

**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.09/CTK/2015**  
Assessment Year : 2010-2011

M/s. Aditya Earth Movers, At: Bijayachandrapur, Paradeep.	Vs.	CIT, Cuttack
PAN/GIR No. AAKFA 3612 N		
<b>(Appellant)</b>	..	<b>( Respondent)</b>

Assessee by : Shri S.K.Jena, AR  
Revenue by : Shri Kunal Singh, CIT DR

**Date of Hearing : 15/06/ 2017**  
**Date of Pronouncement : 27 /06/ 2017**

**ORDER**

**Per N.S.Saini, AM**

This is an appeal filed by the assessee against the order u/s.263 of the Act of CIT, Cuttack, dated 27.11.2014, for the assessment year 2010-2011.

2. The assessee has taken the following grounds:

"1. For that the impugned order u/s. 263 of the Act, to revise the assessment order passed u/s. 143 (3) of the Act, is mere change of opinion by the Ld. CIT, Cuttack Charge. For the reasons that the issue as regards to depreciation was subject matter in appeal before the First Appellate Authority and which merged the assessment order for the self same assessment year, further during the course of assessment the Ld. AO has examined the details thereafter passed the assessment order. Therefore the statutory revision power vested u/s. 263(1) Act has been

incorrectly exercised by the Ld. CIT, in order to make more disallowances thus impermissible under law.

2. For that despite books of accounts, bills and supporting documents were produced before the Ld.CIT during the course of proceeding u/s.263 of the Act, without verifying the same he simply directed the AO to examine the same and reframe the assessment order, which is absolutely impermissible under law. Thus the order of u/s263 is liable to be quashed.

3. For that the invocation of statutory revision power vested u/s. 263(1) of the Act by the Ld. CIT is not proper for the reasons that the assessment order passed u/s. 143(3) of the Act is neither erroneous nor prejudicial to the interest of revenue, therefore the order is lack of jurisdiction not permissible.”

3. Brief facts of the case are that the assessee firm derived income by hiring out its excavator/Rock breakers and supply of labour to the different organization. The assessee filed return of income for assessment year 2010-2011 on 13.10.2010 disclosing total income of Rs.73,733/-. The assessment was completed u/s.143(3) of the Act on 19.12.2012 determining the income of the assessee at Rs.2,83,130/-.

4. The CIT verified the assessment records for the impugned assessment year and observed from the audited profit and loss account for the year ended on 31.3.2010, as per the schedule of fixed assets as on 31.03.2010, assessee has claimed depreciation of Rs.16,44,301/-. Out of such fixed assets, assessee has claimed depreciation on KOBLO 210 Loader @12.5%, whereas depreciation @15% of the W.D.V is allowable as actual depreciation on such assets in general and half of allowable rate where the assets are put to use is less than 180 days during the previous year. He observed that this asset was purchased on 19.2.2010 which is less than 180 days used during the financial year 2009-2010 and, accordingly, depreciation of the block of asset was allowable @ 7.5% but it

has been allowed @ 12.5%. Hence, he concluded that excess depreciation on this vehicle amounting to Rs.2,48,010/- is liable to disallowed.

5. Further, he found from the audited accounts that the assessee has debited Rs.1,45,000/-, Rs.19,21,035/-, Rs.8,06,708/- towards expenses of mobilization expenses, oil and fuel, repair and maintenance, respectively. On verification of the ledger account of the expenses, he found that the following payments were made in cash other than by A/c payee cheque or A/c payee bank draft and thus, there was violation of provisions contained in section 40A(3) of the I.T.Act, 1961.

6. The CIT(A) noted that where the assessee makes payment in cash in a day exceeding Rs.20,000/- then same was to be disallowed u/s.40A(3) of the Act. Hence, the disallowance was required to be u/s.40A(3) of the Act , which was not examined by the Assessing Officer during the assessment proceedings.

7. He, therefore, concluded that for such facts, the order of assessment was apparently in error in not examining the aforesaid issues having direct impact on the computation of the assessable total income. He, therefore, held that the assessment order dated 19.12.2012 passed u/s.143(3) of the Act was erroneous and prejudicial to the interest of the revenue.

8. Being aggrieved by the said order, the assessee is in appeal before us.

9. Ld A.R. during the course of hearing submitted that the Assessing Officer has examined both the issues considered by the CIT in detail and thereafter passed an order u/s.143(3) of the Act. He referred to page 11 & 12 of PB filed before us and pointed out therefrom that the Assessing Officer has issued a questionnaire , wherein, he required the assessee to furnish the details of depreciation of Rs.16,44,301/- alongwith depreciation chart at point No.6 of the questionnaire. He further submitted that at Sl. No.9 of the questionnaire, the Assessing Officer required the assessee to submit the details of oil and fuel expenses of Rs.19,21,035/-, repair and maintenance of Rs.8,06,708/-, salary and wages of Rs.9,26,000/- and other expenses of Rs.3,90,521/- etc, with supporting documents. This shows that the Assessing Officer has examined the issues and thereafter being satisfied has allowed the deduction for the same.

10. The other arguments of Id A.R. was that the action u/s.263 of the Act was taken by the CIT(A) on the audit objection and, therefore, the order passed u/s.263 was bad in law. For this, he relied on the decision of Hon'ble P&H High Court in the case of CIT vs. Sohana Woolen Mills, 296 ITR 398 (P&H), wherein, it was held that where the CIT initiated proceeding u/s.263 of the Act on the strength of audit note, the same was bad in law.

11. On the other hand, Id D.R. argued that the assessee has claimed higher depreciation than that allowable under the Income Tax Act, which was allowed by the Assessing Officer without any discussion in the

assessment order. Further, the CIT also found that the assessee has made payments in cash in violation of provisions of section 40A(3) of the Act and there is no discussion in the assessment order about the same and, therefore, he held that the order passed by the Assessing Officer is erroneous as well as prejudicial to the interest of the revenue. He submitted that it is a settled law that where there is no application of mind by the Assessing officer, 263 proceedings can be invoked. He submitted that the assessee has argued that proceedings u/s.263 were initiated by the CIT on audit objection but has not produced any evidence to that effect. He argued that even if there is an audit objection and thereafter the CIT has applied his mind and after verification comes to his own conclusion that the order was erroneous and prejudicial to the interest of the revenue, he can exercise his power u/s.263 of the Act and direct the Assessing Officer to rectify the order.

12. We have heard the rival submissions and perused the orders of lower authorities and materials available on record. In the instant case, the CIT initiated proceedings u/s.263 of the Act after verifying the assessment records from where he found that the assessee was entitled to depreciation @ 15% on excavator/rock breakers as per the Income tax Act but it has claimed higher depreciation @ 25%, which was allowed by the Assessing officer without verification. The CIT also found that payment exceeding Rs.20,000/- in a day was made in cash by the assessee and the Assessing Officer without verification has allowed the same but the same was required

to be disallowed u/s.40A(3) of the Act. The contention of Id A.R. of the assessee is that during the course of assessment proceedings, the Assessing Officer verified all the details as per questionnaire issued by him and for this he referred to page 11 & 12 of the paper book. We find that in the assessment order, there is no discussion about the depreciation and payment made in cash by the Assessing Officer. Thus, it is a non-speaking order. Further, Id A.R. of the assessee on a query from the bench to show what was the reply and evidence filed by the assessee in response to the questionnaire issued by the Assessing Officer on 14.5.2012 placed at 11 and 12 of paper book, Id A.R. expressed his inability to produce the same. Thus, only from the questionnaire issued by the Assessing Officer to the assessee produced before us without the reply of the assessee to same, it cannot be concluded by us that the Assessing Officer had verified both the issues on which the Id CIT has exercised his jurisdiction u/s.143(3) of the Act. In these circumstances, the observations of the CIT is correct that the Assessing Officer has not verified these issues before passing the order u/s.263 of the Act and, therefore, was fully justified in invoking the provisions of section 263 of the Act.

13. The other arguments of Id A.R. of the assessee is that provisions of section 263 of the act was invoked by the CIT on an audit objection. However, he could not produce any evidence before us to show that proceedings u/s.263 of the Act were initiated by the CIT on the audit objection. Therefore, this plea of Id A.R. is un-substantiated and cannot be

accepted. Thus, we find no infirmity in the order of the CIT in passing order u/s.263 of the Act. Accordingly, we uphold the same and dismiss the grounds of appeal of the assessee.

14. In the result, the appeal filed by the assessee is dismissed.

Order pronounced in the open court on 27 /06/2017 in the presence of parties.

Sd/-

**(Pavan Kumar Gadale)**  
**JUDICIALMEMBER**

sd/-

**(N.S Saini)**  
**ACCOUNTANT MEMBER**

Cuttack; Dated 27 /06/2017  
B.K.Parida, SPS

**Copy of the Order forwarded to :**

1. The Appellant : M/s. Aditya Earth Movers,  
At: Bijayachandrapur, Paradeep.
2. The Respondent. CIT, Cuttack
3. The CIT(A), Cuttack
4. Pr.CIT,
5. DR, ITAT, Cuttack
6. Guard file.  
//True Copy//

BY ORDER,

SR.PRIVATE SECRETARY  
**ITAT, Cuttack**