IN THE HIGH COURT OF ORISSA AT CUTTACK

ITA No.155 of 2018

The Principal Commissioner of Income Tax (Central), Vishakapatnam	....	***Appellant***

Mr. R. S. Chimanka, Sr, Standing Counsel (IT)

-versus-

M/s. Nidan	....	***Respondent***

Mr. S. Ray, Advocate
Mr. Chitrasen Parida, Advocate

CORAM:
THE CHIEF JUSTICE
JUSTICE R. K. PATTANAIK

ORDER
13.07.2022

Order No.

Dr. S. Muralidhar, CJ.

I.A. No.9 of 2019

03. 1. There is a delay of 51 days in filing appeal petition. For the reasons stated therein, the delay is condoned. I.A. No.9 of 2019 is allowed.

ITA No.155 of 2018

2. The present appeal by the Revenue challenges an order dated 16th May, 2018 passed by the Income Tax Appellate Tribunal, Cuttack Bench, Cuttack (ITAT) in IT(SS) A Nos.32 to 37/ CTK/2018 for the Assessment Years (AYs) 2009-10 to 2015-16. The questions sought to be urged by the Revenue for consideration by this Court read as under:

> "A) Whether the ITAT was correct in observing that the assessment order dated 30th December, 2016 under S. 144 read with S.153A of the Income Tax Act, 1961 received by the assessee on 9th January, 2017 could be said to be barred by limitation, when there was no indication to show that the Assessing Officer did not pass the said order on 30th December, 2016?
>
> B) Whether the ITAT was correct in holding that when there are two divergent views of different High Courts, one favouring the assessee should be followed, totally ignoring the fact that the decision of the High Court favouring the Revenue was confirmed by the Apex Court, in as much as the SLP filed in that regard was dismissed?"

3. The facts in brief are that a search was as conducted under Section 132 of the Income Tax Act, 1961 ('Act') in the case of the Respondent Assessee on 20th May, 2014. Pursuant thereto an assessment was completed under Section 153-A read with Section 144 of the Act and an assessment order was passed for the aforementioned AY on 30th December, 2016.

4. Relevant to the first question sought to be urged, the facts are that the assessment order dated 30th December 2016, was according to the Assessee, despatched by the Assessing Officer (AO) by post only on 7th January, 2017 and was received by the Assessee on 9th January 2017. Contending that in terms of Section 153-B of the Act the assessment order has to in fact be communicated to the Assessee on or before 31st December, 2016 and therefore, was time barred, the Assessee assailed the said order before the Commissioner Income Tax (Appeals) [CIT (A)] apart from other grounds. However, the CIT (A) observed that the

assessment order was dated 30th December, 2016 and there was no material to show that the AO had revisited the order thereafter. Accordingly, the CIT (A) upheld the order relying on the decision of the Calcutta High Court in ***Commissioner of Income Tax, Central-1 v. M/s. Binani Industries Ltd. (2015) 59 Taxmann.Com 389 (Cal)***.

5. As far as the present case is concerned, the Respondent Assessee could produce before the ITAT the envelope in which the assessment order was despatched by the AO by speed post and also produce a copy of the tracking record of speed post which showed that the order was in fact despatched only on 7th January, 2017 although it was dated 30th December, 2016. Relying on decisions in ***CIT v. BJN Hotels Ltd. (2017) 79 taxmann.com 336 (Kar)***; ***K. Joseph v. Agricultural Income Tax Officer (1991) 190 ITR 464 (Ker)*** and ***Commissioner of Agricultural Income Tax Officer v. Kappurmalai Estate 234 ITR 187 (Ker)***, the ITAT came to the conclusion that the order of assessment had to be made on or before 31st December, 2016 and since it was despatched only on 7th January, 2017 and delivered to the Assessee on 9th January, 2017 it the time barred.

6. Mr. Chimanka, learned counsel for the Revenue places before the Court copies of the judgment of the Calcutta High Court in ***M/s. Binani Industries Ltd.*** (*supra*) as well as an order dated 20th November, 2015 passed by the Supreme Court of India in SLP Civil No.8397 of 2015 filed by the Revenue against the said decision. The Supreme Court dismissed the SLP *in limine* on the

first date of hearing at the stage of admission by a short order. It is accordingly, submitted that the ITAT ought to have followed the decision of the Calcutta High Court in ***M/s. Binani Industries Ltd.*** (*supra*) which favoured the Revenue and not the decisions of Karnataka and Kerala High Courts which were against it.

7. As rightly noted by the ITAT the requirement under Section 153B (1) is for the AO to make the assessment order within a period of twenty-one months from the end of the financial year in which the last of the authorization for the search under Section 132 of the Act was executed. In the present case, there is no doubt that the last date by which the assessment had to be made was 31st December, 2016. As further rightly noticed Section 153B (1) uses the expression "order of assessment" and not merely 'assessment'. Therefore, the assessment order becomes an order only when in fact it is communicated and therefore the communication of the order had to be prior to the end of the limitation period. In ***BJN Hotels Ltd***. (*supra*) the Karnataka High Court, held as under:

> "That the revenue is neither able to point out from the records that the assessment orders were dispatched on 27.4.2007 nor produced the dispatched register to establish that the orders were complete and effective i.e. it was issued, so as to be beyond the control of the authority concerned within the period of limitation i.e. 29.4.2007. Admittedly, the assessment orders were served on the assessee on 30.4.2007, hence, the assessment orders passed were barred by limitation."

8. In the same judgment in ***BJN Hotels Ltd***. (*supra*), the Karnataka High Court noted:

> "An identical issue was before this Court in ITA No.832/2008 (D.D. 14.10.2014 in the case *of Maharaja Shopping Complex vs DCIT*. This courts following the judgment of Kerala High Court in the case of *Government Wood Works vs State of Kerala (1988) 69 STC 62* has held that in the absence of dispatch date made available to the Court from the records, to prove that the order is issued within the prescribed period, order passed by AO is barred by limitation. The said judgment squarely applies to the facts of the present case."

9. On the other hand, the facts in the decision of the Calcutta High Court in ***M/s. Binani Industries Ltd.*** (*supra*) did not involve despatch of the assessment order by post at all. The judgment reveals that the assessment order was passed on 31st March, 2005, the last date by which had to be made and the Authorised Representative (AR) of the Assessee visited the office of the Department and collected it on 13th April, 2005. When confronted the CIT produced records which 'did not contain the dispatch register'. The Calcutta High Court then concluded that from the oral evidence of the CIT that the Department had "not made any attempt to despatch the order for service on the assessee." It further observed "there is no indication that the Assessing Officer revisited the order after 31.3.2005. The probability of the order being made and ready to be collected by the representative of the assessee as on 1.4.2005 cannot also be ruled out."

10. The above facts in ***M/s. Binani Industries Ltd.*** (*supra*) are therefore clearly distinguishable from the case at hand were the postal records clearly show that the despatch of the assessment was made by speed post only on 7th January, 2017 and was delivered to

the Assessee only on 9th January, 2017. Therefore, notwithstanding that the Supreme Court may have the dismissed the SLP filed by the Assessee against the decision of the Calcutta High Court in ***M/s. Binani Industries Ltd.*** (*supra*) *in limine*, the said decision is not of assistance to the Revenue as far as the present case is concerned.

11. Consequently, the Court is satisfied that no error has been committed by the ITAT in allowing the Assessee's appeal. This Court is, therefore, not persuaded to frame the questions of law as urged by the Revenue.

12. The appeal is accordingly dismissed.

(Dr. S. Muralidhar)
Chief Justice

(R. K. Pattanaik)
Judge

TUDU