the AO had failed to conduct the required enquiry and also had failed in application of the provisions of s. 72(1) of the IT Act. This rendered order passed by the AO erroneous and prejudicial to the interest of Revenue to that extent. The Tribunal was, thus, supposed to adjudge the validity of such an order and not to go beyond when the challenge before it was limited to the said order passed by CIT in exercising the powers under s. 263 of the Act.*

5. It was the submission that the order of the Hon'ble Delhi High Court has categorically held that the limited scope of the appeal before it was the validity of the order passed by the Commissioner of Income Tax exercising his revisionary powers u/s.263 of the Act and it is not the assessment order. It was the submission that the misuse of the actions of the AO can validly be challenged in the appropriate appellate forum but

not in an appeal to an order of revision u/s.263 of the Act. It was the prayer that the order of the Id.Pr.CIT is liable to be upheld.

6. We have considered the rival submissions. It is true that the cash balance as found in the balance sheet is as a result of the trading activities of the assessee. It is also an admitted fact that the impugned appeal before the Tribunal is in challenge to the action of the Id. Pr.CIT in directing the AO to treat the cash in hand as held by the AO to be unexplained and non-genuine as the income of the assessee. A perusal of the decision of the ITAT Chennai Bench of the Tribunal in the case of M.C.Hospital, reported in [2022] 142 taxmann.com 122 (Chennai-Trib.) clearly lays down the principle that the cash in hand as shown by the assessee is nothing but the cash out of the opening balances and the trading result of the assessee for the relevant assessment year and this has already been considered when determining the profit or loss in the relevant assessment year which is brought to tax. Thus, an addition of the closing cash in hand would in result be a double addition. This is also as per the accounting principles. The AO when he has passed his order has been conscious enough not to bring to tax the same amount of cash in hand insofar as it would amount to double addition. This is very much a plausible view which has been taken by the AO. It would be too farfetched to even assume that the AO having consciously held the cash in hand to be unexplained and not genuine and to have not brought the same to tax in his computation if the same was really liable to be brought to tax. The AO having taken a plausible view, the view as being proposed by the Id.

Pr.CIT in his order u/s.263 is in effect attempting to force his opinion over that of the AO which is not permissible under the provisions of Section 263 of the Act. We are live to the decision of the principle laid down by the Hon'ble Delhi High Court in the case of Nalwa Investments Ltd. (supra) and we make it very clear that we are not expressed any opinion in respect of the action of the AO. In view of the above, the order passed by the Id. Pr.CIT u/s.263 of the Act in the case of the assessee stands quashed.

7. In the result, appeal of the assessee partly allowed.

Order dictated and pronounced in the open court on 19/01/2023.

**Sd/-**

(अरुण खोड़पिया)

**(ARUN KHODPIA)**

लेखा सदस्य/ **ACCOUNTANT MEMBER**

**Sd/-**

(जार्ज माथन)

**(GEORGE MATHAN)**

न्यायिक सदस्य / **JUDICIAL MEMBER**

**कटक** Cuttack; दिनांक Dated 19/01/2023

*Prakash Kumar Mishra, Sr.P.S.*

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

1. अपीलार्थी / The Appellant-
2. प्रत्यर्थी / The Respondent-
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,**

**(Assistant Registrar)**

**आयकर अपीलीय अधिकरण, कटक/ITAT, Cuttack**