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IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P.(C) No.4492 of 2022
(Through Hybrid mode)

Kalinga Institute of Industrial Technology (KIIT) .... ***Petitioner***

-versus-

Asst. Commissioner of Income Tax Exemption Circle, Bhubaneswar and others .... ***Opposite Parties***

Learned advocates appeared in this case:

For petitioner : Mr. Sidhartha Ray, Senior Advocate

For opposite parties : Mr. Radheshyam Chimanka, Advocate
(Senior Standing Counsel, I.T)

CORAM:

JUSTICE ARINDAM SINHA
JUSTICE G. SATAPATHY

Dates of hearing : 18.07.2023 and 31.07.2023

Date of judgment : 31.07.2023

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1. Petitioner (assessee) has challenged notice dated 31st March, 2021 issued under section 148 of Income Tax Act, 1961. The facts are, there was scrutiny assessment order dated 13th December, 2018 in

respect of assessment year, 2016-17, regarding which impugned notice stood issued. The scrutiny assessment was made, upon the Assessing Officer (AO) having issued questionnaire and verified documents produced by petitioner. The scrutiny assessment resulted in finding that income of petitioner chargeable to tax was nil. Subsequent thereto, the Commissioner of Income Tax (CIT), Exemption made order dated 30th March, 2021, setting aside the assessment as prejudicial to the interest of revenue. Petitioner preferred appeal before the Tribunal and was successful. The order made under section 263 was set aside. Revenue has preferred appeal to this Court (ITA no.71 of 2022). The appeal has not yet been admitted. However, co-ordinate Bench had passed interim order in the appeal, directing no final order be passed in the reassessment.

2. Mr. Ray, learned senior advocate appears on behalf of petitioner. He relies on judgment of the Supreme Court in **CIT vs. Kelivinator India Limited**, reported in **(2010) 320 ITR 561 (SC)**, paragraph 6. He submits, there must be tangible material for reopening an assessment already made. In this case his client underwent scrutiny assessment. All the more that revenue cannot

simply say, they have reason to believe. It is nothing but change of opinion.

3. He draws attention to reply affidavit filed by his client disclosing response to the notice annexing the questionnaire, issued by the AO. He demonstrates from the response, his client had responded to it in respect of each and every question asked. In the circumstances, it cannot be said that particulars of donations received from the donors were not disclosed in the scrutiny assessment. The material standing disclosed and subject matter of the scrutiny assessment, cannot again be tangible material for reopening the assessment. It is nothing but change of opinion on earlier appreciation of the disclosures in the scrutiny assessment. He prays for interference.

4. Mr. Chimanka, learned advocate, Senior Standing Counsel appears on behalf of revenue. He draws attention to paragraph 3 in the counter, dealing with paragraph 1 in the writ petition. He submits, the disclosure was in violation of accounting principles and standards. Referring to the answers given by petitioner he points out that each and every one of them are partial. In the circumstances, it cannot be

said that there was full disclosure. Hence, the donations escaped notice and therefore reassessment is to be done. As such, the transactions themselves are tangible material for reopening the assessment. That is why the Commissioner found the assessment was prejudicial to the interest of revenue. The reassessment is necessary.

5. He submits further, petitioner had filed objection to impugned notice. The objection was dealt with on reasons communicated to petitioner by letter dated 28th January, 2022. Therein was reliance on judgment of the Supreme Court in **ACIT vs. Rajesh Jhaveri Stock Brokers P. Limited**, reported in **(2007) 291 ITR 500**. A passage from paragraph 1 of said communication is reproduced below.

> *"1. ... ... The only requirement is that whether there was any relevant material on which a reasonable person can form the requisite belief that taxable income has escaped assessment. It has also been held that the word "reason" in the phrase "reason to believe" would mean cause or justification. If the AO has cause or justification to know or suppose that income has escaped assessment, he can be said to have reason to believe that income had escaped assessment. The expression "reason to believe" cannot be read to mean that the AO should have finally ascertained the fact by legal evidence or conclusion. It has also been held by the Hon'ble Apex Court that at the*

> *stage of initiation of proceedings u/s. 147 of the Act, the final outcome of the proceedings is not relevant. In other words, at the initiation stage, what is required is "reason to believe", but not the established fact of escapement of income. Thus, at the stage of issue of notice,* ***the only question is whether there was relevant material on which a reasonable person could have formed a requisite belief. Whether the materials would conclusively prove the escapement is not the concern at this stage****. ... ... "*
>
> (emphasis supplied)

6. Challenge of petitioner boils down to the question on existence of tangible material, for reopening the assessment. In context of aforesaid, it is necessary to look at order dated 8th April, 2022 passed by the Tribunal in setting aside the order of the Commissioner made under section 263. We reproduce below passages from paragraphs 14 and 15 in said order.

> *"14. On the first issue, after considering the rival submissions of both the sides and keeping in view the documentary evidences submitted by the assessee in paper book Vol.I and II, we clearly note that case of the assessee was selected for complete scrutiny and the AO has issued notice u/s.142 (1) of the Act on 4.7.2018 alongwith questionnaire, wherein, the assessee was asked to furnish individual ledger*

account of income and expenditure and to furnish details of specific grant-in-aid alongwith documentary evidence. ***The said notice was replied by the assessee vide letter dated 15.11.2018 and copy of ledger account and income and expenditure account were submitted by the assessee before the AO. From 'E' filing compliance to the said notice u/s.142(1) of the Act dated 4.7.2018, we note that the assessee has submitted copy of the statement pertaining to development fees received from the students containing 475 pages, which has also been produced before this Bench as PB Vol-II of the assessee****.*

15. ... ... As we have noted that during the scrutiny assessment proceedings, in reply to notice u/s. 142(1) of the Act, ***the assessee submitted copies of ledger account and income and expenditure account as Annexure-1 alongwith copy of the audit report*** *for the financial year 2015-16,* ***which includes notes of account No.2(1) wherein, it is clearly discernible that the assessee has received grant-in-aid of Rs.62,03,872/- and development fees of Rs.69,57,67,059/- totaling to Rs.70,19,70,931/- and the same issue has been picked up the Id CIT(E) observing that the assessee has received voluntary contribution including anonymous donation****. These documents were submitted before the CIT(E) alongwith reply to notice u/s.263 dated 28.03.2021 in*

> *para 3.1. These facts were brought to the notice of CIT(E) along with copies of development fees as Annexure-1 and details of grant-in-aid as Annexure-II and sanction letters of Govt. of India as Annexure-3 but we are unable to see any adjudication by the CIT(E) in the impugned revisionary order on the issue."*
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> (emphasis supplied)

7. The Tribunal found the facts to be that there was disclosure. It went on to say that the Commissioner, without conducting any inquiry, set aside the assessment order, to direct the AO to make further inquiry and redo the assessment. In this context the Tribunal had relied on **DIT vs. Jyoti Foundation**, reported in **(2013) 357 ITR 388**, whereby a Division Bench in the High Court of Delhi relied on the Court's earlier view. Paragraph 5 is reproduced below.

> *"5. In the present case, inquiries were certainly conducted by the Assessing Officer. It is not a case of no inquiry. The order under Section 263 itself records that the Director felt that the inquiries were not sufficient and further inquiries or details should have been called. However, in such cases, as observed in the case of DG Housing Projects Limited (supra),* ***the inquiry should have been conducted by the Commissioner or Director himself to record the***

> ***finding that the assessment order was erroneous****. He should not have set aside the order and directed the Assessing Officer to conduct the said inquiry."*
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> (emphasis supplied)

Above view was reiterated, no doubt in dealing with challenge to an order made under section 263. In absence of further inquiry, all that was there was disclosure by petitioner and, at best, error of omission by the AO, to properly scrutinize.

8. The Supreme Court in **Kelivinator** (supra) said in paragraph 6 of the judgment that it must be kept in mind, there is conceptual difference between power to review and power to reassess. Here, revenue has moved on two fronts against petitioner. Firstly, there was proceeding under section 263 in finding that the scrutiny assessment was prejudicial to the interest of revenue. Petitioner challenged the order in appeal and was successful. The other front opened by the revenue is on issuance of impugned notice under section 148. Here, what revenue wants to do is reopen the assessment. It is true that just because there has been a scrutiny assessment, same by itself is not an embargo on the assessment being reopened. However, there must be tangible material. So stands declared by the Supreme Court as the law

and holding the field. In proceeding to reopen, the revenue through the AO is actually seeking to review the assessment, to rectify earlier error of omission, if any. Error apparent on face of the record is a good ground for review, as stands recognized by law. However, as aforesaid, the Supreme Court had said that there is conceptual difference between power to review and power to reassess. For there to be a reassessment, the revenue must disclose tangible material. It is not necessary for it to establish at the reopening or at the initial stage that there will be a finding of escapement in the reassessment. As was said in **Kelivinator** (supra) so also the Supreme Court said in **Rajesh Jhaveri** (supra) that the only question is, was there relevant material, on which a reasonable person could have formed a requisite belief ? Whether the materials would conclusively prove the escapement is not the concern at this stage.

9. We are aware that from said order of the Tribunal, revenue has preferred appeal but, yet to be admitted. The appeal, if admitted, can only be on substantial question(s) of law arising from the order. The finding of fact regarding disclosure by the assessee, of the donations, cannot be gone into or adjudicated in the appeal under section 260-A. As such, in exercising writ jurisdiction to deal with the

challenge, established finding of fact is that there was disclosure and scrutiny assessment made. Apart from the disclosure, the materials on record do not show anything else as tangible material to substantiate issuance of impugned notice. It is set aside and quashed.

10. The writ petition is allowed and disposed of.

(Arindam Sinha)
Judge

(G. Satapathy)
Judge

Prasant