

आयकर अपीलीय अधिकरण, कटक न्यायापीठ, कटक

**IN THE INCOME TAX APPELLATE TRIBUNAL CUTTACK BENCH CUTTACK
(THROUGH VIRTUAL HEARING)**

श्री जार्ज माथन, न्यायिक सदस्य एवं श्री राजेश कुमार, लेखा सदस्य के समक्ष ।

**BEFORE SHRI GEORGE MATHAN, JUDICIAL MEMBER
AND**

SHRI RAJESH KUMAR, ACCOUNTANT MEMBER

आयकर अपील सं/ITA No.83/CTK/2020

(निर्धारण वर्ष / Assessment Year : 2014-2015)

Commissioner, Cuttack Municipal Corporation, Choudhury Bazar, Dist: Cuttack	Vs	ITO (TDS), Cuttack
TAN No. :BBNC 00195 G		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)
निर्धारिती की ओर से /Assessee by	:	Shri P.K.Mishra & Sanjeev Swain, Advs
राजस्व की ओर से /Revenue by	:	Shri Charan Dass, Sr. DR
सुनवाई की तारीख / Date of Hearing	:	12/10/2023
घोषणा की तारीख/ Date of Pronouncement	:	12/10/2023

आदेश / O R D E R

Per Bench :

This is an appeal filed by the assessee against the order of the Id. CIT(A), Cuttack, dated 31.10.2019, passed in I.T.Appeal No.0398/2015-16 for the assessment year 2014-2015.

2. The appeal of the assessee is delayed by 25 days for which the assessee has filed necessary application for condonation of delay and the affidavit. The reason for delay is mentioned to be on account of urinary infection and high blood pressure and the consequential medical treatment. The affidavit filed by the assessee has not been controverted by the revenue. Consequently, the delay in filing the present appeal is condoned and the appeal is disposed off on merits.

3. It was submitted by the Id. AR that the issue in the appeal was against holding the assessee as an assessee in default for non-deduction

of tax u/s.194C of the Act on the payments made to Odisha State Police Housing & Welfare Corporation Ltd. and liable to pay tax u/s.201(1) of the Act along with interest u/s.201(1A) of the Act. It was the submission that the assessee being the Commissioner of Cuttack Municipal Corporation, who had been directed by the Govt. of Odisha to enter into an MOU with the executing agency of Odisha State Police Housing & Welfare Corporation Ltd. to construct 456 dwelling units (G+3) storied building for slum people at Tulasipur, Tala Sahi and & Andarpur, Cuttack under IHSDP Project Phase-II of Cuttack City. Ld. AR has placed before us the copy of minutes of the meeting held under the Chairmanship of Additional Chief Secretary of the Government of Odisha, H & UD Department, dated 05.10.2013, which reads as under :-

Minutes of the meeting held on 1.10.2013 at 3.00 PM under the Chairmanship of the Additional Chief Secretary to Govt, H&UD Deptt to discuss the issues in connection with execution of IHSDP Project in Cuttack.

Members Present:-
As per the list annexed

The Additional Chief Secretary chaired the meeting.

After detailed discussions, following decisions were taken

- The executing agency i.e. Odisha State Police Housing & Welfare Corporation Ltd, has to reduce the carpet area size of the dwelling units to 180 sq.ft to 200 sq.ft to keep the project cost within the approved amount. of Rs 2650.50 lakh.
- No further funds shall be provided beyond the approved cost.
- The Municipal Corporation has to bear any excess expenditure out of their own resources.
- The Odisha State Police Housing & Welfare Corporation Ltd, may execute the project departmentally on expediency as a special case, since the project is of high priority and has been badly delayed. Moreover, any further delay will seriously jeopardise this slum rehabilitation project
- The Municipal Commissioner, Cuttack Municipal Corporation shall execute a MOA with the Odisha State Police Housing & Welfare corporation Ltd and necessary funds shall be released to the executing agency within a fortnight positively.

The meeting ended with votes of thanks from and to the chair.

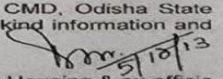
I .Srinivas
Additional Chief Secretary to Govt .

By Fax

Government of Odisha
Housing & Urban development Department

Memo No 29932 /HUD, Bhubaneswar dated the 5.10.13
HS(IHSDP)-48/13

Copy forwarded to the Municipal Commissioner, CMC, Cuttack / CMD, Odisha State Police Housing & Welfare corporation Ltd., Janapath, Bhubaneswar-22 for kind information and necessary action.


Director Housing & ex-officio
Addl Secretary to Govt.

4. It was the submission that consequent to the direction by the Govt. of Odisha, the assessee entered into an agreement with Odisha State Police Housing & Welfare Corporation Ltd. on 22.11.2013. In the said MOU, the Odisha State Police Housing & Welfare Corporation Ltd. was to get the project executed. It was the submission that the assessee was only custodian of the funds on behalf of the Govt. of Odisha and the execution was done by the Odisha State Police Housing & Welfare Corporation Ltd., which was also a Govt. of Odisha undertaking. It was the submission that on account of the direction from the Government, the assessee had made payments for the project to Odisha State Police Housing & Welfare Corporation Ltd. No TDS has been deducted on the payments as it was not a contract between the assessee and Odisha State Police Housing & Welfare Corporation Ltd. It was the submission that on account of non-deduction of TDS, the AO on the basis of verification done by the Income Tax Officer (TDS) held that the assessee was liable to deduct TDS. It was the submission that as the TDS have not been deducted, the AO treated the assessee as assessee in default and passed the order u/s.201 & 201(1A) of the Act. It was the submission that the executing agency as per the directions of the Govt. of Odisha was the Odisha State Police Housing & Welfare Corporation Ltd. and the project was also of the Govt. of Odisha's project under the Integrated Housing & Slum Development Programme (IHSDP). The funds were allotted by the Govt of Odisha and the assessee was only the conduit for the transfer of the funds to Odisha State Police Housing & Welfare Corporation Ltd.. It

was the submission that the Odisha State Police Housing & Welfare Corporation Ltd. has filed its return of income and has also deducted the TDS on the payments made to its contractor. The necessary Form 26A along with necessary Annexures were also filed before us. A certificate to the effect has also been issued by MGGS & Associates, Chartered Accountants Firm confirming that they have examined the relevant documents, documents and records of the Odisha State Police Housing & Welfare Corporation Ltd. and that the receipt in respect of which the alleged TDS has not been deducted has been offered to tax in the total income of Odisha State Police Housing & Welfare Corporation Ltd. The said certificate are as follows :-



ANNEXURE A

Certificate of accountant under first provision to sub-section (1) of section 201 of the Income-tax Act, 1961 for certifying the furnishing of return of income, payment of tax etc. by the payee

We hereby confirm that we have examined the relevant accounts, documents and records of The Odisha State Police Housing and Welfare Corporation Ltd with PAN-AABCT7853N located at Bhojnagar, Janpath, Bhubaneswar-22, Odisha for the period 2013-14 and hereby certify the following:

(i) Cuttack Municipal Corporation (payer) has paid to or credited following sum to the account of The Odisha State Police Housing and Welfare (payee) without deduction of whole or any part of the tax in accordance with the provisions of Chapter -XVII-B

Nature of payment	Date of payment or credit	Section under which tax was deductible	Amount paid or credited	Amount of tax deductible	Details of amount deducted, if any	
					Amount deducted	Date of deduction
Cost. of 456 Dwelling units at Tulaspur & Andapur	25.11.2013	Sec-194(C)	13,51,75,500/-	27,03,510/-	Nil	Nil

(ii) The payee, who is a resident, has furnished his return of income for the assessment year 2014-15 relevant to the payment referred to in (i) above. The details of return of income filed by the payee are as under-

Date of filing return	Mode of filing i.e. whether e-filed or paper return	Acknowledgement number of return filed	If paper return— designation and address of the Assessing Officer	Amount of total taxable income as per return filed	Tax due on the income declared in the return	Details of tax paid
28.12.2014	e-filed	452379001261214	NA	19,92,21,299/-	6,77,45,086/-	Adv. Tax- 2,61,82,000/- TDS- 4,49,33,802/-

(iii) The payee has taken into account the sum referred to in (i) for computing his taxable income in return of income filed by him, the details of which are as under-

Receipt on which Tax has not been deducted	Head of Income under which the receipt is accounted for	Gross receipt under the head of income under which the receipt is accounted for	Amount of taxable income under the head of income under which the receipt is accounted for
13,51,75,500/-	Revenue from Operation	308,20,33,108/-	F.Y. 2013-14 Rs. 1,33,41,013/- (Including 10% Supervision Charges) F.Y. 2014-15 Rs. 1,04,69,914/- (Including 10% Supervision Charges)

(iv) It has been ensured that the information furnished is true and correct in all respects and no relevant information has been concealed or withheld



(v) Neither I, nor any of my partners, is a director, partner or an employee of the above mentioned entities or its associated concerns

I fully understand that any statement made in this certificate, if proved incorrect or false, will render me liable for any penal or other consequences as may be prescribed in law or is otherwise warranted

For M G G S & ASSOCIATES
Chartered Accountants

Soumyajeet
CA Soumyajeet Mishra
Partner



(Signature and Stamp/Seal of the Signatory)

Soumyajeet Mishra, FCA
Flat No-1B, 1st Floor, R.K. Enclave,
Plot No-A/155, Sahid Nagar,
Bhubaneswar-751007, Odisha
Membership No- 518057
UDIN: 22518057AKKBLF4456

Place: Bhubaneswar
Date: 07.06.2022

Notes:

1. *Delete whichever is not applicable
2. *This certificate is to be given by—
 - (i) a chartered accountant within the meaning of the Chartered Accountants Act, 1949 (38 of 1949); or
 - (ii) any person, who in relation to any State, is, by virtue of the provisions in sub-section (2) of section 226 of the Companies Act, 1956 (1 of 1956), entitled to be appointed to act as an auditor of companies registered in that State.

5. It was the submission that at the outset, the assessee was not liable to deduct TDS. In the alternative also the income having been offered to tax by Odisha State Police Housing & Welfare Corporation Ltd having been offered the amount of tax, no levy u/s.201 & 201(1A) of the Act is liable to be levied on the assessee in view of the decision of the ITAT Mumbai Bench of the Tribunal in the case of ICICI Securities Limited, passed in ITA No.1511/Mum/2022, order dated 09.11.2022. He also placed reliance on the decision of Hon'ble Gujarat High Court in the case of Rishikesh Apartments Co-op. Housing Society Ltd., reported in [2002] 253 ITR 310 (Gujarat), wherein it has been held that if the tax was duly paid and that too at the time when it had become due, it would not be proper on the part of the revenue to levy any interest under section 201(1A) of the Act, especially when the contractor had paid more amount of tax by way of advance tax than what was payable by it. It was the submission that the levy as raised on the assessee u/s.201 & 201(1A) is liable to be deleted.

6. In reply, Id. Sr.DR vehemently supported the order of the Id. CIT(A).
Id.Sr. DR on an earlier occasion has also filed written submission which reads as follows :-

1. Interest would be levied U/S 201 (1A) even in case of the payee (deductee) having paid income tax on the income from the payment with no, or short, TDS.

[Singapore Airlines Ltd. (2022) 449 ITR 203 (SC) (Attached)'] .]

2. Authorised AO to receive form no. 26A and the mode of furnishing it now are CPC- TDS and electronic respectively.

3. Filing of the. form no.26A for furnishing the accountant certificate ulr 31ACB of Income Tax Rules read with the first proviso to s. 201(1) of Income Tax Act in the form of additional evidence is not in accordance with the notification (enclosure ii) no. 11/2016 dtd. 02112/2016 [F.No. DGIT(S)/CPC/TDS/Notification 2016-17] on the subject of 'procedure for furnishing and verification of form no. 26A for removing the default of ... non deduction of tax at source' by the Principal Director General of Income Tax (Systems) [PDGIT (Sys.)] ulr 31ACB(2) of Income Tax Rules.

4. The notification cited above and enclosed herewith also authorises the person to furnish the form no.26A to, apart from the DGIT (Sys.) u/r 31ACB(1) of Income Tax Rules. The authorised persons do not include the jurisdictional Assessing Officer assessing income (IAO), the CIT(A) or the ITAT.

5. The notification also specifies, u/r 31ACB(2) of Income Tax Rules, the mode of furnishing the form no.26A to be not physical but' Electronic' now.

6. The procedure for furnishing and verification of form no. 26A specified under the notification does not include offline submission of a physical certificate by the 'Accountant' to the assessee-deductor. It includes roles for the 'Accountant' also apart from that of the assessee-deductor at multiple portals like the efiling and NSDL/TRACES. The role of the assessee-deductor includes submitting request for no- deduction transactions, entering and submitting no-deduction transactions, authorising the 'Accountant' who has completed his role, submitting the form under digital signature and . payment of the mandatory interest under the proviso to s. 201(IA) of Income Tax Act upon reprocessing of the assessee-deductor's TDS statement with modified non-deduction.

The role of the 'Accountant' includes registration, filling in his certificate in the form of the annexure to the form no. 26A in respect of the concerned deductee and submitting it under digital signature.

[Notification no. 1112016 dtd. 0211212016 F. no. DGIT(S)/CPC(TDS)/ Notification/20 16-17 (Attachedj" .]

i,Encl.: As above

7. It was the submission that the arguments of the assessee have been considered by the Id. CIT(A) and the same had been rejected in page 3 of the order of the Id.CIT(A). It was the submission that the contract had been entered between Cuttack Municipal Corporation and Odisha State Police Housing & Welfare Corporation Ltd and the assessee being the Chairman of the Cuttack Municipal Corporation, was required to deduct TDS.

8. We have considered the rival submission. At the outset, what is noticed is that the Government has treated the Odisha State Police Housing & Welfare Corporation Ltd as the executing agency. The Commissioner, Cuttack Municipal Corporation, had nothing to do with the project other than to obey the direction issued by the Government through Additional Chief Secretary to the Government of Orissa. The Government had directed the Cuttack Municipal Corporation to execute the MOU with Odisha State Police Housing & Welfare Corporation Ltd and that the necessary funds shall be realized to the executing agency. When the assessee is a State Government and the State Government has made a payment to the Corporation which is duly owned by the State Government and under the control of the State Government, it cannot be said that there is a contract between the assessee and the executing agency. The Cuttack Municipal Corporation does not have any executable contract right with Odisha State Police Housing & Welfare Corporation Ltd. The

Cuttack Municipal Corporation is only the custodian of the funds on behalf of the Government of Orissa. This being so, we are of the view that the Commissioner, Cuttack Municipal Corporation was not liable, at the outset, to deduct any TDS in respect of payments made by it to Odisha State Police Housing & Welfare Corporation Ltd under the instruction of the State Government. On this ground, levy u/s.201/201(1A) of the Act is liable to be deleted and we do so.

9. Even otherwise, the Id. AR has categorically placed before us the certificate issued in the Form 26A by the Chartered Accountant, who has verified the accounts of the Odisha State Police Housing & Welfare Corporation Ltd and mentioned that Odisha State Police Housing & Welfare Corporation Ltd has included the amount received in the total income and have also paid the necessary taxes on the same. The argument of the Id. Sr. DR that the procedure for furnishing and verification of form no. 26A specified under the notification does not include offline submission of a physical certificate by the 'Accountant' to the assessee-deductor does not survive, insofar this issue relates to the assessment year 2014-2015, whereas the Notification in respect of online filing etc. was issued in December 2016. In these circumstances, as it is noticed that the Odisha State Police Housing & Welfare Corporation Ltd has included the amount received from Cuttack Municipal Corporation in the total income and has paid the necessary taxes thereon, in view of the decision of the coordinate bench of the Tribunal in the case of ICICI Securities Limited (supra), the order passed u/s.201/201(1) of the Act

stands quashed. This view of ours also finds support from the decision of the Hon'ble Gujarat High Court in the case of Rishikesh Apartments Co-op. Housing Society Ltd. (supra).

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

Order dictated and pronounced in the open court on 12/10/2023.

Sd/-

(राजेश कुमार)

(RAJESH KUMAR)

लेखा सदस्य/ **ACCOUNTANT MEMBER**

Sd/-

(जार्ज माथन)

(GEORGE MATHAN)

न्यायिक सदस्य / **JUDICIAL MEMBER**

कटक Cuttack; दिनांक Dated 12/10/2023

Prakash Kumar Mishra, Sr.P.S.

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

1. अपीलार्थी / The Appellant-
Commissioner,
Cuttack Municipal Corporation,
Choudhury Bazar,
Dist: Cuttack
2. प्रत्यर्थी / The Respondent-
ITO (TDS), Cuttack
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