IN THE HIGH COURT OF ORISSA AT CUTTACK

I.T.A. Nos. 8, 7, 9 & 10 of 2023

Principal Commissioner of Income Tax, Sambalpur Charge …. ***Appellant***

Mr. Sidharth Sankar Mohapatra
Senior Standing Counsel

-versus-

Badal Prakash Jindal, HUF, Bargarh ….
(In ITA No.8 of 2023)

Binay Kumar Jindal, HUF, Bargarh
(In ITA No.7 of 2023)

Respondents

Bulbul Agrawal
(In ITA No.9 of 2023)

Binay Kumar Jindal
(In ITA No.10 of 2023)

None

CORAM:
THE CHIEF JUSTICE
JUSTICE M.S. RAMAN

ORDER

Order No. **02.03.2023**

01. 1. The present appeals filed by the Revenue are directed against the common order dated 18th August, 2022 passed by the Income Tax Appellate Tribunal (ITAT), Cuttack Bench, Cuttack in ITA Nos.7275/CTK/2021 filed by the Assessees for the Assessment Years (AYs) 2013-14.

2. By the impugned order, the ITAT allowed the aforementioned appeals of the Assessees thereby setting aside an order dated 23rd March, 2021 passed by the Principal Commissioner of Income Tax

(PCIT), Sambalpur under Section 263 of the Income Tax Act, 1961 (Act) holding the original assessment order dated 28th December, 2018 of the Assessing Officer (AO) to be erroneous and prejudicial to the interests of the Revenue.

3. The background facts are that as far as the Assessee Badal

Prakash Jindal, HUF is concerned, the said Assessee filed its return of income for the AY 2013-14 on 25th November, 2013 after claiming Long Term Capital Gains (LTCG) under Section 10(38) of the Act. The AO, i.e., the Income Tax Officer, Bargarh Ward, Bargarh gathered information that the Assessee had shown the

LTCG out of the share transaction of a Kolkata based company, M/s. Tuni Textile Mills Ltd. (TTML) and that the price of such shares had increased by more than 768% from the cost of acquisition within a span of a little more than one year.

4. Alleging that the Assessee had taken an accommodation entry in the form of bogus LTCG and that TTML was a sham company, the AO reopened the assessment by issuing notice dated 30th March, 2018 to the Assessee under Section 148 of the Act.

5. In response thereto, the Assessee filed a return of income this time offering the net consideration from the sale of shares for taxation under the head Short-Term Capital Gains (STCG) in lieu of LTCG shown in the original return. On this basis, the AO passed an assessment order under Section 143 (3) read with Section 147 of the Act on 28th December, 2018 accepting the revised income as

disclosed in the return and accordingly raising a demand. The Assessee accepted the above assessment order by not challenging it further in appeal.

6. The PCIT, Sambalpur then exercised the suo motu revisional power under Section 263(1) of the Act and an order was passed on 23rd March, 2021 directing the AO to add an entire amount of Rs.29,49,800/- under Section 68 read with Section 115BBE of the Act.

7. Aggrieved by the above order, the Assessee filed an appeal before the ITAT. It will be noted that the facts in the companion appeals are more or less similar.

8. In the appeal, the ITAT took up for consideration one ground, viz., whether the reassessment proceedings were themselves invalid since the reasons recorded in the file for reopening and the reasons supplied to the Assessee were different. In response, it was sought to be contended on behalf of the Revenue before the ITAT that the validity of the re-assessment order cannot be challenged by the Assessee in an appeal filed by it against the revisional order under Section 263 of the Act.

9. Following the decision of the Kolkata Bench of the ITAT dated 5th April, 2017 in ITA Nos.764-766/Kol/2014 ***(Classic Flour & Food Processing Pvt. Ltd. v. CIT)*** and other orders of the coordinated benches of both Kolkata and Delhi, the ITAT negatived the above plea of the Revenue.

10. Relying on the decision of the ITAT, Delhi dated 12th August, 2021 in ITA No.3132/Del/2018 ***(Jansampark Advertisement & Marketing Pvt. Ltd. v. ITO)***, the ITAT has in the impugned order held as under:

> "14. Now, we turn to the third contention of the ld. Counsel that the copy of the reasons recorded by the AO on 26.03.2018 in the order sheet and copy of the reasons supplied to the assessee are different and there is no date in the copy of the reasons supplied to the assessee by the

Department which clearly show that the AO has not supplied the actual reasons recorded by him in the order sheet to the assessee. Therefore, in view of the order of the ITAT, Kolkata in the case of Jansampark Advertising & Marketing Pvt. Ltd (supra), the validity of initiation of reassessment proceedings u/s 147 of the Act and consequent reassessment order is not sustainable.

15. We are not in agreement with the contention of the ld. CIT-DR that the AO has only made order sheet entry on 26.03.2018 copy of the actual reasons recorded by him was supplied to the assessee which is available at pages 4-9 of the assessee's paper book. Therefore, it cannot be alleged that the reasons recorded by the AO are different from the copy of the reasons supplied to the assessee because the reasons recorded in the order sheet at page 13 clearly reveals that the AO has recorded reasons for initiation of reassessment proceedings in the first order sheet recorded on 26.03.2018 and, therefore, on the very same date, after obtaining approval of competent authority/JCIT, Range-2, Sambalpur on the very same date issued notice u/s 148. Therefore, we safely presume that the reasons recorded by the AO are different from the copy of the reasons supplied to the assessee. The ITAT, Delhi Bench in the case of Jansampark Advertising & Marketing Pvt. Ltd. (supra) decided a similar issue by referring to the order of the ITAT Delhi in the case of Wimco Seedlings Ltd. vs. JCIT, dated 2.06.2020 in ITAs No.2755, 2756, 2757/Del/2002 with the following observations and findings:-

"8. A reading of the above clearly establishes that the reasons supplied to the assessee are not the very same reasons recorded and found in the assessment record. Alienation of the assessee against the revenue is that it gave few extracts of the reasons to them to defend it against the reopening of the assessment and when cornered before the higher authorities, the revenue comes out with the detailed reasons recorded by the Assessing Officer and such furnishing of a bridge or part of reasons

is deprecated by higher forums as recorded by a coordinate Bench of this Tribunal in the case of Wimco Seedlings (supra).

9. For the sake of completeness we think necessary to

extract the relevant observations of the coordinate Bench in the case of Wimco Seedlings which is an as under:-

"27. On perusal of above two statements (one) the reasons supplied it to the assessee and (two) the reasons some before the High Court it is apparent that both are altogether different. It is not denied that in context and in substance they are same but there should be same ad verbatim. It cannot be the case of the revenue that it gives few extracts of the reasons to the assessee to defend it against the reopening of the assessment and when cornered before the higher authorities, the revenue comes out with the detailed reasons recorded by the assessing officer. In fact in all circumstances the assessing officer is supposed to provide the complete reasons recorded for reopening of the assessment to facilitate the assessee to defend itself against the reopening of the assessment. To keep few arrows in its quiver and only disclosing few arrows out of that is not expected from a revenue officer. It also against the fair play rule of reassessment proceedings. In Haryana Acrylic Manufacturing Co v. Commissioner of Income Tax 308 ITR 38 (Delhi) the identical issue arose. As per para no 4 following reasons were given to the assessee:-

"4. The Assistant Commissioner of Income-tax supplied the reasons for initiating the proceedings under section 148 of the said Act dated March 29, 2004, sometime in September, 2004. The reasons which were supplied to the petitioner in September, 2004 were as under:

"M/s. Haryana Acrylic Mfg. Co. Pvt. Ltd. Assessment year 1998-99

Reasons for initiating the proceedings under section 148 of the Income-tax Act.

Return of income in this case was filed on November 30, 1998 declaring nil income. Assessment under section 143(3) was completed at nil income on March 7, 2001. It has come to the notice that the assessee-company has taken accommodation entries from one of the companies of Sh. Sanjay Rastogi, i.e. Hallmark Helathcare Limited, vide cheque no. 201845 dated October 17, 1997, amounting to Rs.5,00,000 during the year www.taxguru.inwww.taxguru.in 7 relevant to the assessment year 1998-99. I have reason to believe that the income to the extent of Rs. 5,00,000 has escaped assessment. As such after obtaining the approval o f CIT(C)- II to reopen the case, notice under section 148 of the Income-tax Act is issued to the assessee.

(Sd)……
29.3.2004
ACIT, CC-18, New Delhi."

28. It was further pleaded before honourable court that:-

> *16. Lastly, it was contended that in the counter-affidavit filed by the respondents the reasons which had been indicated for initiation of proceedings under section 147 were entirely different to the reasons which had been supplied to the petitioner. The attention of this court was drawn to paragraph 5(d) of the counter-affidavit wherein it is stated that the true copy of the reasons recorded by the Assessing Officer and the approval granted by the Commissioner of Income-tax is enclosed as Annexure A. Annexure A purports to be a form for recording the reasons for initiating proceedings under section 148 and for obtaining approval of the Commissioner of Income- Tax. Serial No. 11 of the form pertains to 'reasons for the belief that income has escaped assessment'. Under this heading, the following is recorded:*
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> *17. It is apparent by comparing these purported reasons with the reasons extracted earlier and which had been supplied to the petitioner that the two are different. While in the reasons supplied to the petitioner there is no mention of the allegation that there was a failure on the part of the assessee to disclose fully and truly all material facts, in the reasons shown in the said form in Annexure A to the counter-affidavit, there is a specific allegation that there was failure on the part of the assessee to disclose fully and truly all material facts relating to accommodation entries raised from one of the companies of Sh. Sanjay Rastogi to the extent of Rs.5,00,000. In this context, the learned counsel for the petitioner submitted that the entire proceedings are vitiated inasmuch as the reasons which were supplied to the petitioner were different from what, according to the respondents, were the 'true' reasons. Therefore, what was supplied to the petitioner cannot be regarded as reasons and the entire process of filing of objections to those purported reasons and the impugned order dated March 2, 2005, would be in respect of something which, even as per the respondents, were not the true reasons. Consequently, the entire proceedings leading up to the passing of the impugned order dated March 2, 2005, have to be set aside.*

29. The honourable High Court responded to the above anomaly where the reasons given to the assessee are altogether different then the reasons given to the higher authorities when the order of the assessing officer is challenged as under:-

"30. The matter, however, does not end here. We have mentioned above that the stand taken by the respondents in their counter-affidavit before this Court is that the 'actual' reasons recorded are those recorded in the Form for recording reasons, a copy of which has been filed as Annexure A to the said counter-affidavit. It was urged on behalf of the respondents that the 'reasons for the belief that income has escaped assessment' at serial no. 11 of the said form clearly carries the allegation that 'there was failure on the part of the assessee to disclose fully and truly all material facts relating to accommodation entries'. This being the case, it was submitted, the bar of taking action within four years would not apply and consequently, the notice under section 148 was valid.

31. This argument suffers from several infirmities. First of all, the respondents cannot be permitted to gloss over the fact that the reasons which were supplied to the petitioner were different from the reasons purportedly recorded in the said form on which they now seek to rely.
If the reasons in the said form were the 'actual' reasons, why were they not communicated to the petitioner? Why was nothing said about these reasons (noted in the form) when the petitioner filed its objections to the reasons which were supplied to it? It must be remembered that in its objections, the petitioner took the specific plea that in the absence of any allegation that the petitioner had failed to disclose fully and truly all material facts necessary for assessment, the Assessing Officer had no jurisdiction to issue the notice under section 148 and initiate action under section 147 after four years from the end of the relevant assessment year. Despite this precise objection, there is no mention of the reasons noted in the said form in the impugned order dated March 2, 9 2005. If the respondents had regarded the reasons noted in the said form to be the 'actual' reasons, it would have been very easy for the Assessing Officer to have countered this objection by simply referring to the reasons noted in the form and saying that the allegation of failure to disclose is very much there. It is obvious that the reasons noted in the said form were never regarded as the reasons

for initiating action under section 147 of the said act. Thus, the respondents cannot now be permitted to fall back on those purported reasons noted in the said form.

32. Secondly, let us assume for the sake of argument that the 'actual' reasons were those as noted in the said form. Then why did the assessing officer communicate a different set of reasons to the petitioner? Did he think that the supplying of reasons and the inviting of objections were mere charades? Did he think that it was a mere pretence or a formality which had to be gotten over with? At this point, it would be well to remember that the Supreme Court in G.K.N. Driveshafts [2003] 259 ITR 19 had specifically directed that when a notice under section 148 of the said act is issued and the noticee files a return and seeks reasons for the issuance of the notice, the Assessing Officer is bound to furnish reasons within a reasonable time. On receipt of the reasons, the noticee is entitled to file objections to the issuance of notice and the Assessing Officer is bound to dispose of the same by passing a speaking order. These are specific directions given by the Supreme Court in all cases where notices under section 148 of the said Act are issued. Surely, the Assessing Officer could not have construed these specific directions to be a mere empty formalities or dead letters? There is a strong logic and purpose behind the directions issued by the Supreme Court and that is to prevent highhandedness on the part of Assessing Officers and to temper any action contemplated under section 147 of the said Act by reason and substance. In fact, even section 148(2) stipulates that the Assessing Officer shall, before issuing any notice under the said section, record his reasons for doing so. The Supreme Court has only carried forward this mandatory requirement by directing that the reasons which are recorded be communicated to the assessee within a reasonable period of time so that at that stage itself the assessee may point out any objections that he may have with regard to the initiation of action under section 147 of the said Act. The requirement of recording the reasons, communicating the same to the assessee, enabling the assessee to file objections and the requirement of passing a speaking order are all designed to ensure that the Assessing Officer does not reopen assessments which have been finalized on his mere whim or fancy and that he does so only on the basis of lawful reasons. These steps are also designed to ensure complete transparency and adherence to the principles of natural justice. Thus, a deviation from these

directions would entail the nullifying of the proceedings. Assuming as we have done that the 'actual' reasons were those as noted in the said form, it is obvious that the reasons were never communicated to the petitioner and it is only for the first time in the course of the present writ petition that those 'reasons' have surfaced. Therefore, if he proceeded on the assumption that the 'actual' reasons were those as noted in the said form, the proper course of action as directed by the Supreme Court in G.K.N. Driveshafts [2003] 259 ITR 19, has not been followed. It would mean that the reasons which were supplied to the petitioner were not the actual reasons and the objections which were taken by the petitioner were not to the actual reasons and the speaking order dated March 2, 2005, which was passed was also neither on the basis of the

actual reasons nor the objections to the actual reasons. The entire process would be a sham and would amount to making a mockery of the law as settled by the Supreme Court. Therefore, for this reason also, the notice under section 148 as well as all proceedings subsequent thereto as also the order dated March 2, 2005, are liable to be quashed."

30. As before us also the reasons recorded by the assessing officer produced before the honourable High Court are quite different and number eight whereas the extract given to the assessee was merely of two paragraphs. In view of this, respectfully following the decision of the honourable Delhi High Court we are not inclined to uphold the reopening of the assessment and hence they are quashed. The orders of the learned Commissioner of Income tax upholding of the reopening of the assessment are reversed. Thus all the three assessment years reopening proceedings are held to be invalid and quashed.

10. It is, therefore, clear that the settled position of law on this aspect, as held by the hon'ble High Court in the case of Haryana Acrylic Manufacturing Co. v. Commissioner of Income Tax 308 ITR 38 [Delhi] is that the requirement of recording the reasons communicating the same to the assessee enabling the assessee to file objections and the requirement of passing a speaking order are all designed to ensure that the Assessing Officer does not reopen assessments which have been finalized on his mere whim or fancy and that he does so only on the basis of lawful reasons and since these steps are also designed to ensure complete transparency and adherence to the principles of natural justice, any deviation from these directions would entail the nullifying of the proceedings.

11. Admittedly in the case on hand, the reasons supplied to the assessee are not the same and verbatim. In view of this settled position of law and respectfully following the line of decision in Haryana Acrylic Manufacturing Co v. Commissioner of Income Tax 308 ITR 38 [Delhi] by the higher forum referred to in the decision of the coordinate

reopening of proceedings under section 147 of the Act and consequently quash the same."

11. This Court is entirely in agreement with the above conclusion of the ITAT which is based on the decisions of the High Courts and the Supreme Court of India.

12. Indeed, if the original re-assessment order itself was not validly passed, the subsequent revisional order by the PCIT was required to be held invalid.

13. No substantial question of law arises from the impugned order of the ITAT. The Court is therefore not inclined to frame the questions of law as urged by the Revenue in the present appeals. It will be noted here that in Para-19 of the impugned order of the ITAT, the Revenue has not disputed that the connected appeals raised similar issues.

14. The appeals are accordingly dismissed in the above terms.

(Dr. S. Muralidhar)

Chief Justice

(M.S. Raman)
Judge

S. Behera


HIGH COURT
सत्यमेव जयते
ORISSA