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IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P. (C) No.4440 of 2022

Kalinga Institute of Industrial Technology (KIIT, Bhubaneswar .... ***Petitioner***

Mr.Sidhartha Ray, Advocate

-versus-

Asst. Commissioner of Income Tax Exemption Circle, Bhubaneswar & Others .... ***Opposite Parties***

Mr. R.S. Chimanka, Sr. Standing Counsel along with Mr.A.Kedia, Jr.Standing Counsel for IT Department.

CORAM:
THE CHIEF JUSTICE
JUSTICE R.K. PATTANAIK

ORDER
21.07.2022

Order No.

Dr. S. Muralidhar, CJ.

02. 1. The challenge is the present petition is to a notice issued to the Petitioner under Section 148 of the Income Tax Act 1961(Act) dated 31st March, 2021 and the subsequent order dated 28th January, 2022 of the National Faceless Assessment Centre, (NAFAC), New Delhi rejecting the objections filed by the Petitioner to the reopening of the assessment.

2. The reopening was sought to be made of an assessment which was completed on scrutiny for the Assessment Year (AY) 2014-15 by the assessment order dated 30th December, 2016.

3. It must be noticed at this stage that in the course of this said assessment order a notice was issued to the Petitioner under Section 143(2) of the Income Tax Act not by the authorized officer i.e. the

Commissioner of Income Tax(OSD)(Exemption) but by the Assistant Commissioner of Income Tax, Corporate Circle-1(2), (ACIT). When the Petitioner challenged both the assessment order dated 30th December, 2016 as well as the aforementioned notice under Section 143(2) of the Act in a Writ Petition (Civil) No.898 of 2017 in this Court, the said writ petition was disposed of by this Court by an order dated 6th March, 2019 setting aside the aforementioned notice under Section 143(2) of the Act on the ground that it was issued by an authority i.e. the ACIT who did not have jurisdiction to do so. However, this Court did not interfere with the assessment order on the ground that it was an appealable order.

4. Today, Mr. Sidhartha Ray learned counsel appearing for the Petitioner confirms to the Court that as of date the Assessee has not challenged by way of appeal, the said assessment order dated 30th December, 2016 for AY 2014-15.

5. After receipt of the reasons for reopening provided by the Department on 13th May 2021, the Petitioner filed an objection on 26th May, 2021 to the impugned notice dated 31st May, 2021pointed out that the reopening was based merely on a change of opinion and not on any new material. The NFAC has by the further order dated 28st January, 2022 rejected the objections.

6. This Court has heard the submissions of Mr.Ray, learned counsel appearing for the Petitioner as well as Mr. R.S. Chimanka, Sr. Standing Counsel for the Department.

7. A perusal of the reasons provided by the Department by letter dated 13th May, 2021 to the reopening of the assessment for the aforementioned AY 2014-15 reveals that, it refers to the tax audit report and the information available in the books of accounts of the Petitioner. It then proceeds to say "from the above details, it is revealed that the trust was selling medicines with huge margin of profit....." Interestingly, the original assessment order dated 30th December, 2016 was on identical terms. The Assessing Officer (AO) therein stated "on perusal of the tax audit report it is revealed that... that the trust is selling the medicine on huge margin of profit..." Further the original assessment order in a tabular form sets out the cost of medicines and the selling price of the medicines as was done in identical terms in the reasons for reopening the assessment. This is a text book example of reopening of assessment being made on exactly the same materials that were available to the AO in the first instance.

8. This is precisely what has been disapproved by the Supreme Court of India in its decision in ***Commissioner of Income Tax v. Kelvinator of India Ltd.(2010) 320 ITR 561(SC)*** where it observed as under:

> ".....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 fulfillment 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."

9. This Court too has in similar circumstances, where there was a mere change of opinion on the same materials, set aside the reassessment notice and the consequential assessment order by its judgment dated 15th February, 2022 in Writ Petition (Civil) No. 25229 of 2017 (***M/s. Tuff Tubes (Orissa) Pvt. Ltd. v. The Deputy Commissioner of Income Tax, Corporate Circle-1(2), Bhubaneswar***).

10. For the aforementioned reasons, this Court quashes the notice dated 31st March, 2021 issued to the Petitioner under Section 148 of the Act and the consequential order dated 26th May, 2021 of the NAFAC rejecting the objections of the Petitioner to the reopening of the assessment.

11. The writ petition is allowed in the above terms, but in the circumstances with no order as to costs. An urgent certified copy be issued as per Rules.

(Dr. S. Muralidhar)
Chief Justice

(R.K.Pattanaik)
Judge

Kabita