

IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P.(C) No. 25229 of 2017

M/s. Tuff Tubes (Orissa) Pvt. Ltd. ***Petitioner***

Mr. Sidhartha Ray, Advocate

-versus-

The Deputy Commissioner of Income Tax, Corporate Circle -1(2), Bhubaneswar and Another ***Opposite Parties***

Mr. T.K. Satapathy, Senior Standing Counsel

**CORAM:
THE CHIEF JUSTICE
JUSTICE R.K. PATTANAİK**

Order No.

**ORDER
15.02.2022**

07. 1. The Petitioner questions an assessment order dated 9th November, 2017 passed by the Deputy Commissioner of Income Tax, Circle 1(2), Bhubaneswar [hereafter 'Assessing Officer' (AO)] for the Assessment Year (AY) 2012-13 under Section 143(3) of the Income Tax Act, 1961 (IT Act) read with Section 147 thereof.
2. The brief facts are that for the aforementioned AY, the assessment earlier made on 30th March, 2015 in respect of the Petitioner under Section 143(3) of the IT Act was reopened under Section 147 of the IT Act and a notice under Section 148 of the IT Act is issued to the Petitioner Assessee on 29th March, 2017. However, after the Assessee claimed not to have received it, it was

reissued on 11th August, 2017. After receiving the reasons for the reopening, the Petitioner-Assessee on 8th November, 2017 submitted its objection to the reopening of the assessment. According to the Assessee without dealing with the objections, the AO proceeded to complete the assessment and after disallowing of Rs.2,93,01,441/- under Section 69-A of the IT Act recomputed the assessed income as Rs.3,03,27,508/-.

3. While issuing notice in the present petition on 17th January, 2018 this Court stayed the impugned assessment order and the consequential demand notice (Annexure-2).

4. Mr. Sidhartha Ray, learned counsel for the Petitioner raises two principal grounds to assail the impugned assessment order. First, he argues that on account of non-compliance of mandatory directions contained in the judgment of the Supreme Court of India in *GKN Driveshafts (India) Ltd. v. Income Tax Officer [2003] 259 ITR 19 (SC)* the assessment proceedings and the consequential order are bad in law. Secondly, on merits he contends that the reopening was based merely on a change of opinion and therefore was unsustainable in law. In support of the submissions, he placed reliance on the decision in *Commissioner of Income Tax v. Kelvinator of India Ltd. (2010) 320 ITR 561 (SC)* and the judgment of this Court in *Viresh Hemani v. Income Tax Officer (2021) 435 ITR 376 (Ori)* and the order dated 3rd January, 2022 in W.P.(C) No.16139 of 2016 (*Sri Laxmi Narayan Agency v. The Income Tax Officer, Angul*).

5. Appearing on behalf of the Department (Opposite Party), Mr. T.K. Satapathy, learned Senior Standing Counsel sought to reply to the second point first. According to him, with the Assessee having participated in the proceedings under Section 147 of the IT Act, the Assessee cannot complaint of non-compliance of the **GKN Driveshafts (India) Ltd. (supra)**. Reliance is also placed under Section 292 BB of the IT Act. On merits however Sri Satapathy was unable to dispute the fact that the reassessment order merely reproduces the notice under Section 147 of the IT Act as a reasoning of the AO which was entirely based on a reappréciation of the accounts. In other words, there was no new material on the basis of which the AO could have formed a subjective satisfaction as to income that supposedly escaped assessment.

6. As explained by the Supreme Court of India in **Kelvinator of India Ltd. (supra)**:

“...post-1st April, 1989, power to reopen is much wider. However, one needs to give a schematic interpretation to the words "reason to believe" failing which, we are afraid, section 147 would give arbitrary powers to the Assessing Officer to reopen assessments on the basis of "mere change of opinion", which cannot be per se reason to reopen . We must also keep in mind the conceptual difference between power to review and power to reassess. The Assessing Officer has no power to review; he has the power to reassess. But reassessment has to be based on fulfilment of certain preconditions and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the grab of reopening the assessment, review would take place. One must treat the concept of

"change of opinion" as an in-built test to check abuse of power by the Assessing Officer."

7. Consequently, this Court is unable to sustain the impugned assessment order since in the considered view of the Court it is not based on any new material and constitutes a mere change of opinion of the AO.

8. In view of the Petitioner's succeeding in the second point, the Court does not consider it necessary to examine the effect of non-compliance by the Department of the mandatory requirement of the law explained by the Supreme Court in ***GKN Driveshafts (India) Ltd. (supra)***. The impugned assessment order and the consequential demand notice are hereby quashed. The writ petition is allowed in the above terms, but in the circumstances with no order as to costs.

9. An urgent certified copy of this order be issued as per rules.

(Dr. S. Muralidhar)
Chief Justice

(R.K. Pattanaik)
Judge