

**IN THE INCOME TAX APPELLATE TRIBUNAL,
CUTTACK BENCH, CUTTACK**

**BEFORE S/SHRI N.S SAINI, ACCOUNTANT MEMBER
AND PAVAN KUMAR GADALE, JUDICIAL MEMBER**

ITA No. 223/CTK/2014
Assessment Year : 2009-2010

M/s. Orissa State Police Housing & Welfare Corporation Limited., Bhoi Nagar, Janapath, Bhubaneswar.	Vs.	ACIT, Circle 2(2), Bhubaneswar.
PAN/GIR No. AABCT 7853 N		
(Appellant)	..	(Respondent)

Assessee by : Shri Bhagaban Panda/D.K.Mohanty, AR
Revenue by : Shri Kunal Singh, CIT DR

Date of Hearing : 06/06/ 2017
Date of Pronouncement : /06/ 2017

ORDER

Per N.S.Saini, AM

This is an appeal filed by the assessee against the order under section 263 of the Act of CIT-Bhubaneswar, dated 29.3.2014, for the assessment year 2009-2010.

2. The assessee has taken the following grounds of appeal:

1. For that the notice issued by the learned Commissioner of Income Tax, Bhubaneswar (CIT) under Section **263** of **the** I.T. Act, 1961 (the 'Act') are bad in law, void ab initio and is liable to be quashed.

2. For that the order dated 29.03.2014 passed by the learned CIT under section 263 of the Act is bad in law, void ab initio and is liable to be cancelled.

3. For that the learned CIT erred in invoking his jurisdiction under section 263 of the Act without satisfying the pre-conditions necessary for assumption of such jurisdiction.

4. For that the finding of the Ld. **CIT** in the order U/s. 263 in respect of work-in-progress are rather a substituting of his own opinion in that of the Assessing Officer or for making a fishing and roving enquiry

7 and as such the orders U/s. 263 are bad in law, without jurisdiction and/or in excess of jurisdiction and legally untenable.

5. For that when the department has examined the nature of transaction in the earlier years and its nature remained unchanged, the department is not entitled to reopen the assessment based on the pretext of dubbing them as erroneous.

6. For that the Ld, CIT has erred in setting aside and restored the file of the Ld. A.O. for redoing the assessment with ordered that the assessee's contention needs further verification and therefore the order U/s. 263 of the I.T. Act, 1961 are liable to be quashed only on this ground, in absence of any satisfaction of the two of the conditions primarily required to invoke the provision of Section 263.

7. For that the other contentions in the notice U/s. 263 are being curable in nature and could be rectified in a proceeding U/s. 154, the invoking of provision U/s. 263 are not only excessive, arbitrary but also ex facie illegal and liable to be quashed."

3. We have heard the rival submissions and perused the orders of lower authorities and materials available on record. The brief facts of the case are that the assessee is a State Public Sector Undertaking owned by Government of Orissa. The assessee derives income from construction of building for residential purposes of the police, vigilance, prison and fire personnel, etc. The assessee filed its return of income based on provisional account on 30.9.2009 disclosing income of Rs.9,2048,485/-. The assessee could not file the revised return u/s.139(5) of the Act after the completion

of their departmental audit since there was no scope to revise the return voluntarily as the due date of filing the return was 31.3.2011. The assessee discharged its burden on the higher income determined on the basis of its audited account by filing a revised computation during the course of hearing declaring income of Rs.11,58,48,250/-. Thereafter the assessment was made u/s.143(3) of the Act by the Assessing Officer determining the total income at Rs.11,89,65,710/-.

4. The Commissioner of Income Tax, Bhubaneswar has passed the impugned order u/s.263 of the Act to revise the said order of assessment.

The impugned order was passed on three grounds:

(i) profit element embedded in the work-in-progress was to be taken into account as per Accounting Standard on construction (AS-7) was not added to the income by the Assessing;

(ii) As per revised computation furnished by the assessee, its total income was Rs.11,58,84,250/-, which was mistakenly taken by the Assessing Officer at Rs.1,58,48,250/-

(iii) short levy of interest u/s.234C at Rs.7,89,024/- in place of Rs.11,98,163/-.

5. In respect of the first issue, after considering the submission of the assessee, the CIT passed order u/s.263 in the following terms:

"The basis issue in the instant case is the valuation of work-in-progress (WIP) and profit element contained therein. In accordance with the accounting standard-7, which is mandatory for percentage completion method, the profit in respect of WIP has to be accepted as income. The assessee's contention is that the same has been done so. This contention of the

assessee needs further verification and therefore the matter is set-aside and restored to the file of the AO for redoing the assessment after offering proper opportunity to the assessee."

6. We find that in the instant case, it is not in dispute that during the course of assessment, the Assessing Officer called for details of closing work-in-progress, which was furnished by the assessee and was also examined by the Assessing Officer. It is not the case of the Id Commissioner of Income Tax that the Assessing Officer has not examined the valuation of closing work in progress. That being so, in our considered view, the Id Commissioner of Income Tax could have interfered with the order of the Assessing Officer u/s.263 only when it finds that the conclusion of the Assessing Officer is either erroneous in fact or erroneous in law. Without returning a clear finding that the order of the Assessing Officer was erroneous, the Id Commissioner of Income Tax could not interfere with such an order u/s.263 for making a fishing or roving enquiry. In this connection, it is observed that the Hon'ble Delhi High Court in the case of **INCOME TAX OFFICER vs. DG HOUSING PROJECTS LTD(2012) 343 ITR 329 (Del)** has held as under:

"20. In the present case, the findings recorded by the Tribunal are correct as the Commissioner of Income-tax has not gone into and has not given any reason for observing that the order passed by the Assessing Officer was erroneous. The finding recorded by the Commissioner of Income-tax is that "order passed by the Assessing Officer may be erroneous". The Commissioner of Income-tax had doubts about the valuation and sale consideration received but the Commissioner of Income-tax should have examined the said aspect himself and given a finding that the order passed by the Assessing Officer was erroneous. He came to the conclusion and finding that the

Assessing Officer had examined the said aspect and accepted the respondent's computation figures but he had reservations. The Commissioner of Income-tax in the order has recorded that the consideration receivable was examined by the Assessing Officer but was not properly examined and, therefore, the assessment order is "erroneous". The said finding will be correct, if the Commissioner of Income-tax had examined and verified the said transaction himself and given a finding on the merits. As held above, a distinction must be drawn in the cases where the Assessing Officer does not conduct an enquiry ; as lack of enquiry by itself renders the order being erroneous and prejudicial to the interests of the Revenue and cases where the Assessing Officer conducts enquiry but finding recorded is erroneous and which is also prejudicial to the interests of the Revenue. In latter cases, the Commissioner of Income-tax has to examine the order of the Assessing Officer on the merits or the decision taken by the Assessing Officer on the merits and then hold and form an opinion on the merits that the order passed by the Assessing Officer is erroneous and prejudicial to the interests of the Revenue. In the second set of cases, the Commissioner of Income-tax cannot direct the Assessing Officer to conduct further enquiry to verify and find out whether the order passed is erroneous or not."

7. In the instant case, we find that the Id Commissioner of Income Tax has simply observed that the submission of the assessee needs verification. As per the provisions of section 263, the Id Commissioner of Income Tax could have either himself verified the submission of the assessee or could have got the submission of the assessee verified by other agencies and thereafter if he would have come to the conclusion that the order passed by the Assessing Officer in respect of the issue was actually erroneous then only he could have interfered with the order of the Assessing Officer. In the circumstances, we find that the order of the Id Commissioner of Income Tax in respect of this issue is bad in law and untenable. We, therefore, set aside the order of the Commissioner of Income Tax in respect of this issue.

8. In respect of second and third issue, mentioned herein above before us, Id A.R. of the assessee has candidly conceded that there was mistake in the order of the Assessing Officer. The only submission is that the error in the assessment order in respect of the said two issues could have been rectified by the Assessing Officer u/s.154 of the Act and, therefore, exercise of power u/s.263 of the Act was excessive.

9. We find that as per provisions of section 263 of the Act, the Id Commissioner of Income Tax can exercise the jurisdiction when he finds that the order of the Assessing officer is erroneous and prejudicial to the interests of the revenue. Nowhere, the said section provides that if the error is apparent then powers conferred u/s.263 upon the Commissioner of Income Tax cannot be exercised. Hence, we do not find any force in the above submission of the assessee. Therefore, the order of the Commissioner of Income Tax in respect of above two issues are confirmed and the related grounds of appeal of the assessee are dismissed.

10. In the result, the appeal filed by the assessee is partly allowed.

Order pronounced in the open court on /06/2017 in the presence of parties.

(Pavan Kumar Gadale)
JUDICIALMEMBER

(N.S Saini)
ACCOUNTANT MEMBER

Cuttack; Dated /06/2017
B.K.Parida, SPS

Copy of the Order forwarded to :

1. The Appellant : M/s. Orissa State Police Housing & Welfare Corporation Limited., Bhoi Nagar, Janapath, Bhubaneswar.
2. The Respondent. ACIT, Circle 2(2), Bhubaneswar
3. The CIT(A)
4. Pr.CIT, Bhubaneswar
5. DR, ITAT, Cuttack
6. Guard file.
//True Copy//

BY ORDER,

SR.PRIVATE SECRETARY
ITAT, Cuttack