

IN THE HIGH COURT OF ORISSA AT CUTTACK

ITA No.102 of 2009

Subhendu Kumar Subudhi

....

Appellant

Mr. S. Ray, Advocate

-versus-

Commissioner of Income Tax,

Orissa, Bhubaneswar

....

Respondent

Mr.T.K. Satpathy, Standing Counsel for Revenue

CORAM:

THE CHIEF JUSTICE

JUSTICE R.K. PATTANAİK

ORDER

06.01.2022

Order No.

Dr. S. Muralidhar, CJ.

07.

1. While admitting the appeal against the order dated 21st July, 2009 passed by the Income Tax Appellate Authority (ITAT), Cuttack Bench, Cuttack in ITA No.283/CTK/2008 for the Assessment Year (AY) 2005-06, the following question of law was framed by this Court by order dated 10th July, 2017:

“Whether on the facts and circumstances of the case, the Income Tax Appellate Tribunal erred in affirming the conclusion of the Assessing Officer and CIT (appeals) based on materials collected during the period subsequent to the assessment period in question as each assessment year is separate?”

2. The background facts are that the assessment for the AY in question was completed by the Assessing Officer (AO) under Section 143 (3) of the Income Tax Act, 1961 [‘IT Act’] during which the books of account were produced by the Appellant Assessee. The issue was regarding valuation of the closing stock

since, as noted in the assessment order, while the cash book, ledger, purchase, sale, vouchers and cash memos were produced only the stock register was not produced.

3. It is then stated in the assessment order “in fact, the stock register was not produced on 8th October, 2007 when a proceeding under Section 133A of the Act was undertaken in the business premises of the assessee.” Clearly, this event of the survey on 8th October, 2007 was subsequent to the period of the AY.

4. Again in the concluding portion of the assessment order, the AO stated that “during the course of proceeding under Section 133A of the Income Tax Act, 1961 in the business premises of the assessee on 8th October, 2007 (AY 2008-09), it was admitted by the assessee”. It appears to the Court that the non-production of stock register during the survey operation weighed with the AO while rejecting the valuation of the closing stock by the Assessee and estimating it on the basis of the gross profit margin. The expenditure claimed against carriage outwards and sales promotion was also rejected.

5. The matter was then carried by the Assessee in appeal. The Commissioner of Income Tax (Appeals)-II, Bhubaneswar [(CIT) (A)], by order dated 26th September, 2008 partly allowed the appeal reducing the profit margin to Rs.15,00,775/- that is Rs.4,00,000/- less.

6. The further appeal by the Assessee was dismissed by the ITAT by the impugned order. In para 3 of the impugned order, the ITAT observed as under:

“3. We heard the parties, and perused the material on record. The assessee has not been able to make out any case for acceptance of its accounts by showing of it as leading to deduction of true and correct profits, so that the rejection of its accounts under section 145 merits being upheld, particularly considering that the assessee also failed to substantiate its declared results and accounts with any evidence in the survey operations on 8-10-2007, carried by the A.O. and its business premises during the course of assessment proceedings. Reference in this context is drawn to the decisions in the case of *S.N. Namasivayam Chettiar v. CIT*, 38 ITR 579 (SC) and *Amiya Kumar Roy & Bros. v. CIT*, 206 ITR 306 (Cal.). The next question, therefore, that arises under the circumstances is the reasonability of estimation of its gross profit by sustaining an addition of Rs.4 lakhs, i.e. Rs.15.68 lakhs; the Revenue being not in appeal against the impugned order. During the hearing, the learned AR was specifically questioned by the Bench in this regard, as the assessee's gross profit rate, after the said addition, works to 1.38%, even as the A.O. has observed two examples (in same trade) wherein gross profit of around 2.1% stands disclosed, as mentioned at page 2 and para 3.6 of the assessment and appellate orders, respectively. We, therefore, see no reason for interference with the order of the Id. CIT (A), even as indicated at the time of hearing and which, thus, gets upheld as a result. We decide accordingly, dismissing the assessee Ground No.2.”

7. This Court has heard the submissions of Mr. S. Ray, learned counsel for the Appellant and Mr. T.K. Satpathy, learned counsel for the Revenue.

8. Although Mr. Satpathy sought to defend the orders of the AO, CIT (A) and ITAT on the ground that the conclusion regarding undervaluation of stock was not based entirely on account of non-production of the stock register during the survey operation, a reading of the assessment order reveals that the AO did take into account that factor. How much of it weighed with the AO is anybody's guess. The fact remains that it continued to be referred to in the order of the CIT (A) and, as noted hereinbefore, the ITAT as well. The survey operation took place at a time when the previous year corresponding to AY in question had already ended. Therefore, what transpired during the survey operation could not have been taken into account.

9. Further, the re-working of the Assessee's gross profit rate for the AY in question appears to be based on surmises and conjectures, triggered as it were by the ITAT's rejection of the Assessee's books of account under Section 145 of the Act. Mr. Ray for the Assessee is right in contending that with the assessment having been completed under Section 143 (3) of the IT Act, and after the Assessee had produced its books of account, the question of invoking Section 145 of the IT Act did not arise.

10. The Court is satisfied that in rejecting the Assessee's book of account under Section 145 of the IT Act, the ITAT committed a serious error. It proceeded on that basis to re-work the gross profit margin.

11. For all of the aforementioned reasons, the question of law framed by this Court by order dated 10th July, 2017 is answered

in the affirmative, i.e., in favour of the Assessee against the Revenue by holding that the ITAT erred in affirming the conclusions of the AO and CIT(A) based on materials collected during the period subsequent to the assessment period since each assessment year is separate. The corresponding orders of the AO and the CIT (A) to the above extent, are also set aside.

12. The appeal is allowed in the above terms. No orders as to costs.

(Dr. S. Muralidhar)
Chief Justice

(R.K. Pattanaik)
Judge

KC Bisoi

