

**IN THE INCOME TAX APPELLATE TRIBUNAL CUTTACK 'SMC' BENCH,
CUTTACK**

BEFORE SHRI N.S SAINI , ACCOUNTANT MEMBER

ITA No.390 /CTK/2016
Assessment Year : 2007-08

Smt. Pinky Agrawal, W/O Shri Manoj Agrawal, At/PO: Boudh, Bikash Lane, Dist: Boudh.	Vs.	ITO, Phulbani Ward, Phulbani
PAN/GIR No. ADIPA 9183 H		
(Appellant)	..	(Respondent)

Assessee by : Shri P.K.Mishra, AR

Revenue by : Shri D.K.Pradhan, DR

Date of Hearing : 05 /01/ 2017

Date of Pronouncement : 05/01/ 2017

ORDER

This is an appeal filed by the assessee against the order of CIT(A)-1, Bhubaneswar, dated 23.6.2016, for the assessment year 2007-08 .

2. In Ground Nos.1 & 2 of the appeal, the assessee has challenged the reopening of assessment made by the Assessing Officer u/s.147 of the Act.

3. Ld A.R. of the assessee argued and submitted that it will be seen from the assessment order at page 1 that the Assessing Officer has observed that

the assessee is a shareholder of M/s. Sherawali Rice Mills Pvt Ltd., Boudh. The assessee filed the return of income on 31.3.2008 showing total income at Rs.1,53,767/-. The sources of income as reflected in the return is salary from the above company and income from other sources. The said return was processed on 28.5.2008. The Assessing Officer has observed that subsequently on verification, it was found that the assessee has received loan/advance of Rs.20,00,000/- from the above company during the previous year. As the assessee and Manoj Kumar Agarwal (HUF), the concern in which the assessee is a member beneficiary, held more than 10% of the shares of the company, the loan to the extent of accumulated profits of the company is to be treated as deemed dividend in the hands of the assessee as per the provisions of section 2(22)(e) of the I.T.Act, 1961. Therefore, there is reason to believe that income escaped assessment, the case was reopened u/s.147 of the Act and, accordingly, notice u/s.148 was issued and served on the assessee on 3.3.2012.

4. He argued that from the above recorded reasons of the Assessing Officer, it will be seen that no new material had come to the knowledge of the Assessing Officer after processing of the return on 28.5.2008, the income chargeable to tax has escaped assessment. He argued that on the basis of the return of income filed by the assessee, subsequently, the Assessing Officer came to the conclusion that the loan/advance received by the assessee from

of M/s. Sherawali Rice Mills Pvt Ltd., Boudh was assessable u/s.2(22)(e) of the Act as deemed dividend. Therefore, the reopening of the assessment is bad in law as it is trite law that the reopening of assessment cannot be made on the very same set of facts, which were before the Assessing Officer at the time of processing of the return as it will amount to change of opinion.

5. He relied on the decision of Hon'ble Delhi High Court in the case of M/s. Atma Ram Properties Private Limited vs DCIT, 343 ITR 141 (Del), wherein, the Hon'ble High Court has held as under:

"..... If the Assessing Officer had failed to apply legal provisions/section of the Act, the fault cannot be attributed to the appellant assessee. The requirement is that the assessee should have failed or omitted to make full and true disclosure of material facts. The assessee is not required to disclose, state or explain the law. It cannot be said that the appellant-assessee had failed to make full and true disclosure of material facts. Full and true facts were stated by the assessee. Full and true details were furnished but as per the case of the Revenue there was a lapse on the part of the assessing officer in not applying and invoking Section 2(22)(e) of the Act. This lapse or error on the part of the Assessing Officer cannot be attributed and regarded as a failure on the part of the assessee to make full and true disclosure of the material facts in the original assessment proceedings. The aforesaid error or failure of the assessing officer in not applying Section 2(22)(e) could have been corrected by exercise of power of revision as the original order may have been erroneous and prejudicial to the interest of Revenue, but limitation period for exercise of the said power had expired. The said error in applying a provision cannot be corrected in the present case due to the factual matrix, by exercise of power under Section 147 of the Act. It is not that the Revenue was remediless or the error could not be corrected or rectified. Due to delay and limitation, the remedial action cannot be taken under the applicable provision. Scope and ambit of each provision/remedy available under the Act is circumscribed and stipulated. Sometimes two or more provisions/remedies may be applicable and recourse to any one of the remedy may be proper but

scope and ambit of a provision/remedy cannot be expanded beyond the legislative mandate. The jurisdictional preconditions, if stipulated in the enactment, must be satisfied before recourse to a remedy/provision can be invoked."

6. Ld D.R. very fairly conceded the above submission of Id A.R. of the assessee.

7. In the above facts and circumstances of the case, I am of the considered opinion that the reopening of assessment by issuance of notice u/s148 on 3.3.2012 by the Assessing Officer is bad in law. Hence, I cancel the impugned reassessment order dated 30.3.2013 and allow the grounds of appeal of the assessee.

8. As I have canceled the reassessment order dated 30.3.2013 passed u/s.147 of the Act while deciding Ground Nos.1 & 2 of the appeal of the assessee, the other grounds of appeal of the assessee on merits of addition have become infructuous and hence dismissed.

9. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open court on 05/01/2017 in the presence of parties.

Sd/-

(N.S Saini)

ACCOUNTANT MEMBER

Cuttack; Dated 05/01 /2017
B.K.Parida, SPS

Copy of the Order forwarded to :

1. The Appellant : Smt. Pinky Agrawal, W/O
Shri Manoj Agrawal, At/PO: Boudh, Bikash
Lane, Dist: Boudh
2. The Respondent. ITO, Phulbani Ward,
Phulbani
3. The CIT(A)-1, Bhubaneswar
4. CIT, Bhubaneswar.
5. DR, ITAT, Cuttack
6. Guard file.
//True Copy//

BY ORDER,

ASST.REGISTRAR,
ITAT, Cuttack