

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.148/CTK/2023

(निर्धारण वर्ष / Assessment Year : 2017-2018)

Midway Motors Private Limited, Plot No.554, Nuapada Chaak, Madhupatna, Cuttack-753010	Vs	Pr.CIT, Bhubaneswar-1
PAN No. : AAJCM 8153 E		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)
निर्धारिती की ओर से / Assessee by	:	Shri Sunil Mishra, Advocate
राजस्व की ओर से / Revenue by	:	Shri M.K.Gautam, Pr.CIT(OSD)
सुनवाई की तारीख / Date of Hearing	:	28/06/2023
घोषणा की तारीख / Date of Pronouncement	:	28/06/2023

आदेश / O R D E R

Per Bench :

This is an appeal filed by the assessee against the order of the Id. Pr.CIT, Bhubaneswar-1, dated 11.01.2022, passed in ITBA/REV/F/REV5/2021-22/1038622483(1), for the assessment year 2017-2018.

2. It was submitted by the Id. AR that there is delay of 411 days in filing the present appeal, which was due to death of the accountant of the assessee, who was looking after the tax matters of the assessee. The affidavit filed by the assessee has not been found to be false and the reasons given are found to be reasonable. Consequently, the delay of 411 days in filing the appeal is condoned and appeal of the assessee is disposed off on merits.

3. It was submitted by the Id. AR that the original assessment in the case of the assessee was completed u/s.143(3) of the Act on 22.12.2019 accepting the returned income. It was the submission that the assessment order was the subject matter of revision u/s.263 of the Act by Id. Pr.CIT. It was the submission that the Id. Pr.CIT issued a show cause notice on 10.08.2021 and again on 10.11.2021 to which the assessee had responded by replying on 27.01.2021. It was the submission that the Id. Pr.CIT had raised the issue of the share application money received by the assessee to an extent of Rs.6 crores which was mistakenly shown under the head unsecured loans. The second issue raised was in regard to the other expenses claimed to an extent of Rs.3,59,30,793/-. It was the submission that the assessee had responded to the issue of share application money pending allotment which was shown under the head unsecured loans wherein it was specifically mentioned that the share application money was shown as Rs.6 crores as on 31.03.2017 and 59 lakhs shares have been issued at Rs.10/- each during the financial year 2017-2018 being the immediately succeeding assessment year and the share capital as on 31.03.2018 had been shown at Rs.6 crores. In regard to the expenses it was informed that the amounts were shown in the note 2.25 in the balance sheet. It was the submission that the Id. Pr.CIT in para 3.6 of his order mentioned that the note 2.25 was not to be found. It was the submission that the said Note 2.25 was part of the balance sheet and the AO in the course of original assessment had specifically raised the

questions in regard to the said expenditures for which the Id. AR drew our attention to the notice issued u/s.142(1) which reads as under :-



GOVERNMENT OF INDIA
MINISTRY OF FINANCE
INCOME TAX DEPARTMENT
OFFICE OF THE INCOME TAX OFFICER
ITO, WARD 2(2), CUTTACK

To, MIDWAY MOTORS PRIVATE LIMITED PLOT NO-554,NUAPADA CHHAK MADHUPATNA CUTTACK 753010,Orissa India	
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PAN: AAJCM8153E	Assessment Year: 2017-18	Dated: 24/10/2019	Letter No : ITBA/AST/F/17/2019-20/1019387535(1)
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Sir/ Madam/ M/s,

Subject: ASSESSMENT PROCEEDINGS

Sub: Assessment proceedings u/s 143(3) of the IT Act,1961 for the assessment year 2017-18 - Matter regarding.

Ref: Notice u/s 142(1) of IT Act dated 2nd August 2019

Refer to the above.

In continuation to the above notice you are requested to produce documentary evidence with supporting ledger bills/vouchers for following expenditures debited to P & L account :-

1. Frieght of Rs.3664769/-
2. Power & Fuel of Rs.2404835/-
3. Rent of Rs.879652/-(with details of TDS deducted)
4. Repairs to Machinery of Rs.245707/-
5. Salaries and wages of Rs.5000673/-
6. Advertisement of Rs.773284/-(with details of TDS deducted)
7. Travelling expenses of Rs.378776/-
8. Intrest of Rs.3142507/-(with details of TDS deducted)

You have not complied to the notice u/s.142(1) dated 02.08.2019 and also you have not complied to the show cause notice for not complying to the above notice. Hence the above information should be furnished on or before 29.10.2019 at 11.00A.M. failure to which it shall be treated that you have nothing to say and the assessment in your case will be completed as per the material available on the record.

Note: If digitally signed, the date of digital signature may be taken as date of document.
AAYAKAR BHAWAN, SHELTER SQUARE, TULASIPUR, CUTTACK, Orissa, 753008
Email: CUTTACK.ITO2.2@INCOMETAX.GOV.IN,

* The Notice/Letter/Order No. mentioned above may be treated as DIN for the purpose of procedure for issuance of Income Tax Notice prescribed by Circular No.19/2019 dt. 14 August 2019.

LALITENDU PATRA
ITO, WARD 2(2), CUTTACK

(In case the document is digitally signed please refer Digital Signature at the bottom of the page)

4. It was submitted by the Id. AR that all these details having been produced before the Id. Pr.CIT, the Id. Pr.CIT did not do any enquiry or verification of any of the evidence produced but by simply saying that the

assessee has merely furnished list of share applicants and nothing more which needs through examination, held the assessment order as erroneous insofar as it is prejudicial to the interest of revenue and direct the AO to examine the said issues after granting adequate opportunity of being heard. It was the submission by the Id. AR that in view of the decision of the coordinate bench of this Tribunal in the case of Earth Minerals Company Ltd. passed in ITA No.223/CTK/2019, order dated 29.08.2022, which has been confirmed by the Hon'ble Jurisdictional High Court in ITA No.24 of 2023, dated 06.03.2022, which followed the decision of the Hon'ble Jurisdictional High Court in the case of Orissa State Police Housing & Welfare Corporation Ltd. [2022] 139 taxmann.com 207 (Orissa), the order passed u/s.263 of the Act being one made without proper enquiry is liable to be quashed.

5. In reply, Id. CIT-Dr submitted that the assessment order is a non-speaking order and it is a very cryptic order which shows the non-application of mind by the AO. It was the submission that the revenue was not aware of the details of the shareholders and, therefore, the Id. Pr.CIT was right in invoking his powers u/s.263 of the Act to direct an enquiry. It was further submission that the provisions of Section 263 of the Act granted the Pr.CIT discretionary powers in regard to whether to conduct enquiry himself or to direct the AO to do the enquiry. It was further submitted that para 14 of the order of the Hon'ble Jurisdictional High Court in the case of Orissa State Police Housing & Welfare Corporation Ltd. (supra), clearly agrees that the enquiry by the Id. Pr.CIT is not

mandatory when he invokes his powers u/s.263 of the Act. It was the submission that the order passed u/s.263 of the Act is liable to be upheld.

6. We have considered the rival submissions. A perusal of the order of the Id Pr.CIT shows that in regard to the issue of the share capital, more so the share application money pending allotment which has been shown under the head non-current liabilities shows that the assessee has given an explanation in respect of the said share application money received. In regard to the issue of the other expenses also the assessee has given the reply along with the details. In regard to the issue of other expenses, it is also noticed that the issue has been examined by the AO in the course of original assessment by issuance of the notice u/s.142(1) of the Act and a view has also been taken by the AO. This view admittedly has not been shown to be erroneous much less prejudicial to the interest of revenue. A further perusal of the order of the Id. Pr.CIT shows that he has initiated the proceedings on 10.08.2021 and again on 11.10.2021 notice has been issued. The assessee has responded on 26.11.2021. The Id. Pr.CIT did have time till 31.03.2022, however, he proceeded to pass the order on 11.01.2022. When passing his order on 11.01.2022, he has mentioned nothing about enquiry which he has done. A perusal of para 4 at page No.3 of the order shows that the Id. Pr.CIT makes the following comments *“From the note for the department, the AO has stated that the thrust of the scrutiny was to examine the cash deposits & evidently no examination has been done during scrutiny on the above issues.”* If this is the note that is available on the file, it was very much available to the AO to initiate

reassessment proceedings. This has not been done. If the Id. Pr.CIT invokes his powers u/s.263 of the Act on this issue, then it becomes incumbent on the Pr.CIT to do at least a primary enquiry in regard to the reply filed by the assessee. This is because in regard to the share application money, the assessee has categorically mentioned that the amount has been shown in Annexure4 & 4A, the balance sheet in Annexure-2 filed along with reply contained the details of the shares allotted. In regard to the expenses, Id. pr.CIT in para 3.6 shows that the note 2.25 was not to be found but a perusal of the balance sheet which has been produced in the paper book in note 2.25 shows the operating and other expenses break up and the figures in the notice issued u/s.142(1) of the Act tally with the said note 2.25 then how was the AO able to issue this notice u/s.142(1) of the Act without the availability of note 2.25. Thus, clearly the order passed u/s.263 of the Act has been made without doing any enquiry whatsoever after obtaining the reply of the assessee. A perusal of the decision of the Hon'ble Jurisdictional High Court in the case of Orissa State Police Housing & Welfare Corporation (supra), shows that the Hon'ble Jurisdictional High Court has used the words "*even if such enquiry may not be mandatory, there has to be some basis on which the CIT can form such a view*". Thus, the argument of the Id.CIT-DR that enquiry by the Id. Pr.CIT is not mandatory, is not without fetters. If the Id. Pr.CIT deems it not necessary to do his enquiry, his order must show how the mistakes or errors pointed out by him in the assessment order passed by the AO is prima facie erroneous and

prejudicial to the interest of revenue. The powers u/s.263 of the Act are not without fetters. In the present case as it is noticed that the order u/s.263 of the Act has been passed without conducting any enquiry after receiving the reply from the assessee, respectfully following the principle laid down by the Hon'ble Jurisdictional High Court in the case of Orissa State Police Housing & Welfare Corporation (supra) and the decision in the case of Earth Minerals Company, referred to supra, the order passed u/s.263 of the Act is found to be unsustainable and consequently quashed.

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

Order dictated and pronounced in the open court on 28/06/2023.

Sd/-

(राजेश कुमार)

(RAJESH KUMAR)

लेखा सदस्य/ **ACCOUNTANT MEMBER**

Sd/-

(जार्ज माथन)

(GEORGE MATHAN)

न्यायिक सदस्य / **JUDICIAL MEMBER**

कटक Cuttack; दिनांक Dated 28/06/2023

Prakash Kumar Mishra, Sr.P.S.

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

1. Midway Motors Private Limited,
Plot No.554, Nuapada Chaak,
Madhupatna, Cuttack-753010
2. प्रत्यर्थी / The Respondent-
Pr.CIT, Bhubaneswar-1
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