

आयकर अपीलीय अधिकरण, “एस.एम.सी” न्यायपीठ, कटक
IN THE INCOME TAX APPELLATE TRIBUNAL “SMC” BENCH CUTTACK

श्री जार्ज माथन, न्यायिक सदस्य के समक्ष ।
BEFORE SHRI GEORGE MATHAN, JUDICIAL MEMBER

आयकर अपील सं/ITA No.244/CTK/2023
(निर्धारण वर्ष / Assessment Year :2011-2012)

Anirudha Mallik, At: Kaptipada, PO: Kaptipada, Dist: Mayurbhanj-757040	Vs	ITO, Ward-1, Baripada
PAN No. : APTPM 2186 D		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)
निर्धारिती की ओर से /Assessee by	:	Shri P.K.Mishra, Advocate & Shri Himanshu Jena, Advocate.
राजस्व की ओर से /Revenue by	:	Shri S.C.Mohanty, Sr. DR
सुनवाई की तारीख / Date of Hearing	:	12/09/2023
घोषणा की तारीख/ Date of Pronouncement	:	12/09/2023

आदेश / O R D E R

This is an appeal filed by the assessee against the order of the Id. CIT(A)-2, Bhubaneswar, dated 22.03.2023, passed in I.T.Appeal No.Cuttack/10185/2017-18 for the assessment year 2011-2012.

2. In the appeal of the assessee, the assessee has raised the legal ground regarding reopening of the assessment and also the ground against the estimation of the income of the assessee.

3. In respect of the reopening, it was submitted by the Id. AR that in para 2 of the assessment order, the AO has categorically mentioned that the reopening has been done on the ground that there was a difference between purchases as recorded in the audited accounts and as the payment made to Indian Oil Corporation Limited (IOCL). It was the submission that in para 9 of his order, the AO categorically admits that the

assessee has been able to reconcile the difference of purchase figures. It was the submission that no addition has been made in respect of purchases. It was further submission that the AO went on to hold that there was ambiguity regarding correctness of the sale figure and in para 10 of the assessment order, the AO on the ground that the true value of the gross profit shown by the assessee was not verifiable, rejected the books of accounts of the assessee and estimated the income of the assessee at 4%. It was the submission that, at the outset, as the ground on which the reopening has been done itself no more survives in view of the fact that the purchases have been fully reconciled and accepted by the AO and no addition on such account has been made by the AO, the reopening and the consequential assessment itself is required to be quashed.

4. In regard to the estimation of income, it was submitted by the Id. AR that no comparable cases have been shown and in the absence of any comparable case, the income of the assessee could not be estimated at the whims and fancies of the AO. It was also submitted that when the gross profit of the assessee was itself at 2.5% as accepted by the AO, he could not have estimated the income of the assessee at a percentage higher than the gross profit.

5. In reply, Id. Sr. DR submitted that in regard to the issue of reopening in view of the Explanation 3 to Section 147 of the Act, the reopening is validly made. Just because no addition has been made on the issue on which the reopening has been done, does not bar the AO

from making additions on other issues. It was the submission that the reopening was required to be upheld.

6. In regard to the estimation of income, it was submitted by the Id. Sr. DR that considering the nature of business of the assessee, the income of the assessee has been estimated at 4%. It was the submission that no evidence has been produced by the assessee to show that his income should be estimated at lower figures. It was the submission that the assessee has not been able to produce the evidence of the valuation of stock and this has resulted in rejecting the books. It was the submission that the opening stock and closing stock valuation was specifically not produced and it has been recorded in the assessment order. It was, thus, submitted that the appeal of the assessee is liable to be dismissed.

7. I have considered the rival submissions. A perusal of the assessment order clearly shows that in para 3, the AO has reopened the assessment specifically for the purpose that there is a difference of Rs.53,91,843/- alleged to have been understated in the purchases. A perusal of the assessment order at para 9 shows that the assessee has successfully reconciled the difference in the purchase figure. This has resulted into no addition being even proposed by the AO much less made. As the ground on which the reopening has been done itself no more survives and no addition has resulted from the reasons on which the reopening has been done, obviously the reasons of the reopening itself has failed and, therefore, the reopening proceedings itself has failed and assessment proceeding is quashed. Thus, I do so.

8. The arguments raised by the Id.Sr. DR that the *Explanation 3* to Section 147 of the Act protects the assessment even though no addition has been made, does not stand to reason insofar as the wordings used in the said section is that, "*the AO may assess or reassess the income in respect of any issue, which has escaped assessment, and such issue comes to his notice subsequently in the course of the proceedings under this section, notwithstanding that the reasons for such issue have not been included in the reasons recorded under sub-section (2) of section 148.*" Thus, the reasons on which the reopening as done must first survive and only when such reason survive then in the course of such assessment, the AO finds other issues which have come to his notice, liberty is granted to the AO to make addition on this additional issues also. When the primary issue fails, the reopening fails along with that. In the present case the reopening has been done because there was allegation of understatement in respect of the purchases. When no addition has been made on that count and that issue has already been reconciled by the assessee and accepted by the AO, the reopening itself failed. Consequential assessment will also fail.

9. Coming to the merits, it is noticed from para 10 of the assessment order that the AO having rejected the books of accounts has not given any comparable case for the purpose of estimating the income of the assessee at 4%. Admittedly, the above method for estimation would be the assessee's own declaration for the earlier and subsequent assessments. Even that has not been attempted by the AO. In absence of

a verifiable and authenticable comparable case, the assessment as has been done by the AO remains unsubstantiated and the same stands deleted. Even on this ground also the addition as made by the AO on merits, is hereby deleted.

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

Order dictated and pronounced in the open court on 12/09/2023.

Sd/-

(जार्ज माथन)

(GEORGE MATHAN)

न्यायिक सदस्य / JUDICIAL MEMBER

कटक Cuttack; दिनांक Dated 12/09/2023

Prakash Kumar Mishra, Sr.P.S.

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

1. अपीलार्थी / The Appellant-
Anirudha Mallik,
At: Kaptipada, PO: Kaptipada,
Dist: Mayurbhanj-757040
2. प्रत्यर्थी / The Respondent-
ITO, Ward-1, Baripada
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