

IN THE HIGH COURT OF ORISSA AT CUTTACK**ITA Nos. 85 and 86 of 2018****ITA No.85 of 2018*****Principal Commissioner of Income Tax
(Central), Vishakapatnam, Andhra
Pradesh******Appellant******-versus-******M/s. E-City Projects Lucknow (P) Ltd.,
Cuttack******Respondent*****AND****ITA No.86 of 2018*****Principal Commissioner of Income Tax
(Central), Vishakapatnam, Andhra
Pradesh******Appellant******-versus-******M/s. E-City Projects Lucknow (P) Ltd.,
Cuttack******Respondent*****Advocates, appeared in these cases:*****For Appellant(s)*****:****Mr. R.S. Chimanka
Senior Standing Counsel
Mr. A. Kedia
Junior Standing Counsel*****For Respondent(s)*****:****Mr. R.V. Easwar, Senior Advocate
Mr. Mukesh Panda, Advocate
Mr. S.K. Tulsiyan, Advocate
Ms. Rubal Bansal, Advocate
Ms. Ananya Rath, Advocate**

CORAM:
THE CHIEF JUSTICE
JUSTICE R.K. PATTANAIAK

JUDGMENT
05.07.2022

Dr. S. Muralidhar, CJ.

1. These are two appeals by the Revenue. ITA No.86 of 2018 is directed against an order dated 28th February, 2018 passed by the Income Tax Appellate Tribunal, Cuttack Bench, Cuttack (ITAT) in IT (SS) A No.02/CTK/2018 for the Assessment Year (AY) 2012-13. ITA No.85 of 2018 by the Revenue is directed against an order dated 22nd March, 2018 passed by the ITAT in IT (SS) A No.03/CTK/2018 for the AY 2013-14. Since the appeals are directed against the orders of the ITAT allowing the appeals of the same Assessee but for different AYs and the factual backgrounds are similar, both the appeals are being disposed of by this common judgment.

2. In both appeals, the common questions sought to be urged by the Revenue are whether the ITAT was justified in deleting additions made under Section 68 of the Income Tax Act, 1961 (Act) to the taxable income of the Assessee by not treating the corresponding unsecured loan as bogus and sham transactions. In both appeals the contention is that the creditor M/s. Uniworth Agency Pvt. Ltd. (UAPL) was merely a paper company established for the purposes of bogus accommodation entries and that the Assessing Officer (AO) could not examine the Directors of UAPL due to failure of the UAPL as well as the Assessee.

3. This Court has heard the submissions of Mr. R.S. Chimanka, learned Senior Standing Counsel for the Appellant (Revenue) and Mr. R.V. Easwar, learned Senior Counsel appearing for the Assessee (Respondent).

4. The background facts are that the Assessee is a company engaged in the business of construction of residential and commercial buildings apart from complexes, malls along with real estate development. For both AYs 2012-13 and AY 2013-14 the Assessee filed its returns disclosing 'Nil' income.

5. On 6th August, 2014 a search and seizure operation was carried out under Section 132 of the Act in the business premises of the company and the residential premises of the Directors at Cuttack. On 29th April, 2015 notices under Section 153A of the Act were issued pursuant to which returns of income for the respective AYs were filed by the Assessee on 10th August, 2015 again disclosing 'Nil' income. This was followed by notices under Sections 142(1) and 143(3) of the Act being served on the Assessee.

6. For AY 2012-13 the assessment was completed by the AO on 28th December, 2016 determining the total income as Rs.6.92 crores and on the same date, a separate assessment order was passed for AY 2013-14 determining the total income as Rs.3.06 crores. The appeals filed by the Assessee against the respective assessment orders were dismissed by the Commissioner of

Income Tax (Appeals) [CIT (A)] by order dated 13th November, 2017. Being aggrieved, the Assessee preferred further appeals to the ITAT which have been allowed by the respective impugned orders for the two AYs.

7. The ITAT noted that for both AYs in question, the Assessee claimed to have received a corresponding loan amount from UAPL i.e. Rs.6.92 crores by cheque for the AY 2012-13 and Rs. 3.06 crores through banking channels for the AY 2013-14. The fact that the Investigating Officer (IO) examined the Directors of the UAPL was also not in dispute. The both the loans were disclosed by the Assessee in the returns filed in the books of account produced before the AO.

8. For AY 2012-13 the ITAT noted that the time limit for issuance of notice under Section 143(2) of the Act with reference to the original return filed by the Assessee on 30th September, 2012 expired on 30th September, 2013 and by that date, no notice was issued to the Assessee. Thus, the original return of income became final on 30th September, 2013 i.e. before the date of search. In other words, the assessment of AY 2012-13 had not abated. During the course of search, tally account of the Assessee was found which also evidenced the fact of disclosure of the loan amounts received from UAPL through banking channels. This was prior to the date of search.

9. It is in the above context that the Assessee contended that for AY 2012-13 the addition of Rs.6.92 crores as unexplained cash credit under Section 68 of the Act was unwarranted and that proceedings initiated under Section 153A of the Act were without jurisdiction since no incriminating material was found during search and the assessment of the said AY had not abated.

10. The Assessee's contention was that a copy of the assessment order dated 28th March, 2014 passed in the case of UAPL for AY 2008-09 was produced and the Assessee had therefore discharged the initial onus of showing the identity of the creditor, the genuineness of the transaction as well as the creditworthiness of the creditor. The loan amount of Rs.3.06 crores had been repaid in the financial year 2014-15. The further contention was that since the assessment proceedings had commenced in August, 2015 the Assessee had no control or influence over the Directors of UAPL to compel them to appear before the AO. On the other hand, the AO could have required them to appear before him for examination but he did not exercise the power available with him under the Act for that purpose. Therefore, no adverse inference could be drawn against the Assessee.

11. As regards AY 2012-13 it was noted by the ITAT that it was an unabated assessment and unless there was incriminating material, no addition could be made. In particular it was noticed that the statement of the two persons of UAPL was recorded on 13th November, 2014 i.e. after the search was completed on 7th

November, 2014. Therefore, such statements could not be material unearthed during the course of search. Nevertheless, in those statements there was nothing brought out to show that cash was received from the Assessee by UAPL in lieu of the cheque issued by UAPL to the Assessee. Further, the name of the Assessee did not appear in the statement made to the IO by the Directors of the UAPL. The said loan amount of Rs.3.06 crores was not mentioned by them as an accommodation entry.

12. Further, the said two persons were not allowed to be cross-examined by the Assessee. As regards the observation of the CIT (A) that the lack of opportunity to the Assessee to cross examine the Directors of UAPL was not fatal to the addition made by the AO, the ITAT found the said proposition to be contrary to the law explained by the Supreme Court in its decision in *M/s. Andaman Timber Industries v. CCE 2015 (324) E.L.T. 641 (S.C)*, where it was held as under:

“According to us, not allowing the assessee to cross-examine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected.”

13. This Court has in its decisions in *Smt. Jami Nirmala v. Principal Commissioner of Income Tax (2021) 437 ITR 573 (Ori)* and *Smt. Smrutisudha Nayak v. Union of India (2021) 439 ITR 193 (Ori)* relied on the decision of Delhi High Court in *CIT*

v. *Kabul Chawla (2016) 380 ITR 573 (Del)* where *inter alia* it was observed as under:

“...(iv) Although Section 153A does not say that additions should be strictly made on the basis of evidence found in the course of the search, or other post-search material or information available with the Assessing Officer which can be related to the evidence found, it does not mean that the assessment ‘can be arbitrary or made without any relevance or nexus with the seized material. Obviously, an assessment has to be made under this section only on the basis of the seized material.

....

(vii) Completed assessments can be interfered with by the Assessing Officer while making the assessment under section 153A only on the basis of some incriminating material unearthed during the course of search or requisition of documents or undisclosed income or property discovered in the course of search which were not produced or not already disclosed or made known in the course of original assessment.”

14. Since the findings of the ITAT are factual, based on the documents placed on record and have not been shown to be perverse by the Revenue and are consistent with the settled legal position as explained above, the Court finds that no error has been committed by the ITAT in either order deleting the additions sought to be made by the AO.

15. The Court is therefore, not inclined to frame the questions as urged by the Revenue in these two appeals.

16. The appeals are accordingly dismissed.

(S. Muralidhar)
Chief Justice

(R.K. Pattanaik)
Judge

S.K. Jena/Secy

