

## आयकर अपीलीय अधिकरण, कटक न्यायपीठ, कटक

IN THE INCOME TAX APPELLATE TRIBUNAL, CUTTACK BENCH, CUTTACK

(समक्ष)Before माननीय श्री के. के. गुप्ता, लेखा सदस्य, एवं/and

Hon'ble Shri K.K.Gupta, Accountant Member.

माननीय श्री के.एस्.एस्.प्रसाद राव, न्यायिक सदस्य

Hon'ble Shri K.S.S.Prasad Rao, Judicial Member

आयकर अपील संख्या / I.T.A.No. 445/CTK/2012

निर्धारण वर्ष / Assessment year 2008-09

Gobindpada Bhanja Chowdhury, Flat No.DX 2, Satyasai Apartment, Lewis Road, Bhubaneswar 2.	-वनाम- -Versus-	Income-tax Officer, Ward 1(4), Bhubaneswar.
(अपीलार्थी/APELLANT )		(प्रत्यर्थी/RESPONDENT)

अपीलार्थी की ओर से/ For the Appellant: श्री/Shri S.Debasis Nayak/K.K.Bal, ARs

प्रत्यर्थी की ओर से/For the Respondent: श्री/Shri N.K.Neb, DR

सुनवाई की तारीख / Date of hearing:	14.12.2012
घोषणा की तारीख / Date of pronouncement:	21.12.2012

### आदेश/ORDER

श्री के. के. गुप्ता, लेखा सदस्य,

Shri K.K.Gupta, Accountant Member.

This appeal by the assessee

raised the following grounds.

"1. For that the orders of the forums below are arbitrary, illegal and unjust in facts and circumstances of the case and liable to be quashed.

2. For that the Ld. Assessing authority arbitrarily Proceeded for assessment without supplying the reasons recorded u/s 148(2) of the Income tax Act prior to issuance of notice u/s 148(1) Income tax Act, hence the reassessment proceeding is void and liable to be quashed.

3. For that the initiated the proceeding u/s 147 without verifying the third party evidence is liable to be quashed.

4. For that Ld. A.O has proceeded to reassess without granting sufficient opportunity for filing of objection, which is a clear case of violation of principles of natural justice, therefore the assessment is liable to be quashed.

5. For that the Assessing officer has issued notice for reassessment, when the regular assessment is open. It is settled law that no reassessment proceedings can be initiated so long as assessment proceeding on the basis of return is

*already filed are not terminated. Therefore the order passed u/ss. 147/143 of the income tax Act is illegal and liable to be quashed.*

*6. For that the addition of ₹59,91,726 relying on the 26AS statement without verifying the Audited accounts furnished in course of assessment is arbitrary. Further the Statutory Auditor categorically mentioned in his notes of accounts which is part of the Audited Balance sheet that accounts are maintained on cash system of accounting. Both the A.O as well as the CIT (Appeals) has over looked this fact. Therefore the entire proceeding is non application of mind and liable to be quashed.*

*7. For that the order passed by the Ld. CIT (appeals) by disallowance of employees' EPF and ESI contributions is per incuriam, since the issue stood resolve by the Hon'ble Supreme Court in the case of Alom Extrusion Ltd case reported in 319 ITR 306."*

2. Ground No.1 is being general nature needs no specific adjudication.

3. At the time of hearing, the learned Counsel of the assessee did not press ground Nos.2 to 5 challenging the validity of reassessment proceedings u/s.147 on the ground that this being legal issue had not been raised either before the Assessing Officer or before the learned CIT(A). Further the learned Counsel for the assessee submitted that because his case is strong on merits, he preferred not to argue on the above grounds. Accordingly, ground Nos.2 to 5 are dismissed as not pressed.

4. Apropos Ground No.6, the relevant facts are that the assessee derives income from salary and execution of security contract works. The return filed on 11.9.2008 was processed u/s.143(1). In the proceedings u/s.147, the Assessing Officer brought to tax the differential amount of ₹59,91,726 (after reconciliation) between the contract receipts as shown in the Statement in Form No.26AS at ₹2,18,92,896 as against shown in the return by the assessee at ₹1,59,00,468, which difference, the Assessing Officer observed in his order, was accepted by the assessee to be taxed of course after allowing expenses. The Assessing Officer denied the expenses and made the

impugned addition of ₹59,91,726 to the total income of the assessee. On appeal, the learned CIT(A) confirmed the same.

5. The learned Counsel of the assessee submitted that the assessee's business is such that he is forced to maintain his accounts on actual receipt basis. Here the expenditure is booked after income is received. Therefore while preparing the profit and loss account he booked only the expenses against the income received during that financial year. During the financial year 2007-08 relevant to the assessment year 2008-09 his actual contract receipts was ₹ 1,59,00,468, and he has shown the same in his profit and loss account and booked expenses incurred to earn such income accordingly. It is a fact that the assessee has booked all the expenses against the income received during that year. He has not booked the expenses against the entire contract receipts shown in the 26AS statement. The entire contract receipts shown in the 26AS statement has not been received during that financial year. Out of the total contract receipt of ₹2,18,92,896 shown in the 26AS statement only ₹1,59,00,486 has been received during the financial year 2007-08, a sum of Rs34,42,935 has been received during the financial year 2008-09 and some of the amount shown is still not received. In support of the above contention, the learned Counsel of the assessee filed a Statement containing the details of payments received during the immediate subsequent year as Annexre-1 of the Paper Book. He contended that since the entire amount shown in the 26AS statement has not been received during that financial year, the assessee has not credited the entire amount in the profit and loss account. In course of the proceeding u/s 147 the Assessing Officer without verifying the tax audit report, added the differential amount as undisclosed source of income. Had he verified the audited account, he could know the system of account is being followed by

the assessee regularly. He contended that the Assessing Officer has made a gross mistake in treating the accounts maintained on actual receipt basis as mercantile system of accounting. Therefore the assessment completed in confused manner without verifying the audited account produced is a non application of mind and liable to be quashed.

5.1. The learned Counsel of the assessee further submitted that in course of assessment, when Assessing officer did not accept the stand of the assessee, the AR of the assessee having no other way out offered the differential amount of ₹ 59,91,726 as his contract receipt, claimed expenses at ₹56,66,376 incurred to earn such income and offered ₹3,25,350 as his net income and paid tax thereon at ₹1,75,305. This was done in order to give a quietus to any litigation and to purchase peace. On this basis, the learned counsel submitted that it should not have been treated that the assessee has admitted his undisclosed source of income. The assessee offered the contract receipt which was not received during that year and paid tax on the income derived out of that contract received in order to purchase peace.

5.2. The learned Counsel of the assessee perused the order of the learned CIT(A) in Para 2.2, wherein the learned CIT(A) has held that the claim of the appellant for further expenditure in respect of undisclosed contract receipt is not correct. Since all the expenses have been booked by the appellant in regular books of accounts, there is no claim of undisclosed expenditure. The contract receipt was as per form No.26AS and related to financial year 2007-08 but not shown in the profit and loss account for the financial year 2007- 08 for unexplained reason. The learned Counsel of the assessee submitted that it is the fact that the assessee has booked all the expenses against the income received during that year. He has not booked the expenses against the entire contract receipts shown in the 26AS statement.

The entire contract receipts shown in the 26AS statement has not been received during that financial year. Out of the total contract receipt of ₹2,18,92,896 shown in the 26AS statement only ₹1,59,00,486 has been received during the financial year 2007-08, a sum of ₹34,42,935 has been received during the financial year 2008-09 and some of the amount shown is still not received. Learned CIT(A)'s finding that the assessee has claimed undisclosed expenditure is not correct. In course of assessment the assessee claimed expenses to be incurred against income to the received. Therefore question of undisclosed source of income or claim of undisclosed expenditure does not arise. Both the Assessing Officer as well as the learned CIT (Appeals) have passed the orders in a confused manner without appreciating the bonafide of the assessee. Had it been a case of mercantile system of accounting they would have been correct that the Assessee has booked all the expense there is nothing to be claimed. The learned Counsel of the assessee further submitted that Statement 26AS is nothing but a statement issued on behalf of the Income tax department on the basis of the details given by the deductors. The facts and figures of the 26AS statement are purely third party information should not have been treated as genuine figure for making addition. After introduction of Section 40(a) (ia) the deductors deducting tax on both the amount paid and payable to avoid disallowance of expenses. In the assessee's case the contractee departments have deducted tax on the entire amount payable, therefore there is a mismatch between the turnover shown by the assessee and the amount shown in the 26AS statement. Further the assessee maintains his account in receipt basis and the Contractee departments maintain their account in mercantile basis, which is another reason for mismatch. In fact there is no undisclosed contract receipt, rather it is a mismatch of contract receipt.

Further sometimes the deductors deducts tax arbitrarily adopting different rate of deductions which are not applicable to the assesses, therefore the TDS claimed cannot be a basis for calculation of the contract receipts.

5.3. On the basis of above, the learned Counsel of the assessee prayed for deletion of the addition of ₹59,91,726 made in this regard.

6. The learned DR opposed the contention of the learned Counsel of the assessee and submitted that after 1.4.89 there is no basis for holding incomes on receipt basis or cash basis as the learned Counsel of the assessee has tried to suggest. The incomes are to be accounted for on mercantile basis insofar as the assessee does not deny receiving such incomes which have been put forth by the deductors at source in Form 26AS. It is now that the assessee is seeking opportunity to reconcile the same inspite of insisting that his accounts are duly audited and maintained on receipt basis which receipt basis will definitely not incorporated these items which have been received subsequently. The Assessing Officer had rightly considered the expenditure against these incomes which have been reflected by the tax deductors in AS-26 have been paid by them or credited to them therefore was to be incorporated in the assessee's income account which has not been able to substantiate.

7. We have heard the rival submissions on this issue. We find as regards the fact of bringing to tax a sum of ₹59,91,720 relying on the statement 26AS as uploaded by the tax deductors, we do find merit in the contention of the learned Counsel of the assessee that the accounting of the income was on the basis of receipt of income in the bank accounts of the assessee which have been fully disclosed to the Department as per the requisition of the Assessing Officer. The assessee is a retired Air-force Officer and was conversant with employing personnel for security services rendered by him

to reputed public sector undertakings which names are also disclosed by the 26AS statement. In other words, not following mercantile system of accounting was a misnomer insofar as the assessee has recorded the expenses incurred against the receipts the major expenditure being salary and employees PF etc., against the income received only. Therefore, it was nobody's case that the tax deduction was to be explained according to the income generated by the assessee not disclosed to the Department on whatever method of accounting it followed. The deductors have to deduct tax at source even after the amounts are payable or credited to the account of the assessee to meet the deadline of the tax so deducted to be deposited with the government Department in accordance with the provisions of Section 200 of the I.T.Act. Therefore, the Assessing Officer confined himself to non-disclosure of the contract income from the information available from the tax deductors was to be reconciled to the fact that the Assessing Officer has given credit of the TDS to the assessee less than the amount so disclosed in the AS-26. The learned Counsel of the assessee has submitted that as can be perused in the financial statements that the assessee had to pay the service tax from its own pocket when the part of the service tax has been paid for the impugned year or receipts which the deductors have not considered as payment, obviously they would not have deducted tax on the amount of service tax which income remains undisclosed. Service tax is a statutory liability which when charged has to be paid and not because the assessee was to bear the same as expenditure which expenditure the Assessing Officer noted had been claimed against such income. Furthermore the incomes disclosed in the AS-26 remained payable to the extent of ₹34,42,935 which was to be incorporated in the later year has been rendered to tax in accordance with the accounting system followed by the

assessee when no expenditure had been incurred there against insofar as the expenditure was to be incurred by the assessee up to 31<sup>st</sup> March when no liability has been shown by the assessee to that effect. In other words, the income has not been shown against purported bogus expenditure was not to be taxed as income in the impugned Assessment Year as per the expansion of the tax deducted at source on the basis of information available to the Assessing Officer in AS-26. We do find the contention of the learned Counsel of the assessee sufficient for the purpose of restoring the issue back to the file of the Assessing Officer to afford opportunity of being heard to the assessee insofar as the reconciliation was to be given effect to by the Assessing Officer in view of the fact that it was not purely not undisclosed income in the impugned Assessment Year insofar as the same income cannot be taxed twice and further more expenditure incurred on behalf of the tax deductors not billed to the tax deductors cannot form part of the income of the assessee being a statutory liability could at best be disallowed u/s.43B has not been established by the Assessing Officer which issue leans in favour of the assessee at the time of verification of reconciliation by the Assessing Officer . In view of the above, we set aside the order of the learned CIT(A) on this issue and restore the same to the file of the Assessing Officer for consideration afresh in the light of what has been stated above needless to say, after affording reasonable opportunity to the assessee of being heard.

8. As regards Ground No.7, on verification of the details of EPF & ESI along with deposit challans filed by the assessee, the Assessing Officer found that the assessee had collected an amount of ₹6,65,890 towards EPF and ₹90,300 towards ESI but the same have not been deposited in the respective funds within the due date specified in the said Act. Therefore, he treated the

these two amounts totaling ₹7,56,190 as income u/s.2(24)(x) and added to the total income of the assessee.

9. Before the learned CIT(A) the assessee contended that the said amount of ₹7,56,190 has been deposited before date of filing of returns and therefore, the disallowance is not proper in view of the decision of Hon'ble Karnataka High Court in CIT v. Sabari Enterprises (298 ITR 141) and of Hon'ble Supreme Court in the case of CIT v. Alom Extrusions Ltd (319 ITR 306). The learned CIT(A) confirmed the disallowance observing that the decision in the case of Alom Extrusions Ltd., (supra) by Hon'ble Supreme Court has been considered by the ITAT, Kolkata and ITAT, Cuttack Bench while deciding against the assessee.

10. The learned Counsel for the assessee reiterated the submissions as were made before the learned CIT(A) and contended that the disallowance as made by the Assessing Officer and confirmed by the learned CIT(A) is not justified in view of the decision of Hon'ble Supreme Court in the case of CIT v. Alom Extrusions Ltd (supra).

11. The learned DR, on the other hand, supported the impugned orders of the authorities below and contended that the grace period for deposit of employees' share has to be taxed under the provisions of Section 2(24)(x) rightly confirmed by the learned CIT(A) by holding a view as decided by the ITAT, Kolkata.

12. Having heard both the parties and on perusal of the first appellate order, we do find the contention of the learned DR that the learned CIT(A) has followed the decision of the ITAT, Kolkata Bench was to distinguish the fact as was on the basis brought on record by the Hon'ble Supreme Court in the case of CIT v. Alom Extrusions Ltd (supra). We are of the considered view that the decision was rendered to do away with the purpose of

clarifying the fact that any tax, duty, cess, if deposited before the due date of filing of return whether of employer's share or employees' shares, set at rest insofar as the learned Counsel for the assessee has submitted a chart when the EPF & ESI contributions till the date of final closure of accounts stood deposited within the assessment year itself therefore only leaves a room of doubt whether the assessee held an income under the provisions of Section 2(24)(x) for the period of grace dates only which grace period has been allowed by the respective Statutes could be brought to tax under the provisions of Section 43B was not the issue distinguished by the ITAT, Kolkata. The grace period is allowed by the respective Statutes cannot be pointed out for adherence by the income-tax authorities when the law provides which has been clarified by the Hon'ble Supreme Court in the case of CIT v. Alom Extrusions Ltd (supra), that the amounts whether employees' contribution or the employer's contribution are not being shown as payable as on the last date of the Assessment Year cannot be brought to tax if the same has been paid before the due date of filing of the return. There is no dispute of the fact that the amount in question has been deposited before the due date of filing of return and that too within the grace period allowed by the respective statutes, therefore, cannot be disallowed under the misinterpretation of the cited case laws. In this view of the matter, the disallowance/addition of ₹7,56,189 made by the Assessing Officer and confirmed by the learned CIT(A) in this regard is hereby deleted.

13. In the result, the appeal of the assessee is partly allowed.

Sd/-

(के.एस.एस.प्रसाद राव), न्यायिक सदस्य  
(K.S.S.Prasad Rao), Judicial Member

Sd/-

(के. के. गुप्ता), लेखा सदस्य,  
(K.K.Gupta), Accountant Member.

(तारीख)Date: **21.12.2012**

(हरेकिष्ण पाटी), वरिष्ठ निजी सचिव  
(H.K.Padhee), Senior.Private Secretary.

आदेश की प्रतिलिपि अग्रेषित:-

Copy of the order forwarded to:

1. अपीलार्थी / The Appellant : Gobindpada Bhanja Chowdhury, Flat No.DX 2, Satyasai Apartment, Lewis Road, Bhubaneswar 2.
2. प्रत्यर्थी / The Respondent: Income-tax Officer, Ward 1(4), Bhubaneswar.
3. आयकर कमिशनर/The CIT,
4. आयकर कमिशनर (अपील)/The CIT(A),
5. वभागिय प्रतिनीधी /DR, Cuttack Bench
6. Guard file.

सत्यापित प्रति/True Copy,

आदेशानुसार/ By order,

APPENDIX XVII  
SEAL TO BE AFFIXED ON THE ORDER SHEET BY THE  
SR. P.S./P.S. AFTER DICTATION IS GIVEN

1. Date of dictation ...18.12.2012.....
2. Date on which the typed draft is placed before the Dictating Member ...19.12.2012.....Other Member .....
3. Date on which the approved draft comes to the Sr. P.S./P.S. ....
4. Date on which the fair order is placed before the Dictating Member for pronouncement.....
5. Date on which the fair order comes back to the Sr. P.S./P.S. ....
6. Date on which the file goes to the Bench Clerk .....**21.12.2012**.....
7. Date on which the file goes to the Head Clerk .....
8. The date on which the file goes to the Assistant Registrar for signature on the order .....
9. Date of Despatch of the Order .....