

आयकर अपीलीय अधिकरण, कटक न्यायापीठ, कटक

IN THE INCOME TAX APPELLATE TRIBUNAL CUTTACK BENCH CUTTACK
श्री जार्ज माथन, न्यायिक सदस्य एवं श्री राजेश कुमार, लेखा सदस्य के समक्ष ।

(THROUGH VIRTUAL HEARING)

BEFORE SHRI GEORGE MATHAN, JUDICIAL MEMBER
AND

SHRI RAJESH KUMAR, ACCOUNTANT MEMBER

आयकर अपील सं/ITA No.129/CTK/2022

(निर्धारण वर्ष / Assessment Year : 2013-2014)

Suresh Kumar Divakar, 3 rd Floor, Paradise Chamber, Budharaja, Sambalpur	Vs	ACIT, Circle-1(1), Sambalpur
PAN No. : AGUPD 1872 B		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)
निर्धारिती की ओर से / Assessee by	:	Shri P.K.Mishra and Himanshu Jena, Advs
राजस्व की ओर से / Revenue by	:	Shri S.C.Mohanty, Sr. DR
सुनवाई की तारीख / Date of Hearing	:	26/06/2023
घोषणा की तारीख / Date of Pronouncement	:	26/06/2023

आदेश / ORDER

Per Bench :

This is an appeal filed by the assessee against the order of the Id. CIT(A), National Faceless Appeal Centre (NFAC), Delhi, dated 27.05.2022, passed in DIN & Oder No.ITBA/NFAC/S/250/2022-23/1043218435(1), for the assessment year 2013-2014.

2. It was submitted by the Id. AR of the assessee that the assessee is an individual, who is deriving rental income and supply of building materials. It was submitted that during the relevant assessment year, the assessee had decided to stop his business and had consequently filed his return of income, wherein he had offered an income of Rs.2,53,10,510/- which included the sundry creditors. It was the submission that the assessment came to be completed u/s.143(3) of the Act on 29.02.2016, wherein the AO had made an addition u/s.14A of the Act in respect of

dividend income received by the assessee. It was the submission that subsequently on 28.03.2018, notice u/s.148 of the Act came to be issued. It was the submission that the reopening was done to bring to tax the estimated income from sale of stone dust and chips to an extent of Rs.8,84,211/-.

3. The Id. Sr. DR has placed the reasons recorded for the purpose of reopening which is as follows :-

Annexure-A

Reason for initiation of proceedings u/s.147 in the case of Shri Suresh Kumar Divakar, PAN:AGUPD1872B, A.Y.2013-14

The assessee filed his return of income for the A. Y. 2013-14 on 01.11.2013 declaring total income of Rs.2,53,10,510/-. The assessee during the previous year had derived income from house property, Interest income and Income from business of supply of building materials. The assessee is proprietor of two business concerns i.e. (1) Divakar Construction and (2) Manish Industries.

Subsequently, the case was selected for scrutiny under CASS. Accordingly, scrutiny u/s.143(3) was completed on 29.02.2016 assessed total income of Rs.2,53,16,440/- and a demand of Rs.44,450 / - was raised.

The assessee Shri Suresh Kumar Divakar, PAN:AGUPD1872B .filed his return of income for the A.Y.20 13-14 on 01.11.2013 declaring total income of Rs.2,53,10,510/-. The assessee during the previous year had derived income from house property, Interest income and Income from business of supply of building materials. The assessee is proprietor of two business concerns i.e. (1) Divakar Construction and (2) Manish Industries.

Subsequently, the case was selected for scrutiny 'under CASS. Accordingly, scrutiny u/s.143(3) was completed on 29.02.2016 assessed total income of Rs.2,53,16,440/- and a demand of Rs.44,450 / - was raised.

While filing of return of Income for the A.Y.2013-14, the assessee has not mentioned anywhere regarding income declared u/s.44AD and also mentioned books of account u/s.44AA. In the tax audit report at point no.10, it is stated that profit and loss account does not include any profit and gains assessable on presumptive basis.

However, the assessee, in the course of assessment proceedings in a submission made on 10-11-2014 vide covering letter dated 30-10-

2014 had submitted that income from business of supply of building materials was determined on presumptive basis u/s.44AD since no proper books of accounts were maintained by it .

No adverse inference was made against the assessee by the AO for non maintenance of proper books of accounts or nonproduction of the same as seen from assessment order u/s 143(3) dated 29-03-2016 implying that the AO accepted the assessee's plea that income from business of supply of building material was computed under provision of section 44AD on presumptive basis.

But consequent upon the acceptance of assessee's plea, there was underassessment of total income of assessee as narrated below.

Determined on presumptive basis u/s.44AD since no proper books of accounts were maintained by it.

No adverse inference was made against the assessee by the AO for non maintenance of proper books of accounts or nonproduction of the same as seen from assessment order u/s 143(3) dated 29-03-2016 implying that the AO accepted the assessee's plea that income from business of supply of building material was computed under provision of section 44AD on presumptive basis.

But consequent upon the acceptance of assessee's plea, there was underassessment of total income of assessee as narrated below.

During the FY 2012-13, Divakar Construction was the only functioning concern of the assessee. Therefore u/s 44AD assessee should have declared at least 8% profit on sales of Rs.8,84,211/- made by 'Divakar Construction' which comes to Rs.70,737/-.

But on verification of profit and loss account of Divakar Construction, it is seen that the assessee has shown Rs.8,84,211/- from sale of stone dust and sale of chips and claimed aggregate expenditures aggregating to Rs.9,12,171/- against such sales income , leaving a net loss of Rs. 27,960/- only. And it is also seen that in the P&L account assessee's net profit is showing positive figure of Rs.62,12,040/- only because of writing sundry creditors aggregating Rs.62,40,000/-.

In view of the above it is conclusive that while computing the income from business, the assessee had understated his profit from business by Rs.98,697/- [Rs.70,737/- + Rs.27,960/= Rs.98,697/- and the consequent understatement of total income has not been taken care of in assessment order passed u/s 143(3) dated 29-03-2016.

In view of the above discussion I have reason to believe that income amounting to Rs. 98,697/- has escaped assessment in the case of the assessee for the AY 2013-14 and therefore proceeding u/s 147 has to be initiated in this case.

(Parul Singh)
Dy. Commissioner of Income Tax
Circle-2(1), Sambalpur

4. It was the submission of the Id. AR that the reopening has been done purely on the basis of change of opinion. It was the submission that the assessee had not disclosed any income by invoking the provisions of Section 44AD of the Act. It was the submission that on the basis of a letter which had been filed on 30.10.2014, which was before the Id. AO when he completed the original assessment u/s.143(3) of the Act on 29.02.2016, the AO mentions that the income of the assessee was to be assessed by applying the provisions of Section 44AD of the Act, insofar as no proper books of accounts were maintained by the assessee. The Id. AR has placed before us the copy of profit and loss account of the assessee which is as follows :-

SURESH DIVAKAR
AT :- LARPANK, P.O. :- HIRAKUD
DIST :- SAMBALPUR

CONSOLIDATED TRADING, PROFIT & LOSS ACCOUNT FOR THE YEAR ENDED 31ST MARCH 2013

PARTICULARS	AMOUNT	PARTICULARS	AMOUNT
To Purchases	8,40,001.00	By Sales	8,84,211.00
To Gross Profit c/d	44,210.00		
	8,84,211.00		8,84,211.00
To Depreciation	1,85,593.00	By Gross Profit b/d	44,210.00
To Fuel & Lub. Expenses	8,582.00	By Sundry Credit Balances W/back	1,01,70,000.00
To Insurance	8,271.00	By Profit on Sale of Car	76,107.65
To Bank Charges	69,811.52		
To Electricity Charges	77,450.00		
To Interest on TDS	3,020.00		
To Interest on Service Tax	1,510.00		
To Interest on Unsecured Loan	1,54,076.00		
To Legal Fees & Expenses	86,046.00		
To Rent Deduction	829.00		
To Security Charges	46,839.00		
To Telephone Charges	35,030.00		
To Water Tax	8,512.00		
To Repair & Maintenance (Building)	1,03,287.23		
To Rounded off	34.77		
To Land Revune & Municipal Tax	85,146.25		
To Net Profit carried to Proprietor's Capital A/c	94,16,279.88		
	1,02,90,317.65		1,02,90,317.65

certified True copy
Agarwal
A/R
N.L. Agarwal

5. It was the submission that after reopening of the assessment, the AO proceeded to estimate the income of the assessee on the turnover of Rs.8,84,211/- by estimating the income at 8% and thereby making an addition of Rs.70,737/-. It was the submission that the AO further did not allow any of the expenses claimed holding that the income of the assessee has been estimated. It was thus the submission that the income of the assessee which was originally assessed as Rs.2,53,16,440/- was enhanced to Rs.2,62,16,999/-. It was the submission that on account of the said estimation the various expenses claimed in the profit and loss account has been disallowed. It was the submission that in the course of original assessment the AO had called for the details in respect of the profit and loss account as is evident from the assessment order itself wherein the following queries had been raised :-

As per the letter issued on 22/09/2014, the assessee was requested to produce the following details and documents;

1. Please furnish the details of your nature of work and list of books of account maintained by you. You are requested to produce all the books of account or any kind of registered maintained in related to your business/profession.

2. Please furnish your trading, profit and loss account, capital account and balance sheet for the period 01/04/2010 to 31/03/2013 including audit report, if any.

3. You are requested to furnish the details of your fixed assets in the following format.

Sl.No.	Details of assets	Value of assets	Purchase value	Date of purchase	Name of the seller	Mode of payment	Source	Relationship with the seller

4. You have shown unsecured loan of Rs.94,42,439/-. Please furnish the details regarding date of loan, mode of loan, purpose of loan and business relationship with the loaner. Again please furnish the details if any loan amount has been repaid.

5. You have debited a sum of Rs.1,03,287/- and Rs.85) 46/- towards repair and maintenance (building) and land document and municipal tax respectively whereas in the computation you have deducted 30% of the gross rent receipt towards repair and maintenance. Please explain.

6. You have shown a sum of Rs. 62,40,000/- and Rs. 39,30,000/- as sundry credit balance W/back. Please furnish the details with documents.

7. You have shown a sum of Rs.94,50,000/- as other miscellaneous income. Please furnish the details the income shown with complete documentary evidence.

8. You have shown a loss of Rs.1,46,513/- as loss from house property. Please furnish the details. Details of movable & immovable properties in the following format:-

Sl.No.	Details of assets	Value of assets	Purchase value	Date of purchase	Name of the seller	Mode of payment	Source	Relationship with the seller

6. It was the submission that after examining all the details, the original assessment was concluded. In absence of any fresh material but by only revisiting the material that already stood disclosed at the time of original assessment, the reopening had been proposed. It was the submission that this is not permissible and the reopening is liable to be quashed as also the consequential assessment.

7. Ld. AR placed reliance on the decision of the Hon'ble Supreme Court in the case of Kelvinator India Ltd., reported in 320 ITR 561(SC) to support his contention that the AO has the power to reopen provided there is 'tangible material' to come to conclusion that there is escapement of income from assessment and the reasons must have a live link with formation of belief. He also placed reliance on the decision of Hon'ble Jurisdictional High Court in the case of Ram Kumar Agrawal Engineers passed in WP (C) No.11277 and 11291 of 2022, dated 19.05.2022,

wherein in para 5 & 6, the Hon'ble Jurisdictional High Court has held as follows :-

5. *Mr. S.S.Mohapatra, learned Senior Standing Counsel for the Opposite Parties-Income Tax department is unable to dispute the fact that the reopening was not based on any new material but only on a revisiting of the material that already stood disclosed at the time of original assessment proceedings.*

6. *This appears to be a textbook example of reopening based on mere "change of opinion", which was disapproved by the Supreme Court in Kelvinator of India Ltd.(supra). On that short ground, the impugned notices under Section 148 of the Act in each of the two petitions and all the consequential orders, the re-assessment orders dated 28th March, 2022 and 30th March, 2022 respectively as well as the consequential demand notices of the same dates are hereby quashed.*

8. It was the submission that the reopening of the assessment and consequential assessment order is liable to be quashed.

9. In reply, Id. Sr. DR placed reliance upon the decision of Hon'ble Delhi High Court in the case of Consolidated Photo & Finvest Ltd., reported in 281 ITR 394 (Delhi) to support his submission that action u/s.147 of the Act is permissible even if the AO has gathered his reasons to believe from very same record as had been subject matter of completed assessment proceedings and the issue of mere change of opinion would have no application where order of assessment does not address itself to aspect which is the basis for reopening of assessment.

10. It was the submission that in the original assessment, the assessee had specially mentioned that the income from the business of supply of building materials was required to be determined on presumptive basis under the provisions of 44AD of the Act where no books of accounts were maintained by it. It was the submission that the AO after receiving the said

letter had not made any addition on presumptive basis and consequently this is not a case of change of opinion, insofar as the AO had not addressed itself in respect of decision on the presumptive taxation. It was the submission that the order of the reopening was required to be upheld.

11. We have considered the rival submission. A perusal of the facts of the present case clearly shows that in course of original assessment the AO had called for various details from the assessee. These details include details in respect of various expenses, which have been claimed in his profit and loss accounts. After considering the various details produced, the assessment has been completed on 29.02.2016. A perusal of the reasons recorded shows that the AO has proposed the reopening only on the basis of the letter dated 30.10.2014 filed by the assessee in the course of original assessment. No fresh material is in the possession of the AO. A perusal of the assessment order originally passed shows that the details have been called for and the AO has categorically given a finding that the assessee had appeared and filed detailed documents and explanation from time to time. The assessee having produced all the details in the course of original assessment and the original assessment having been concluded, the reopening without any fresh material is not permissible. A perusal of the reasons clearly shows that the reopening is being made only by revisiting one letter filed by the assessee dated 30.10.2014, no other evidence is available with the AO. Admittedly this letter was before the AO when the original assessment had been completed. In these circumstances, in view of the decision of the Hon'ble

Jurisdictional High Court in the case of Ram Kumar Agrawal Engineers, referred to supra, which is binding decision to this Tribunal, as also the decision of the Hon'ble Supreme Court in the case of Kelvinator India Ltd. (supra), the reopening as proposed by the Id. AO is found to be unsubstantiated and consequently quashed.

12. The case law relied on the by the Id. Sr. DR in the case of Consolidated Photo & Finvest Ltd.(supra) would not apply insofar as in the present case when completing the original assessment, the AO has called for the details and has considered the details even after the letter has been filed by the assessee dated 30.10.2014. In these circumstances, the reopening as made by the AO and consequential assessment stand quashed.

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

Order dictated and pronounced in the open court on 26/06/2023.

Sd/-

(राजेश कुमार)

(RAJESH KUMAR)

लेखा सदस्य/ **ACCOUNTANT MEMBER**

Sd/-

(जार्ज माथन)

(GEORGE MATHAN)

न्यायिक सदस्य / **JUDICIAL MEMBER**

कटक Cuttack; दिनांक Dated 26/06/2023

Prakash Kumar Mishra, Sr.P.S.

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

1. अपीलार्थी / The Appellant-
Suresh Kumar Divakar,
3rd Floor, Paradise Chamber,
Budharaja, Sambalpur
2. प्रत्यर्थी / The Respondent-
ACIT, Circle-1(1), Sambalpur
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