IN THE HIGH COURT OF ORISSA AT CUTTACK

ITA Nos.29 and 30 of 2021

Sri Bijoy Kishore Mohanty .... ***Appellant***

Mr. Sidhartha Ray, Advocate

-versus-

Principal Chief Commissioner of Income Tax, Odisha and others .... ***Respondents***

Mr. T.K. Satapathy, Senior Standing Counsel

CORAM:
THE CHIEF JUSTICE
JUSTICE R.K. PATTANAIK

ORDER
08.03.2022

Order No.

2. 1. These two appeals are directed against the corresponding orders of the Income Tax Appellate Tribunal, Cuttack Bench, Cuttack (ITAT) dated 15th October 2019 in ITA Nos.464 and 465/CTK/2017 for the assessment year (AY) 2009-10 and 2010-11.

2. While admitting these appeals on 10th November 2021, the following questions of law were framed for consideration:

> (i) Whether the jurisdictional requirement for reopening of the assessment under Section 147 of the Income Tax Act, 1961 stood satisfied in the present case?
>
> (ii) Whether the AO was justified in reopening the assessment for the AY in question in terms of Section 147 of the Act?
>
> (iii) Whether the reassessment was bad in law for failure to issue notice to the Assessee under Section 143 (2) of the Act?

3. As far as Question No. (iii) is concerned, Mr. Satapathy, learned Senior Standing Counsel for the Department raises preliminary objection that this issue was not raised by the Assessee at any of the stages of the proceedings before the AO, CITA and ITAT and therefore, it should not be permitted to raise such question at this stage.

4. In response, Mr. Ray, learned counsel for the Appellant draws attention of this Court to the following observations of the Supreme Court of India in ***Saurav Jain v. A.B.P. Design AIR 2021 SC 3673*****:**

> "34. Based on the position of law, we find it just to allow the appellant to raise the ground of jurisdiction before us. Allowing the ground to be raised would not require the submission of additional evidence since it is a pure question of law and strikes at the heart of the matter. We shall now turn to the merits of this argument."

5. Consequently, the preliminary objection of the learned Senior Standing Counsel for the Department is overruled. In any event, once this Court while admitting the appeal, framed a question and that order has not been challenged by the Department, it cannot raise an objection at this stage to the framing of such question by this Court.

6. As far as Question No. (iii) is concerned, the matter is squarely covered in favour of the Assessee by several judgments of the Supreme Court and the High Court including ***Assistant Commissioner of Income Tax v. Hotel Blue Moon (2010) 321 ITR 362 (SC)*** and the Delhi High Court in ***Pr. Commissioner of***

Income Tax v. Shri Jay Shiv Shankar Traders Pvt. Ltd. (2016) 383 ITR (Del) 448 and the order dated 25th February 2022 of this Court in ITA No.20 of 2017 (***Principal Commissioner of Income Tax, Bhubaneswar v. Orissa Mining Corporation Ltd.).***

7. With the admitted position being that on facts in the present case, notice under Section 143 (2) of the Income Tax Act, 1961 (Act) was not issued to the Petitioner while reopening the assessment under Section 147 of the Act, Question No. (iii) is answered in the affirmative, by holding that the re-assessment is bad in law, in favour of the Assessee and against the Department.

8. In view of the answer to Question No. (iii), the Court is not required to answer Question Nos.(i) and (ii) since the re-assessment proceedings already stand invalidated.

9. The appeals are accordingly disposed of in the above terms.

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

(Dr. S. Muralidhar)
Chief Justice

(R.K. Pattanaik)
Judge

S.K. Guin