IN THE HIGH COURT OF ORISSA AT CUTTACK
W.P.(C) No.24419 of 2022

M/s. D.R. Patnaik, Rourkela .... ***Petitioner***

Mr. Sidhartha Ray, Advocate

-versus-

Chief Commissioner of Income Tax, Odisha & Others .... ***Opposite Parties***

Mr. Radheshyam Chimanka, Senior Standing Counsel along with Mr. Avinash Kedia, Jr. Standing Counsel for Income Tax Department

CORAM:
JUSTICE JASWANT SINGH
JUSTICE M.S. RAMAN

ORDER (Oral)
`14.10.2022

Order No.

02. This matter is taken up by virtual/physical mode.

1. Assailing the jurisdiction to exercise power under Section 143(3)/147 of the Income Tax Act, 1961 (in short "the IT Act") for the Assessment Year 2008-09 by the Assessing Officer of Central Circle, Sambalpur, the Petitioner has knocked the doors of this Court invoking provisions of Article 226/227 of the Constitution of India on the ground that the said authority seized to have authority to proceed with the assessment under Section 143(3)/147. It is contended by the petitioner that after this Court set aside the revisional order dated 25th March, 2015 of the Principal Commissioner of Income Tax, Sambalpur under Section 264 of the

IT Act, 1961 as well as the reassessment order dated 21st November, 2012 of the Assessing Officer, in W.P.(C) No. 18868 of 2015 *vide* order dated 2nd May, 2022, there is no scope for the Assessing Officer to initiate fresh proceeding on the self-same matter.

2. The Petitioner, proprietorship concern, being engaged in the business of Mining activities, faced proceeding being selected for scrutiny assessment pertaining to the Assessment Year 2008-09 (Financial Year 2007-08) under CASS. Notices under Section 142(1) & 142(3) of the IT Act were issued directing the Petitioner to produce the books of account for assessment.

3. After examination of books of account, assessment under Section 143(3) of the said Act was framed *vide* order dated 31st December, 2010. The said order being challenged before the Appellate Authority, the demand was deleted *vide* order dated 21st November, 2012 before the First Appellate Authority, against which the Income Tax Department filed appeal before the Income Tax Appellate Tribunal. The said Appeal of the Department stood dismissed by Income Tax Appellate Tribunal *vide* order dated 25th May, 2015.

4. While the matter stood thus, the Assistant Commissioner of Income Tax, Central Circle, Sambalpur (Opposite Party No.3) issued notice under Section 148 of the IT Act, 1961 asking the Petitioner to submit the returns for the purpose of escaped assessment under Section 147 of the IT Act. The said proceeding culminated by passing assessment order on 21st November, 2012 under Section 143(3) read with Section 147 of the IT Act, 1961. Against the said order, the Petitioner availed the remedy of revision by filing an application under Section 264 of the IT Act before the Principal Commissioner of Income Tax, Sambalpur (Opposite Party No.2). The said revision was disposed of *vide* order dated 25th March, 2015 affirming the order assailed therein. Being aggrieved, the Petitioner approached this Court by way of writ petition which was registered as W.P.(C) No. 18868 of 2015. This Court *vide* order dated 2nd May, 2022 passed the following order:-

> "**3.** *The background facts are that the Petitioner-Assessee derives income from mining. The Petitioner is the proprietor of M/s. Dipti Ranjan Patnaik, a mining concern. He filed a return of income on 29th September, 2008 for the Assessment Year (AY) 2008-09 declaring a total income of Rs.2,39,29,880/-. The return was picked up for scrutiny and the assessment was completed under Section 143(3) of the IT Act by an assessment order dated 31st December, 2010 with the AO determining the assessable income as Rs.2,88,014.90.*
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> **4.** *Notice under Section 148 of the IT Act was issued to the Petitioner seeking to reopen the above assessment under Section 147 of the IT Act. By a letter dated 23rd August, 2012, the AO communicated the following reasons for reopening the assessment:*
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> *From the details, it is revealed that assessee has provided temporary advance of Rs.7.96 Cr. in respect of nine concerns namely Kalinga Hatchery, Jyoti Motors, Passary Minerals, Carnex Sales Agencies P. Ltgd., Altrade Expo Pvt. Ltd., RKD Construction Pvt. Ltd., Tarini Minerals Pvt. Ltd., Rudra Commercial, Epsochem Altrade for non-business purpose. Further, it is seen that assessee*

has raised huge secured loan and claimed interest expenses on such secured loan which were utilized for providing temporary advance to the sister concerns and accordingly, the claim of interest expenses is not at all related to business. Therefore, the interest @ 12% on the diversion of money of Rs.7.96 Cr. given for non-business purpose which comes to Rs.95,48,392/- is treated as escapement of income.

Hence, there is reason to believe that interest on the temporary advance of Rs.7.96 Cr. given for non-business purpose which comes to Rs.95,48,392/- is income escaped assessment.

Issue notice u/s. 148 of I.T. Act, 1961.

7. The grievance of the petitioner is that without considering the above objection, a reassessment order was passed by the AO on 21st November, 2012, which the Assessee challenges before the PCIT under Section 264 of the IT Act.

8. In the impugned order, the PCIT has failed to deal with one of the principal grounds of challenge to the assessment order viz., that without considering the Petitioner's objection to the reopening of the assessment under Section 147 of the IT Act, the reassessment order could not have been framed and that this was contrary to the dictum of the Supreme Court in GKN Driveshafts (India) Ltd. v. Income Tax Officer [2003] 259 ITR 19 (SC). On a perusal of the impugned order, it reveals that the above objection was in fact not considered by the PCIT.

9. Although notice was issued in the present petition way back on 7th December, 2017, till date no reply has been filed by the Department.

10. Having heard learned counsel for the parties, the Court is of the view that the impugned order of the PCIT is unsustainable in law in so far as it is failed to consider the principal objection of the Petitioner to the opening of the

assessment. Therefore, the flaw vitiates the order of reassessment equally vitiates the impugned order of the PCIT as well.

11. In this connection, references were being made to the decision of this Court in Viresh Hemani v. Income Tax Officer [2021] 435 ITR 376 (Ori.) and the recent decision dated 15th February, 2022 passed by this Court in W.P.(C) No. 25229 of 2017 (M/s. Tuff Tubes (Orissa) Pvt. Ltd. v. The Deputy Commissioner of Income Tax).

12. For the aforementioned reasons, the impugned order dated 25th March, 2015 of the PCIT, Sambalpur as well as the reassessment order dated 21st November, 2012 of the AO (Annexure-8) are hereby set aside.

13. The writ petition is allowed in the above terms, but in the circumstances, with no order as to costs."

5. Alleging that the Assistant Commissioner of Income Tax, Central Circle, Sambalpur (Opposite Party No.3) misconceived the word "set aside" and perceiving as if the matter has been remanded for fresh adjudication by this Court, he issued notice dated 27.07.2022. The Petitioner has urged that the issue of notice dated 27th July, 2022 fixing hearing "for the set-aside assessment proceeding" and instructing the Petitioner to produce certain documents is incompetent and tantamount to overreaching the order of this Court.

6. When the matter is taken up today for entertainment, by filing a Memo, dated 11th October, 2022 seeking permission to withdraw the writ petition, Sri Sidhartha Ray, learned Advocate for the petitioner submitted that this writ petition has become infructuous inasmuch as the impugned notice dated 27th July, 2022 *vide* Annexure-7 issued by the Assessing Officer, Central Circle, Sambalpur stands withdrawn by the authority concerned.

7. In view of such submission, the writ petition is disposed of as withdrawn.

(Jaswant Singh)
Judge

(M.S. Raman)
Judge

Laxmikant October 14, 2022 Cuttack