

**ORISSA HIGH COURT: CUTTACK**

**AFR**

**ITA NO. 64 OF 2022**

In the matter of an appeal under Section 260A of the Income Tax Act, 1961 filed against the order dated 30.03.2022 passed by the Income Tax Appellate Tribunal, Cuttack Bench, Cuttack in M.A. No.17/CTK/2019 arising out of ITA No. 205/CTK/2019 for the Assessment Year 2014-15.

Principal Commissioner of  
Income Tax-1, Bhubaneswar ..... Appellant

-Versus-

Sekhar Kumar Mohapatra ..... Respondent

For appellant : Mr. Tushar Kanti Satapathy,  
Senior Standing Counsel (IT)

For respondent : Mr. Rudra Prasad Kar,  
Senior Advocate along with  
Mr. Pranay Kumar Mishra,  
Advocate

P R E S E N T:

**THE HONOURABLE ACTING CHIEF JUSTICE DR. B.R. SARANGI,  
AND  
THE HONOURABLE MR JUSTICE MURAHARI SRI RAMAN**

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**Date of Judgment : 11.10.2023**

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**DR. B.R. SARANGI, ACJ.** The Revenue Department, being the appellant, has filed this Income Tax Appeal under Section 260A of the Income Tax Act, 1961 seeking to quash the

order dated 30.03.2022 passed by the Income Tax Appellate Tribunal ('ITAT'), Cuttack Bench, Cuttack in M.A. No. 17/CTK/2019 arising out of ITA No. 205/CTK/2019 for the Assessment Year 2014-15.

2. The factual matrix, which led to filing of this appeal, is that the respondent-assessee, who is an individual, filed its return of income by e-mode for the Assessment Year 2014-15 on 07.10.2014 by disclosing total income at Rs.15,19,420/-. Later on, a special survey was conducted under Section 133A of the Income Tax Act, 1961 in the business premises of Shri Kishore Kumar Mohapatra and group of assesseees on 22.07.2015. As a result of such survey, return of the respondent-assessee was selected for scrutiny of assessment under CASS (Computer-Assisted Scrutiny Selection). During the course of survey, the assessee, who is a family member of this group, was confronted with the statements of Directors of certain Kolkata based companies whose shares were bought and sold in the stock market by the respondent-assessee. Those Kolkata based companies were under scanner of the I.T.

Department for providing accommodation entries and had subsequently been subjected to search and seizure operations. A list of beneficiaries, who had taken accommodation entries from those Kolkata based companies, had been drawn up by the I.T. Department and the family members of Shri Kishore Kumar Mohapatra group featured in it. Consequently, the respondent-assessee filed a revised return of income, on 24.09.2015, for the Assessment Year 2014-15, wherein the original claim of exemption under Section 10(38) of the Income Tax Act, 1961 in respect of Long Term Capital Gain (LTCG) on shares was withdrawn and the entire income was offered for taxation as "Income From Other Sources".

2.1. The respondent-assessee took the plea that the revised return for the Assessment Year 2014-15 was invalid as it had been filed on 24.09.2015 whereas the last date for filing of the same was 31.03.2015. The revised return was filed under duress during the survey operation under Section 133A of the Income Tax Act, 1961 on 22.07.2015. Therefore, the claim made under Section 10(38) of the Act

in the original return was valid as the receipt was from transfer of equity shares of listed companies and the Security Transaction Tax (STT) had been duly paid and the period of holding of the equity shares exceeded twelve months. The Assessing Officer rejected the plea of the assessee and rejected the claim of exemption under Section 10(38) on the LTCG on transfer of shares and proceeded to treat the same as “Income from Other Sources”, as the root of the issue, i.e., “share” issued by a bogus company was an instrument used only to colour the money as capital gain through accommodation entry, confirmed on the basis of statement given by the Directors of that bogus company. Mere payment of STT and holding of a piece of paper for more than 12 months can never justify earning as LTCG.

2.2. The respondent-assessee preferred an appeal against the order of the Assessing Officer before the Commissioner of Income Tax (Appeals), i.e., CIT (A), Cuttack. The CIT(A) deleted the additions made by the Assessing Officer citing decisions of the Income Tax Appellate Tribunal (ITAT), Delhi Bench and Kolkata Bench

in relation to sale of shares of M/s Kailash Auto Finance Ltd. for the Assessment Year 2014-15, and Assessment Year 2015-16, vide its order dated 29.03.2019 in ITA No.0445/2016-17 and order dated 23.04.2019 in ITA No.0041(A)/2017-18 respectively.

2.3. Against the order dated 29.03.2019 of the CIT (A), Cuttack, the revenue preferred appeal before the ITAT, Cuttack Bench, Cuttack on 25.06.2019 for the Assessment Year 2014-15, which was registered as ITA No.205/CTK/2019. The ITAT dismissed the appeal of the Revenue, vide order dated 26.09.2019, on the ground that tax effect does not exceed the monetary limit, i.e. tax effect of Rs.50 lakhs as per Circular No.3/2018 dated 20.08.2018 and Circular No.17/2019 dated 08.08.2019.

2.4. In view of the cases involved in organized tax evasion activities through bogus LTCG/STCL on penny stocks, the CBDT had come up with Circular No.23 of 2019 dated 06.09.2019 and Office Memorandum by special order dated 16.09.2019, mentioning therein that the monetary

limit fixed for filing further appeals shall not apply in cases, where assesseees are claiming bogus LTCG/STCL in penny stocks, and appeals in such cases shall be filed on merits. Therefore, the revenue filed Miscellaneous Application on 11.11.2019 before the ITAT for the Assessment Year 2014-15 for consideration of the case on merit. The same was registered as M.A. No. 17/CTK/2019. But the Tribunal, vide order dated 30.03.2022, dismissed the said Miscellaneous Application of the revenue on the ground that the Tribunal had passed order on 20.08.2019 as tax effect is below monetary limit and the CBDT issued special circular on 06.09.2019 read with special circular dated 16.09.2019, i.e., after passing the order of the Tribunal. Therefore, it cannot be alleged that special circular had not been considered by the Tribunal, which was not a mistake apparent on record to recall the order for fresh consideration. The Tribunal had also cited the decisions of the ITAT, Ahmedabad and ITAT, Jaipur Benches in the said order. Hence, this ITA.

3. Mr. Tushar Kanti Satapathy, learned Senior Standing Counsel appearing for the Revenue contended that in the CBDT's Circular No.23/2019 dated 06.09.2019 and special order dated 16.09.2019, the monetary limit for filing appeal has been withdrawn. The ITAT has granted liberty to the Revenue to file Miscellaneous Application, where tax effect is more than the prescribed monetary limit. Therefore, keeping in view the liberty to file M.A. and withdrawal of monetary limit, the revenue filed Miscellaneous Application on 11.11.2019 basing on the Circulars dated 06.09.2019 and 16.09.2019 for consideration of the case on merit. Thereby, it is contended that the Tribunal is not justified in dismissing the Miscellaneous Application of the Revenue on the ground that original appeals were dismissed by the ITAT on 26.09.2019 on account of low tax effect and the CBDT Circular No.23/2019 dated 06.09.2019 and special order dated 16.09.2019 were issued before the said order and, as such, it cannot be alleged that special circular has not been considered by the Tribunal. But, the revenue had been

granted liberty for filing Miscellaneous Application by the same Tribunal after withdrawal of monetary limit. According to him, ITAT has committed gross error in rejecting the Miscellaneous Application filed by the revenue. Therefore, seeks for interference of this Court.

4. Mr. Rudra Prasad Kar, learned Senior Advocate appearing for the respondent-assessee, at the outset contended that against the order passed in the Miscellaneous Application, the present ITA is not maintainable. In addition to the same, it is contended that no substantial question is framed so as to be answered by this Court. As a consequence thereof, the ITA should be dismissed outright. Reference is made to the order of this Court in the case of **Principal Commissioner of Income Tax I, Ayakar Bhawan, Bhubaneswar v. Dipansu Mohapatra**, ITA No. 11 of 2022 and batch disposed of on 08.02.2023 and **M/s. Radha-Govindo v. Assistant Commissioner of Income Tax**, (ITA No.69 of 2010) disposed of on 17.04.2019; the decision of High Court of Delhi in the case of **Commissioner of Income Tax**



**(Ghaziabad) v. Krishna Gupta**, Writ Petition (Civil) No.2174/2011 disposed of 31.03.2011; the decision of High Court of Punjab and Haryana in the case of **Commissioner of Income-tax v. Saroop Tanneries Ltd.**, [2015] 60 Taxmann.com 305 (Punjab & Haryana): [2015] 374 ITR 20 (Punjab & Haryana); the decision of High Court of Jammu & Kashmir and Ladakh in the case of **Kashmir Fabric Industries v. Income-tax Appellate Tribunal**, [2021] 133 Taxmann.com 369 (Jammu & Kashmir and Ladakh): [2022] 284 Taxman 552 (Jammu & Kashmir and Ladakh); and the decision of the High Court of Rajasthan in the case of **Madhav Marbles & Granites v. Income-tax Appellate Tribunal**, [2012] 22 Taxmann.com 51 (Rajasthan): [2012] 246 CTR 243 (Rajasthan).

5. Coming to the merits of the case and on perusal of the orders passed by the Assessing Officer, CIT (A) and the ITAT, this Court finds that the claim for the benefit under Section 10 (38) of the Act had not been considered in its proper perspective and the ITAT is justified in accepting the plea of the respondent-assessee. Therefore, the ITAT

has rightly denied to interfere with the same. Furthermore, the CBDT circular that permitted to the assessee to file revised returns if he omitted to make a claim, was also not noticed by the Assessing Officer. Therefore, the ITAT has not committed any error in concurring with the view of CIT (A) by dismissing the revenue's appeal. As such, no substantial question of law arises from the impugned order passed by the ITAT so as to call for interference by this Court.

6. Apart from the same, the present ITA is not maintainable in view of the fact that the Miscellaneous Application was filed by the Revenue on 11.11.2019 basing on the Circular dated 06.09.2019 and 16.09.2019 for consideration of the case on merit. ITAT dismissed the Miscellaneous Application of the Revenue on the ground that original appeals were dismissed by the ITAT on 26.09.2019 on account of low tax effect and the CBDT issued special Circular No.23/2019 dated 06.09.2019 and special order dated 16.09.2019 before passing the order by the Tribunal.

7. Now, therefore, it is to be considered whether against the order dated 30.03.2022 passed in the Miscellaneous Application, i.e., M.A. No.17/CTK/2019, the present ITA is maintainable before this Court or not. There is no dispute that M.A. No. 17/CTK/2019 arises out of ITA No. 205/CTK/2019 for the Assessment Year 2014-15, which was disposed of by the ITAT on 26.09.2019 on account of low tax effect. Certainly, the order dated 26.09.2019 passed in ITA is appealable, but as against the order dated 30.03.2022 passed in the Miscellaneous Application filed in the ITA, which was disposed of on 26.09.2019, the present appeal does not lie before this Court. Even if ITAT had granted liberty for filing Miscellaneous Application, after withdrawal of the monetary limit pursuant to CBDT Circular, but that *ipso facto* cannot make the said order appealable.

8. No doubt, Section 260A of the Income Tax Act, 1961 envisages about the appeal to High Court. For ready reference, Section 260A is quoted hereunder:-

**“260A.** (1) *An appeal shall lie to the High Court from every order passed in appeal by the Appellate*

*Tribunal before the date of establishment of the National Tax Tribunal, if the High Court is satisfied that the case involves a substantial question of law.*

*(2) The Principal Chief Commissioner or Chief Commissioner or the Principal Commissioner or Commissioner or an assessee aggrieved by any order passed by the Appellate Tribunal may file an appeal to the High Court and such appeal under this sub-section shall be—*

*(a) filed within one hundred and twenty days from the date on which the order appealed against is received by the assessee or the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner;*

*(b) [\*\*\*]*

*(c) in the form of a memorandum of appeal precisely stating therein the substantial question of law involved.*

*(2A) The High Court may admit an appeal after the expiry of the period of one hundred and twenty days referred to in clause (a) of sub-section (2), if it is satisfied that there was sufficient cause for not filing the same within that period.*

*(3) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.*

*(4) The appeal shall be heard only on the question so formulated, and the respondents shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question :*

**Provided** *that nothing in this sub-section shall be deemed to take away or abridge the power of the court to hear, for reasons to be recorded, the appeal on any other substantial question of law not formulated by it, if it is satisfied that the case involves such question.*

*(5) The High Court shall decide the question of law so formulated and deliver such judgment thereon*

*containing the grounds on which such decision is founded and may award such cost as it deems fit.*

*(6) The High Court may determine any issue which—*

*(a) has not been determined by the Appellate Tribunal; or*

*(b) has been wrongly determined by the Appellate Tribunal, by reason of a decision on such question of law as is referred to in sub-section (1).*

*(7) Save as otherwise provided in this Act, the provisions of the Code of Civil Procedure, 1908 (5 of 1908), relating to appeals to the High Court shall, as far as may be, apply in the case of appeals under this section.”*

9. On perusal of the aforementioned provisions, it is made clear that an appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal before the date of establishment of the National Tax Tribunal, if the High Court is satisfied that the case involves a substantial question of law. The order dated 30.03.2022, which is under consideration, has been passed in Miscellaneous Application filed under Section 254 of the Income Tax Act, 1961. The relevant part of Section 254 reads as follows:-

**“254. (1) The Appellate Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit.**

(1A) [\*\*\*]

*(2) The Appellate Tribunal may, at any time within six months from the end of the month in which the order was passed, with a view to rectifying any mistake apparent from the record, amend any order passed by it under sub-section (1), and shall make such amendment if the mistake is brought to its notice by the assessee or the Assessing Officer.”*

10. Admittedly, ITA No. 205/CTK/2019 was dismissed by the ITAT on 26.09.2019 on account of low tax effect. Since the monetary limit for filing appeal had been withdrawn in the CBDT Circular No.23/2019 dated 06.09.2019 and special order dated 16.09.2019, Miscellaneous Application was filed before the very same Tribunal. However, the same was dismissed vide order dated 30.03.2022. The appellant had the right to prefer an ITA before this Court against the order dated 26.09.2019 passed by the ITAT in ITA No. 205/CTK/2019 under Section 260A of the Income Tax Act, 1961. But the order passed under Section 254 (2) in the Miscellaneous Application is not appealable one, because, the order so passed under Section 254 (2) cannot be covered under the expression “every order passed in the appeal”, as has been mentioned under Section 260A. Thereby, the ITA is not

maintainable. At best, the appellant could have taken other remedies available under the provisions of law.

11. In **Krishna Gupta** (supra), the High Court of Delhi observed that the petitioner wanted rehearing of the appeal on merits. The application under Section 254 (2) of the Act was filed for rectification or modification of the order of the Tribunal when there was a mistake apparent from record. The Tribunal in the garb of mistake cannot give fresh hearing and re-examine the matter as an appellate Court and, accordingly, dismissed the writ petition.

12. In **Saroop Tanneries Ltd** (supra), the High Court of Punjab and Haryana held that the order in an application under Section 254 (2) of the Income Tax Act is not appealable one.

13. In **Kashmir Fabric Industries** (supra), the High Court Jammu & Kashmir and Ladakh held that no appeal lies under Section 260A against an order rejecting the application filed under Section 254 (2). Therefore, in

absence of any statutory remedy against it, writ petition is only remedy, if any, available.

14. In **Madhav Marbles & Granites** (supra), the High Court of Rajasthan held that the writ petition under Article 226 of Constitution of India is maintainable against the order of the Tribunal passed under Section 254 (2) of the Act.

15. This Court in the case of **M/s. Radha-Govindo** (supra) did not entertain the ITA and dismissed the same as withdrawn with liberty for the appellant to challenge the order of rejection of review by way of filing a writ petition.

16. Therefore, there is no iota of doubt that the order passed under Section 254 (2) of the Income Tax Act, 1961 cannot be construed to be an order within the meaning of Section 260A to make it appealable before this Court. Rather, the order passed under Section 254 (2) is not appealable one and the remedy is available by invoking Article 226 of the Constitution of India.



17. In view of the above, the present appeal is not maintainable. Accordingly, the same stands dismissed.

**(DR. B.R. SARANGI)  
ACTING CHIEF JUSTICE**

**M.S. RAMAN, J.** I agree.

**(M.S. RAMAN)  
JUDGE**

*Orissa High Court, Cuttack  
The 11<sup>th</sup> October, 2023, Arun*

