

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.237/CTK/2023

(निर्धारण वर्ष / Assessment Year : 2015-2016)

Hanuman Prasad Khemka, Represented by the Legal Heir Smt. Parwati Khemka, Door No.50-102-14/2, 2 nd Floor, Plot No.186, North East Layout, Seethammadhara, Visakhapatnam-530013	Vs	ITO, Ward-1, Bolangir
PAN No. :ABSPK 4649 L		

(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)
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निर्धारिती की ओर से /Assessee by	:	Shri P.K.Mishra , Advocate
राजस्व की ओर से /Revenue by	:	Shri S.C.Mohanty, Sr. DR,
सुनवाई की तारीख / Date of Hearing	:	22/05/2024
घोषणा की तारीख/Date of Pronouncement	:	22/05/2024

आदेश / O R D E R

Per Bench :

This is an appeal filed by the assessee against the order dated 31.05.2023, passed by the CIT(A), National Faceless Appeal Centre (NFAC), Delhi in DIN & Order No.ITBA/NFAC/S/250/2023-24/1053367453(1) for the assessment year 2015-2016.

2. It was submitted by the Id. AR that the assessee is an individual, who is a partner in Khemka Plywood. It was the submission that the assessee along with other partners had purchased a piece of land measuring 596.76 square yards at Plot No.43, Resapuvanipalem Village in Vishakhapatnam for a consideration of Rs.2,10,94,500/-. It was the submission that the purchase was made from the vendor Sri Galla

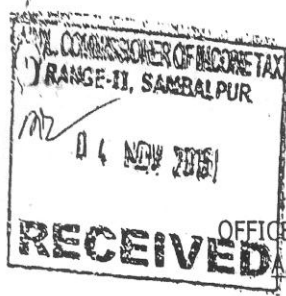
Ravindranath Babu vide sale deed No.3401/2014, dated 29.05.2014 which was registered in the office of the Joint Sub-Registrar, Vishakhapatnam, Andhra Pradesh. It was the submission that subsequently there was a survey on the premises of Khemka Plywood and the sale deeds were found. The statements had been recorded at Vishakhapatnam from the seller Sri Galla Ravindranath Babu under oath u/s.131(1A) of the Act on . As per the statement recorded, it was found that the bank account of Sri Galla Ravindranath Babu was maintained at SBI Hyderabad, Siripuram Branch, Vishakhapatnam and the cheques have been deposited in the said branch. There were also cash deposits on of a total amount of Rs.1,76,11,400/-. The amounts were deposited as self cash deposits of Rs.45 lakhs, Rs.45 lakhs, Rs.41,11,400/- and Rs.45 lakhs, respectively.

3. Ld. Sr. DR has placed before me the copy of the statements recorded as also the copy of bank account of Sri Galla Ravindranath Babu. It was the submission that on the basis of the statement of Sri Galla Ravindranath Babu, it was alleged that the assessee had paid on money to an extent of Rs.27,29,505/- being 1/6th of the total "on money" received by Sri Galla Ravindranath Babu. It was the submission that the assessee had sought cross examination of Shri Galla Ravindranath Babu and the same was not provided to the assessee and subsequently the assessee was informed that Sri Galla Ravindranath Babu had suffered an unnatural death prior to 21.09.2016 and as per the post mortem report, it showed that he had died due to "ethyl alcohol intoxication". It was the submission

that the sale deed which had been registered at the office Joint Sub-Registrar, Vishakhapatnam, and the documents have not been seized on account of any undervaluation. It was the submission that as per page 4 of the sale deed the vendor had categorically accepted the said offer of Rs.2,10,94,500/-, as reasonable and reflecting the true and correct market value prevailing in the locality. The vendor had also confirmed the receipt of the same and there was no mention of any other consideration. It was the submission that Shri Galla Ravindranath Babu has himself deposited the cash and it cannot be said that the assessee has paid any portion of the said cash and there was no "on money" in the transaction. It was the submission that the assessee is challenging the issue on three following grounds :-

- i) that, the notice u/s.148 of the Act had been issued before the expiry of the time for issuance of the notice u/s.143(2) of the Act for a regular assessment;
- ii) that, there was no satisfaction recorded by the approving authority for the purpose of initiating the reopening proceedings and;
- iii) that, no opportunity of cross examination had been provided though the same had been prayed for.

4. It was submitted by the Id. AR that the assessee had filed his return of income on 30.03.2016. The time limit for issuance of notice u/s.143(2) of the Act was 30.09.2016. The Id. AR has placed before me the copy of the approval granted by the Joint Commissioner of Income Tax, Range-Sambalpur, which is extracted as below :-



GOVERNMENT OF INDIA

OFFICE OF THE JOINT COMMISSIONER OF INCOME TAX, RANGE-2

AYAKAR BHAWAN, AINTHAPALI, SAMBALPUR - 768004

No. JCIT/SBP/Misc./2016-17/1750
Dated, Sambalpur, the 24th August, 2016

To

The Income Tax Officer
Ward-1, Bolangir.

Sub: Submission of proposals for re-opening u/s.147 of the I.T Act. 1961- Regarding.

Kindly refer to the above.

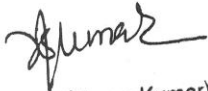
Your proposal for issuing notice u/s 148 of the I.T Act, 1961 along with duly filled in proforma has been received to this office in the following cases:

Sl. No.	Name of the case	PAN	Asst. Year
1	Sri Nandalal Khemka	ADGPK3266R	2015-16
2	Smt. Nisha agrawal	ACHPA1486B	2015-16
3	Sri Govinda Ram Khemka	ABSPK4647E	2015-16
4	Sri Hanuman Prasad Khemka	ABSPK4649L	2015-16
5	Smt. Alka Agrawal	ATVPA8065D	2015-16
6	Smt. Babita Khemka	AEFPK1044K	2015-16

Considering the facts of cases and reasons recorded by you, I am satisfied that it is a fit case for proceedings of section 147 of the IT Act 1961. Accordingly, approval is hereby accorded for issued of notice u/s 148 of the IT Act, 1961 in the above cases.

Encl: As above.

Certified to be True Copy


(Tunna Kumar/Tunna Kumar)
आयकर अधिकारी/Income Tax Officer
वार्ड-१, बलांगीर/Ward-1, Bolangir


11T 24-08-2016.
For Joint Commissioner of Income Tax
Range-2, Sambalpur

Form for recording the reasons for initiating proceedings under section 148 and for obtaining the approval of the Joint Commissioner/Commissioner of Income Tax/Central Board of Direct Taxes.

01 Name and Address of the assessee : SRI HANUMAN PRASAD KHEMKA
C/O- RADHESHYAM AGRAWAL (ADV)
THIKADAR PARA
TITILAGARH
BOLANGIR

Permanent Account No. : ABSPK4649L

03 Status : IND

04 District/Circle : Income Tax Officer, Ward-1, Bolangir

05 Assessment year in respect of which it is proposed to issue notice U/s 148 : 2015-16

06 The quantum of income which has escaped assessment. : Rs. 27,29,505/-

07 Whether the provisions of Sec.147(a) or 147(b) or 147(c) are applicable or both the Sections are applicable : YES, U/s 147(c)

08 Whether the assessment is proposed to be made for the first time. If the reply is in the affirmative, please state:- : No *143(c) later*

a) Whether any voluntary return has already been filed and : NA

b) If so, the date of filing the said return : NA

09 If the answer to item 8 is in the negative, please state. : NA

a) The income originally assessed : NA

b) Whether it is a case of under assessment, assessment at too low rate, assessment which has been made the subject of excessive relief or allowing of excessive loss or depreciation. : This is a case of under assessment.

10 Whether the provision of section 150(1) are applicable. If the reply is in the affirmative, the relevant facts may be stated against item no.11 and it may also be brought out that provisions of sec. 150(2) would not stand in the way of initiating proceedings U/s 147. : No.

11 Reasons for the belief that income has escaped assessment : As per Annexure enclosed:

M. K. Rout
(M. K. Rout)
Income-tax Officer, Ward-1,
Bolangir

12 Whether the Joint Commissioner / Commissioner/Board is satisfied on the reasons recorded by the A.O. that it is a fit case for the issue of a notice u/s 148. Certified to be True Copy : *On perusal of reasons recorded in annexure, the undersigned is satisfied that it is fit case for issue of notice n/s. 148 for the A.O. 14/15/16.*

14/15/16

Turana Kumar
(टुना कुमार/Turana Kumar)
आयकर अधिकारी/Income Tax Officer

5. It was the submission that the proposal was sent on 21.06.2016.

The joint Commissioner of Income Tax has recorded that "on perusal of

reasons recorded in annexure, the undersigned is satisfied that it is fit case for issue of notice u/s.148 for the A.Y.15-16" on 14.07.2016. On 04.11.2016, the AO received the copy of the approval and recorded in the order sheet, copy of which is reproduced hereunder :-

<u>ORDER SHEET</u>	
NAME OF THE ASSESSEE	:SRI HANUMAN PRASAD KHEMKA C/O- RADHESHYAM AGRAWAL (ADV) THIKADAR PARA TITILAGARH BOLANGIR
STATUS	:- INDIVIDUAL
PAN	:- ABSPK4649L
A/Y	:- 2015-16
21/06/2016	<p>The assessee alongwith five other persons namely Sri Nandalal Khemka, Smt. Nisha Agrawal, Sri Govinda Ram Khemka, Smt. Babita Agrawal, Smt. Alka Agrawal made total payment of Rs. 1,76,11,400/- by cash and also Rs. 1,75,78,750/- by cheque in connection with purchase of immovable property vide sale deed no :- 3104 of 2014 dtd. 29/05/2014 of Jt. Sub-Register office Vishakapattanam. The sources of the said payment remained unexplained and therefore I have reason to believe that income chargeable to tax has escaped within the meaning of section 147 of the I.T. Act, 1961. Sent proposal to the Jt. Commissioner of Income Tax, Range - 2, Sambalpur seeking necessary approval before issue of notice u/s. 148 of the I.T. Act, 1961.</p> <p style="text-align: right;"><i>[Signature]</i> I.T.O</p> <p>4/11/16 Approval letter received from the Jt. Commissioner, Range-2, SBO vide memo no. Jt. I.T./SBO/2016-17/750 dt. 24/11/16 placed on the file.</p> <p style="text-align: right;"><i>[Signature]</i> I.T.O</p> <p>15-12-16 Issued notice u/s. 148 of the I.T. Act for reopening of the case.</p> <p style="text-align: right;"><i>[Signature]</i> I.T.O</p>

ORDER SHEET

05/06/17) 8 Harshita Jain FCA AIR of the as appear for hearing 2 filed before along with copy of all receipt return in self book of order 015143 or order ITA no. A copy of 17 or return, capital etc, balance sheet of computation or income bleed in the file. The case dissem partly. order
05/06/17

13-7-17) 9 Shri. Anil 015143 (2) 2 0151424) of the in the hearing the case for hearing on 25/7/2017 at 11:00 am. order
17/0

24/7/17) 40 compliance. order
17/0

21/11/17) 50 Mr. R. Jain FCA AIR of the as appear for hearing 2 filed before on the course of hearing he furnished copy of ITR, computation or in case, P 2 C etc, for the case three items like 13-14-15-2 15-16. He also furnished copy of sale deed, bank statements. He is asked to explain the source of consideration made in the property. The case is adj to 5/12/17. order
21/11/2017

6. Ld. AR submitted that the Hon'ble Delhi High Court in the case of Yum! Restaurants Asia Pte Ltd., reported in [2017] 397 ITR 665 (Delhi), under similar circumstances had categorically held that the reopening were invalid. For better understanding paras 5 to 19 of the order of the Hon'ble Delhi High Court are extracted as under :-

5. The factual scenario, however, is that the note put up by the Assessing Officer to the Director of Income-tax read as under :

"Form of recording the reasons for initiating proceedings under section 148 and for obtaining the approval of the Director of Income-tax/Central Board of Direct Taxes:

1	Name and address of the assessee	:	M/s. Yum! Restaurants (Asia) Pte Limited 99, Bukit Timah Road # 04-01 02, Singapore -999999
2	Permanent Account No.	:	AAACY2204M
3	Status	:	Non-resident

4	District/Circle/Range	:	Circle 2(2), Intl. Taxation, New Delhi
5	Assessment year in respect of which it is proposed to issue notice under section 148	:	2006-07
6	The quantum of income which has escaped assessment	:	Exceeding Rs. 1 lakh
7	Whether the provisions of section 147(a) to be made first time. If the reply is in the affirmative please state.	:	Yes
8	Whether the assessment is proposed to be made first time. If the reply is in the affirmative please state.	:	No
	(a) Whether any voluntary return had already been filed and	:	N.A.
	(b) If so, the date of filing the said return	:	N.A.
9	If the answer to item 8 is in the negative please state	:	
	(a) The income originally assessed	:	
	(b) Whether it is a case of under assessment that too low a rate, assessment which has been made the subject to excessive relief or allowing of excessive loss or depreciation	:	Under assessment
10	Whether the provisions of section 150(1) are applicable. If the reply is in the affirmative, the relevant facts may be stated against item No.11 and it may also be brought out that the provisions of section 150(2) would not stand in the way of initiating proceedings under section 147	:	No
11	Reasons for the belief that the income has escaped assessment	:	As per Annexure A
	Dated : 26-3-2013		
	(Sd.)		
	Mazhar Akram		
	Deputy Director of Income-tax		
	Circ 2(2), Intl. Taxation, New Delhi		
12.	Comments of the Addl. DIT, R-2, Intl. Tax., Delhi, if any • On perusal of the reasons I have reasons to believe that income of more than one lakh has escaped assessment. • The proposal is approved.		
	(Sd.)		
	Manish Mishra		
	Addl. Director of Income-tax Range-2, Intl. Tax., New Delhi		

13.	<i>Whether the Director of Income-tax (Intl. Tax.)-II, New Delhi is satisfied on the reasons recorded by the ITO/ADIT/DDIT that it is a fit case for issue a notice under section 148</i>	<i>I have perused the reasons recorded and find there is income escaping assessment making this a fit case for action under section 147/148 of the Income-tax Act, 1961.</i>
	<i>(Sd.) Poonam K. Sidhu Director of Income-tax Intl. Taxation-II, New Delhi"</i>	

6. Two of the columns in the above note are of immediate relevance. Column 8 poses a question whether the assessment is proposed to be made for the first time. This question is directly relatable to section 151(2) of the Act since it seeks to ascertain whether the return filed for the assessment year in question has only been processed under section 143(1) of the Act or was it subject to a scrutiny assessment? If, as in the present case, the return was only processed under section 143(1) of the Act, then the answer to the question in column 8 should have been in the affirmative, i.e., "Yes". If the answer is in the affirmative, the Assessing Officer then proceeds to fill up columns 8(a) and 8(b).

7. As is evident from the above note prepared by the Assessing Officer, he chose to answer the question in column No. 8 in the negative. This meant that according to the Assessing Officer, the return filed by the assessee for the assessment year 2006-07 had in fact been picked up for scrutiny and an assessment order was passed under section 143(3) of the Act. However, the factual position was to the contrary. The only conclusion, therefore, to be drawn is that when the Assessing Officer filled up column 8 with a negative answer, he did not himself peruse the file as that would have clearly shown him whether the return was subject to scrutiny or not. This was definitely, therefore, an instance of non-application of mind by the Assessing Officer.

8. If in fact the Assessing Officer had seen the record, then apart from answering the question at column 8 in the affirmative, he would have, in response to the question in column 8(a), again answered in the affirmative and in column 8(b) given the date on which the return was filed. Clearly, therefore, it appears that the Assessing Officer did not peruse the record containing the return filed by the assessee.

9. At this stage, it must be noted that for the assessment year 2005-06, where a separate order has been passed by the court today in *W. P. (C) No. 1353 of 2013 reported as Yum! Restaurants Asia Pte Ltd. v. Deputy DIT (No. 1) [2017] 397ITR 639 (Delhi)*, the stand taken by the Department was that the file for that assessment year was not traceable. However, as far as the present assessment year is concerned, the Department has not stated anywhere that the file was not traceable.

10. *One mistake led to the other. Having answered the question in column 8 in the negative, then logically the Assessing Officer should have filled up columns 9(a) and 9(b). Not only was column 9(a) left blank but column 9(b) was answered by stating "underassessment", when in fact there was no pending assessment as far as the assessment year in question was concerned.*

11. *The purpose of section 151 of the Act is to introduce a supervisory check over the work of the Assessing Officer, particularly, in the context of reopening of assessment. The law expects the Assessing Officer to exercise the power under section 147 of the Act to reopen an assessment only after due application of mind. If for some reason, there is an error that creeps into this exercise by the Assessing Officer, then the law expects the superior officer to be able to correct that error. This explains why section 151(1) requires an officer of the rank of the Joint Commissioner to oversee the decision of the Assessing Officer where the return originally filed was assessed under section 143(3) of the Act. Further, where the reopening of an assessment is sought to be made after the expiry of four years from the end of the relevant assessment year, a further check by the further superior officer is contemplated.*

12. *In the present case, having started off on a wrong note that the original assessment was scrutinised and an order was passed under section 143(3) of the Act, the Assessing Officer proceeded to put up the note to the Director of Income-tax as is evident from the title of the note but, through the Additional Director of Income-tax. Both the Additional Director of Income-tax and the Director of Income-tax appear to have concurred with the reasons for reopening the assessment but without applying their minds to the fact that the return originally filed was only processed under section 143(1) of the Act and not under section 143(3) of the Act. Had the Additional Director of Income-tax realised this mistake, he would not have put up the file further for the approval of the Director of Income-tax. Clearly, therefore, at the level of Additional Director of Income-tax there was non-application of mind. Had the Director of Income-tax realised the mistake, he would have declined to make a noting and would have returned the file to the Additional Director of Income-tax drawing his attention to section 151(2) of the Act which did not require any further approval by the Director of Income-tax where the return originally filed is only processed under section 143(1) of the Act. On the contrary, the Director of Income-tax again recorded his concurrence with the views of the Assessing Officer and the Additional Director of Income-tax. Therefore, at the second level also plainly there was non-application of mind.*

13. *Mr. Rahul Chaudhary, the learned senior standing counsel for the Department, sought to characterise this whole exercise as an "over-application" of mind. According to him, it was out of anxiety that the reopening of the assessment might ultimately be invalidated, that these officers enthusiastically participated in the*

exercise by treating the return originally filed as having been subjected to scrutiny under section 143(3) of the Act.

14. *What is evident to the court is the non-application of mind by three officers of the Department—the Assessing Officer, Additional Director of Income-tax and the Director of Income-tax. Plainly they did not bother to examine the record themselves.*

15. *The counter-affidavit filed by the Department, in the present case, makes an interesting reading. In para 9, it seeks to explain the lapse as under :*

"9. That, the contents of para No. 23, are wrong, prejudiced and out of context, hence, the same are denied in totality as the objections raised by the assessee-company has been validly and correctly disposed of vide office letter dated December 26, 2013. Furthermore, the case law cited by the assessee were distinguishable from the facts and circumstances of the case of the assessee, and, hence, out of context. In respect of case law relied on for sanction of issuance of notice under section 148, the same are distinguishable from the present case. From the records available in this circle for the assessment year 2006-07, it was not clear as to whether the scrutiny assessment was done. Therefore, as a matter of abundant caution, prior approval of both Addl. DIT, Range-2, International Taxation, New Delhi and DIT (International Taxation)-II, New Delhi was taken. Besides, as detailed at paras 2, 3 and 7 above, there was valid reasons for reopening of the reassessment proceedings."

16. *It is not understood how from the records available for the assessment year 2006-07 it was not clear whether a scrutiny assessment was made. The records obviously would have contained the order of the Assessing Officer under section 143(3) of the Act. If, as is the case, there was no such order then clearly the only conclusion to be drawn was that the return was processed under section 143(1) of the Act. Since it is not the case of the Department that the file for the assessment year 2006-07 went missing, as was the case for the assessment year 2005-06, the above statement in the counter-affidavit filed on September 9, 2014, more than a year after the reopening, is inexplicable.*

17. *At the highest, the note prepared by the Assessing Officer should have been candid in column 8 that it was not clear whether the assessment was being made for the first time or not. That, at least, would have told the court that the Assessing Officer had applied his mind to the facts of the case. In any event, if such a note had been put up to the Additional Director of Income-tax and thereafter to the Director of Income-tax, either of those officers could have applied their minds and ascertained if indeed the return was processed under section 143(1) of the Act or picked up for scrutiny. The explanation now offered in the counter-affidavit only*

underscores the non-application of mind at all three levels in the Department.

18. The court, therefore, quashes the impugned notice dated March 28, 2013 issued by the Assessing Officer under section 148 of the Act seeking to reopen the assessment for the assessment year 2006-07. The order dated December 26, 2013 of the Assessing Officer rejecting the petitioner's objections is also set aside.

19. The writ petition is accordingly allowed but, in the circumstances, with no order as to costs.

7. It was the submission that a comparison of the approval in the assessee's case and in the case of Yum! Restaurants Asia Pte Ltd. (supra) would clearly show that the reasons recorded are identical and the mistakes are also identical. It was the prayer that the reopening of the assessment is liable to be quashed.

8. Ld. AR, thus, submitted that in respect of initiation of proceedings u/s.147 of the Act have been done before the due date for notice u/s.143(2) of the Act having expired, the issue was squarely covered by the decision of the Hon'ble Madras High Court in the case of Qatalys Software Technologies Ltd., reported in [2009] 308 ITR 249 (Mad), wherein the Hon'ble High Court has held that no action could be initiated u/s.147 of the Act when there is a pendency of the return before the AO. The Hon'ble Madras High Court followed its earlier decision in the case of K.M.Pachayappan, reported in [2008] 304 ITR 264 (Mad), dated 4th July, 2007, wherein it was held that no reassessment proceedings could be initiated so long as the assessment proceedings were pending on the basis of return already filed are not terminated. It was the submission that the return having been filed on 30.03.2016 and the time limit for the issuance of notice u/s.143(2) of the Act being liable to expire only on

30.09.2016, the initiation of the reopening on 21.06.2016 and the approval obtained on 14.07.2016 were invalid and consequently the reopening is liable to be annulled.

9. In regard to the issue of non-granting opportunity of cross-examination though prayed for, it was submitted by the Id. AR that under identical circumstances, the Hon'ble Rajasthan High Court in the case of Smt. Sunita Dhadda, reported in [2018] 100 taxmann.com 525 (Rajasthan) had categorically held that where the AO while making addition on account of "on money" received by assessee on sale of land to a builder group relied upon statement of director of builder and did not allow assessee to cross examine said director, there being violation of principle of natural justice impugned addition was to be deleted. It was submitted that this decision of the Hon'ble Rajasthan High Court has been upheld by the Hon'ble Supreme Court reported in [2018] taxmann.com 526 by dismissal of the SLP. It was further the submission that the Hon'ble Supreme Court in the case of Andaman Timber Industries, reported in [2015] 62 taxmann.com 3 (SC) had also held that since the opportunity was not allowed the impugned demand was nullity. It was the submission that the Hon'ble Supreme Court has categorically held that when statements of witnesses are made basis of demand, not allowing assessee to cross-examine witnesses is a serious flaw which makes order nullity, as it amounts to violation of principles of natural justice. It was the submission that as the statement has also not been given to the assessee for cross examination even though there was adequate time before the

death of Sri Galla Ravindranath Babu, the addition as made is liable to be deleted.

10. In reply, Id. Sr. DR submitted that in regard to the issue of initiating reopening when the time limit for issuance of notice u/s.143(2) of the Act is still available. it was the submission that though the provisions are there in the statute, still the internal instructions in the revenue is that the AO does not have any discretion for scrutinizing any return because the returns are taken up for scrutiny on the basis of "CASS" (Computer Assessed Selection Scrutiny). It was further submitted that certain cases are taken for scrutiny on the basis of guidelines set out and the assessee's case did not fall within those guidelines. It was the submission that the notice u/s.148 of the Act was issued only in December, 2016 after the due date for the issuance of notice u/s.143(2) of the Act had expired.

11. With regard to the issue of non-granting of opportunity of cross examination, it was submitted that the decision of the Hon'ble Supreme Court in the case of Smt. Sunita Dhadda was only a summary dismissal of the SLP and is not a speaking order. It was the submission that the cross examination was not sought by the assessee. It was only raised in the objections of the proceedings but by that time Sri Galla Ravindranath Babu had already been expired. The Id. Sr. DR further drew my attention to the return filed by Sri Galla Ravindranath Babu on 26.02.2016, wherein he had disclosed the entire deposits in the bank account as sale consideration and has paid the taxes. It was the submission that there was a scrutiny assessment and the return had been accepted. It was the

submission that the addition as made in the assessment order and as confirmed by the Id. CIT(A) is liable to be upheld.

12. I have considered the rival submissions. Each of the challenges by the assessee to the assessment is dealt in the following paragraphs.

13. Regarding the issue as to whether the notice u/s.148 of the Act can be issued before the expiry of the time for notice u/s.143(2) of the Act. The Id. Sr. Dr has admittedly submitted that the notice u/s.148 of the Act had been issued only in December, 2016. The fact, however, remained that the proceedings for the issuance of notice u/s.148 of the Act got initiated on 21.06.2016. As on 21.06.2016, admittedly, there was time for issuance of notice u/s.143(2) of the Act. The revenue is unable to explain as to why the simpler, easier, normal and the accepted process of issuing a notice u/s.143(2) of the Act was discarded and the route of initiating reopening by issuance of notice u/s.148 of the Act was started when time was well available for the purpose of issuance of notice u/s.143(2) of the Act. The revenue claims that the condition precedent for the purpose of initiating scrutiny assessment was blocked because of non-availability under CASS, would not stand the test, insofar as, this is a case where the survey had taken place on the business premises of M/s Khemka Plywood and some evidences were found in the course of survey and it will have to be presumed that these evidences found in the course of survey were sent to the officers at Vishakhapatnam for examination of Sri G Ravindranath Babu. This is a case where the statement was recorded from Sri G Ravindranath Babu u/s.131 of the Act and it is specific to the

issue of sale of the land by him to the assessee and not other issues in regard to his return or his non-filing of the return till the time of the recording of the statements has been raised by the revenue. Thus, clearly information has been sought from the concerned officer at Vishakhapatnam, who has obtained the information and has passed it on to the AO of the assessee. Therefore, the proceedings were very much alive and available. In such a case, the question of CASS does not come into play and the restrictions placed by the CASS would not stop the revenue from processing the return filed by the assessee. In the present case, as it is clearly evident that the proceedings for reopening of the assessment has been initiated when there was adequate time for the purpose of issuance of notice u/s.143(2) of the Act, admittedly, the reopening is bad in law. This view of mine finds support from the decision of the Hon'ble Madras High Court in the case of Qatalys Software Technologies Ltd. (supra).

14. Coming to the issue of recording of the satisfaction, a perusal of the report of the AO and the satisfaction along with the approval as recorded by the JCIT, the same being identical to the facts in the case of Yum! Restaurants Asia Pte Ltd., referred to supra and the extracted portion therein. Respectfully following the principles laid down by the Hon'ble Delhi High Court, the notice issued u/s.148 of the Act for the purpose of reopening in the case of the assessee in the impugned assessment year stands quashed.

15. Coming to the issue of non-grant of opportunity for cross-examination, it is noticed that the reopening has been initiated on 21.06.2016. On this date, in any case, Sri G Ravindranath Babu was very much alive. It is on the basis of his statement the reopening has been initiated. It is trite law that if any evidence is to be used against an assessee, such evidence must be put to the assessee whether he asked for it or not. Even after so many years of repeated reiteration by various courts as also the Hon'ble Apex Court, officers of the revenue still decide to take the stand that the assessee has to ask for his rights, it is nothing but pure travesty of justice, which will compel the courts to strike down the proceedings. The Hon'ble Supreme Court has categorically held in *Andaman Timber Industries (supra)*, that additions made on the basis of statement recorded from third party which have not been put to the assessee, cannot survive. It is surprising that in para 4.2 of the assessment order, the AO has taken a stand that the right to cross examine can only be availed when the deponent has been examined in the presence of the assessee. The AO has failed to understand that any evidence which is being collected behind the back of the assessee cannot be used against the assessee until and unless it has been put to the assessee for his rebuttal. When the statement had been given to the assessee, the assessee has asked for the cross-examination and the same has not been granted to the assessee. Thus, such evidence cannot be relied upon. Consequently, the addition made based on such evidence is liable to be quashed and I do so.

15. Here it may be worthwhile to mention that a perusal of the bank account of Sri G Ravindranath Babu shows that on 08.05.2014, there are four entries of cash deposit marked as self. On 08.05.2014, there is also another entry of Rs.2900/- of cash handling charges. Normally, if Sri Galla Ravindranath Babu had gone to the bank and deposited the amount, it would have been a lumpsum amount. There would not be of four entries. The fact that there are four entries and there is a cash handling charges mentioned in the bank statement, it shows that the representative of the bank has proceeded to multiple locations, collected the cash and credited into the accounts of Sri Galla Ravindranath Babu. When this is tallied with the statement of Sri Galla Ravindranath Babu, it shows that he has mentioned in his answer to Qestion No.18 that the above cash deposits were made by me with regard to the sale of land at Balaji Hills, Visakhapatnam and the cash deposits were made out of his sale proceeds. It is not being clarified by him as to whether he deposited the amount or he had the amount collected and how the amounts were received. It would also be worthwhile here to remember that the bank account shows different amounts being deposited for four times. He does not say where he received the money. He says that he had expenses in regard to the property but he is not able to produce the proof. Interestingly, a reading of the statement recorded also shows the calculation of long term capital gains tax liability as an answer to the question. It jars me as to how an uneducated person, who is not assisted by any Chartered Accountant or an Auditor in recording the statement, is

able to give such calculation. This is evident from the reply to question No.14. A perusal of the statement recorded u/s.131 of the Act on 22.02.2016, does not show where the statement was recorded. It shows that oath has been taken but who took the oath is not coming out of the statement. In reply to question No.6 in regard to Andhra Bank account, it is mentioned that it is the name of Sri Galla Ravindranath Babu's husband and surprisingly all this is in typed format. If such statement was recorded at the residence of Sri Galla Ravindranath Babu, obviously it would not have been in typed format. If it had been recorded in the office of the authority then, who had recorded the statement, nothing is available on record to show that this is an actual statement made by Sri G Ravindranath Babu. In fact, the veracity of the statements itself fails, insofar as it is not specified as to where the statements were taken, who took the statements and who had administered on oath. This being so, the statements has become a completely unreliable document. In these circumstances, for the reasons mentioned above, the reopening of the assessment is hereby quashed and even on merits the addition unsupported by any evidence, stands deleted.

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

Order dictated and pronounced in the open court on 22/05/2024.

Sd/-
(GEORGE MATHAN)
न्यायिक सदस्य / JUDICIAL MEMBER

कटक Cuttack; दिनांक Dated 22/05/2024
Prakash Kumar Mishra, Sr.P.S.

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

1. अपीलार्थी / The Appellant-
Hanuman Prasad Khemka,
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Door No.50-102-14/2, 2nd Floor,
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2. प्रत्यर्थी / The Respondent-
ITO, Ward-1, Bolangir
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.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

(Assistant Registrar)
आयकर अपीलीय अधिकरण, कटक/ITAT, Cuttack