

**आयकर अपीलीय अधिकरण, कटक न्यायपीठ, कटक**  
**IN THE INCOME TAX APPELLATE TRIBUNAL CUTTACK BENCH CUTTACK**  
**BEFORE SHRI N.S.SAINI, AM & SHRI PAVAN KUMAR GADALE, JM**

आयकर अपील सं./ITA No.395/CTK/2013  
(निर्धारण वर्ष / Assessment Year :2008-2009)

ACIT, Circle-2(1), Cuttack	Vs.	Paradip Port Trust, Paradeep, Jagatsinghpur
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : <b>AAALP 0055 A</b>		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

**AND**

आयकर अपील सं./ITA No.356/CTK/2013  
(निर्धारण वर्ष / Assessment Year :2009-2010)

ACIT, Circle-2(1), Cuttack	Vs.	Paradip Port Trust, Paradeep, Jagatsinghpur
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : <b>AAALP 0055 A</b>		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

**AND**

आयकर अपील सं./ITA No.332/CTK/2013  
(निर्धारण वर्ष / Assessment Year :2009-2010)

Paradip Port Trust, Paradeep, Jagatsinghpur	Vs.	ACIT, Circle-2(1), Cuttack
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : <b>AAALP 0055 A</b>		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

राजस्व की ओर से /Revenue by : Shri Kunal Singh, CIT DR  
निर्धारिती की ओर से /Assessee by : Shri J.M.Pattnaik, AR

सुनवाई की तारीख / Date of Hearing : **27/07/2017**  
घोषणा की तारीख/Date of Pronouncement **09/08/2017**

**आदेश / O R D E R**

**Per Shri Pavan Kumar Gadale, JM:**

Out of these three appeals, the revenue has filed two appeals i.e. ITA No.395/CTK/2013 for the assessment year 2008-09, against the order of CIT(A), Cuttack dated 27.03.2012 and ITA No.356/CTK/2013, against the order dated 29.3.2013, passed by the CIT(A), Cuttack for the assessment year 2009-2010, whereas the assessee has filed appeal i.e.

ITA No.332/CTK/2013, against the order dated 29.3.2013, passed by the CIT(A), Cuttack, for the assessment year 2009-2010.

2. Although the issues involved in these appeals are different, however, the facts in all the cases are same, therefore, for the sake of convenience, these three appeals are clubbed together, heard analogously and disposed off by this consolidated order. We shall take into consideration the facts mentioned in ITA No.395/CTK/2013, for deciding all the three appeals. The grounds raised by the revenue are as under :-

*01. Whether in the facts and circumstances of the case registration u/s.12A allowed to an assessee means an automatic exemption from the charge of income tax of all types of income of the assessee.*

*02. Whether the profit and gains of an assessee can be considered to have been accumulated for the purpose of genuine charity without a valid Resolution by the concerned trustee/members of a trust or an association in violation of Rule 17 of the I.T.Rules 1962*

*03. Whether the accounting infirmities and irregularities detected by the competent authorities i.e. C&AG of India would not make the declaration filed by the assessee regarding the correctness of the accounts for the purpose of claiming any exemption u/s.11 of the I.T.Act, 1961 as patently wrong.*

*04. Whether the amendment brought out by Finance Act, 2008 to the provision of section 2(15) of the I.T.Act 1961 can only be considered to be applicable for A/Y: 2009-10 onwards and not to be applicable for any past assessment years.*

*05. Whether in case of trust/AOP/Institution claiming to be engaged in charitable activities for the purpose of computation of its net income/utilization of the income for charitable purposes/accumulation of un-utilized income for future charitable purposes it is necessary to draw the receipts and expenses account of such entities/ organization/ trust on cash system of accounts and not on the basis of*

*6. Whether absolutely similar activities carried on by port trust right from the year 1963 can be lawfully considered as charitable till assessment year: 2008-09 and not charitable from assessment year: 2009-10 onwards.*

*07. As the issues on which additions had been made by the AO in the impugned assessment order for the A/Y:2008-09 are not identical with the order passed for the A/Y:2007-08, the new additions/disallowances should not have been deleted referring to the order passed on 20.05.2011 by the ITAT for the A/Y:2007-08.*

*08. Any other matter, if any, shall be urged at the time of hearing.*

3. Facts giving rise to all the three appeals are that the assessee is a local authority and running a major port at Paradeep and filed the return of income for the Assessment Year 2008-09 electronically on 29.09.2008 declaring total income of Rs.315,82,87,380/- and the return of income was processed u/s.143(1) of the Act. Subsequently, the assessee filed another return of income in ITR-7 and disclosed as Nil income after claiming exemption u/s.11 of the Act, whereas the return of income filed on 29.09.2009 was selected for scrutiny and notices u/s.143(2) & 142(1) of the Act were served, calling various details, accounts and explanations. In compliance, the Id. AR of the assessee appeared and filed the details and various issues were discussed, also produced books of accounts. The AO on perusal of the facts, dealt on the return of income filed in ITR-7 for the said assessment year at page 2 to 8 of the order but due to various observations has relied on the return of income filed on 29.9.2008 for assessment and dealt on the issues in respect of prior period expenses, employees contribution to CPF, stores adjustment, miscellaneous expenses and entertainment expenses and other expenses and the AO also discussed at length on the each disputed disallowances and made addition aggregating to Rs.85,44,97,425/- and assessed total income at

Rs.413,36,41,180/- and passed order u/s.143(3) of the Act dated 31.12.2010.

4. Aggrieved by the order of the AO, the assessee filed an appeal before the CIT(A). The Id. CIT(A) considered the grounds raised by the assessee on the disputed issue at page 3 and relied on the decision of the coordinate bench of the Tribunal in assessee's own case for the assessment year 2007-08 in ITA No.099/CTK/2011 and ITA No.114/CTK/2011, dated 20.05.2011. The Id. CIT(A) on perusal of the grounds raised in the present assessment year and the issues dealt earlier by the Tribunal are similar, accordingly, followed the order of the Tribunal and allowed the appeal of the assessee observing at para 6.1 & 6.2 of the order as under :-

*6.1 The issues in the assessment order dated 31.12.2010 for the AY 2008-09 are similar to the ones appearing in the assessment order for the AY 2007-08. The Hon'ble Madhya Pradesh High Court in Agrawal Warehousing and Leasing Ltd. Vs. CIT, 257 ITR 235 has held that the orders passed by the Tribunal are binding on all the tax authorities functioning under the jurisdiction of the Tribunal. While so holding, it followed the decision of Hon'ble Supreme Court in UOI Vs Kamlakshi Finance Corporation Ltd, AIR 1992 SC 711, 7112, which has ruled as thus :-*

*" The principles of judicial discipline require that the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities. The mere fact that the order of the appellate authority is not "acceptable" to the department - in itself an objectionable phrase - and is the subject matter of an appeal can furnish no ground for not following it unless its operation has been suspended by a competent court. If this healthy rule is not followed, the result will only be undue harassment to assesseees and chaos in administration of tax laws.*

*6.2 In view of the above legal principles, I follow the order of the Hon'ble ITAT, Cuttack Bench, in the case of the appellant for the immediate previous assessment year and allow the appeal.*

5. Aggrieved by the order of CIT(A), the revenue is in appeal before the Tribunal.
6. Before us, Id.DR submitted that the CIT(A) has erred in granting the relief relying on the decision of the coordinate bench of the Tribunal in assessee's own case of earlier assessment year and revenue was not satisfied with the order of the Tribunal has filed an appeal u/s.260A with the Hon'ble jurisdictional High Court. Further the CIT(A) has not given any finding on the grounds raised in respect of irregularities detected by the C&AG of India and the additions made by the AO in the impugned assessment year which are not identical to the assessment year 2007-08 and the CIT(A) erred in not verifying and comparing the facts has deleted the additions, which is not in accordance with law and prayed for restoration of order to the file of AO.
7. Contra, Id. AR relied on the orders of the CIT(A) and supported the arguments with the order passed by the coordinate bench of the Tribunal in assessee's own case.
8. We heard the rival submissions, perused the material on record and the judicial decisions. The Id. DR has vehemently argued on the grounds that the CIT(A) was not correct in deleting the additions made by the AO without verifying and relied only on the coordinate bench of the Tribunal in assessee's own case for earlier assessment year i.e. 2007-08. Ld. DR submitted that the assessee was granted 12A registration as per the statement made by the assessee in the assessment proceedings and the contention of Id. DR that the additions made in the current assessment year are not similar for earlier years, and the Id. DR drew our attention to

page 14 para 18 of the ITAT order wherein on the eligibility of exemption u/s.11 of the Act, which reads as under :-

18. *It is submitted by the learned AR of the assessee that the objects and working of the assessee-Trust are 'charitable' in nature in the light of judgment of Hon'ble Apex Court<sup>6</sup> rendered in the case of Gujarat Maritime Board [(2007) 295 ITR 562] wherein it was held that developing and maintaining of ports fall under the 'object of general public utility'. The activities carried out by the major ports of the country including the assessee-Trust are not business activities and are not guided by profit motive. They are all created and being run with the sole object of maintaining and developing the major ports in smooth and effective manner. The surplus which is being generated in the process of such activities is not appropriated by any person or authority and even by the Central Government, and it is totally ploughed back for development of the infrastructure facilities of the port. For immediate preceding year i.e. Assessment Year 2006-07, the Assessing Officer himself held in his assessment order dt.31.12.2008 that that the assessee-Trust is a 'charitable Trust' and accordingly granted exemption u/s 11 to the entire income of the assessee Trust. There being no change in same set of facts pointed out between the AYs 2006-07 and Assessment Year 2007-08, the Department cannot now suddenly turn back and consider the objects of the assessee to be not 'charitable institution'. In support of this plea, the learned AR of the assessee has placed reliance on the decision of Hon'ble Apex Court in the case of Radhsoami Satsang v. CIT (193 ITR 321) and Berger Paints India Ltd. v.CIT [2004] 266 ITR 99 (SC). Therefore, in the light of judgments relied on by the learned AR of the assessee more so the stand of the Department taken in the immediately preceding Assessment Year i.e., Assessment Year 2006-07 in the case of the same assessee on the same set of facts and circumstances, the view taken by the Department for the Assessment Year under consideration that the assessee has carried on activities of commercial nature is not at all sustainable for legal scrutiny and hence, we are of the considered view that the assessee is a charitable Institution not carrying any commercial activity disentitling itself for exemption u/s. 11 of the I.T.Act,1961. Accordingly, the issue raised by the assessee in this regard is decided in favour of the assessee by setting aside the findings of the authorities below.*

9. Ld. DR submitted that the order of the Tribunal in ITA No.099/CTK/2011 & ITA No.114/CTK/2011 was not accepted by the revenue and filed an appeal u/s.260A of the Act before the jurisdictional High Court of Orissa. We find the Tribunal is bound by the precedents of

its orders, therefore, we are of the opinion that though the revenue has filed appeal with the Hon'ble High Court, the Tribunal is bound by its order of precedence and we found as per the submissions of Id. DR grounds no.1, 2, 4, 5 & 6 have been considered by the coordinate bench of this Tribunal in ITA no.099/CTK/2011 & ITA No.114/CTK/2011, dated 10.5.2011. Further, Id. DR drew our attention to the grounds and the observations of the ITAT in the assessment year 2007-08, and further in the assessment year 2008-09 the CIT(A) has not dealt on the issues in respect of irregularities pointed out by the competent authority i.e. C&AG of India and the additions made by the AO for the said assessment years are not similar to earlier years and prayed for adjudicating of the issues. We have considered the apparent facts and material on record. Prima facie, we find as per the submissions of the Id. AR and Id. DR grounds of appeal No.1,2,3, 5 & 6 of the appeal for the impugned assessment year is similar to the assessee's appeal for assessment year 2007-08 and rely on the order of the coordinate bench of the Tribunal in ITA No.099/CTK/2011 and ITA No.114/CTK/2011, and, dismiss the above grounds of appeal of the revenue.

9.1 As far as ground No.3 & 7 raised by the revenue are concerned, we restore these grounds to the file of CIT(A) to adjudicate on merits and pass a speaking order and the assessee should be provided adequate opportunity of hearing before disposal of the appeal.

10. In the result, appeal of the revenue i.e. ITA No.395/CTK/2013 for A.Y.2008-2009 is allowed in part for statistical purposes.

**ITA No.356/CTK/2013 (Revenue's appeal for A.Y.2009-2010):**

11. The grounds raised in this appeal of revenue are as under :-

**01.(Prior period expenses):** *In the facts and circumstances of the case the Id.CIT(A) is not justified to restrict the addition made under the above head to Rs.1,11,96,858/- as the expenditure of the previous year - when the assessee failed to substantiate such expenses debited to the P&L a/c. of Rs.3,29,30,138/- relating to prior years expenses could be claimed in the current financial year i.e.2008-09, since the assessee regularly follow the mercantile system of accounting.*

**02.(Provision towards pension fund):** *Whether in the facts and circumstance of the case Id.CIT(A) is justified to delete the addition made by the AO in the impugned assessment order for provision towards Pension Fund for Rs.25,00,00,000 relying upon the decision passed by the Hon'ble ITAT for the same assessee for the A/Y:2007-08 - When the recognition of such pension fund was approved by the CIT w.e.f. 03.02.2009, since the trust was formalized through the trust deed executed on 03.02.2009 and the contribution was remitted by the assessee on 07.05.2008 prior to the grant of fund can not be allowed as deduction u/s.36(l)(iv) of the I.T.Act.*

**03.(Employer's contribution towards PF):** *Whether in the facts and circumstances of the case Id.CIT(A) is justified to delete the addition of Rs.20,86,903/- made by the AO on account of contribution towards such fund relying upon the decision passed by the Hon'ble ITAT for the A/Y:2007-08 - When the above Provident Fund has not ever been approved by the competent authority till date but, it is reported that application filed for the Provident Fund during year:2005-06. Since the assessee is not entitled to claim the contribution towards recognized PF, it not allowable u/s.36(l)(iv) of the Act.*

**04.( Interest accrued on investment on Capital Asset Replacement Reserve Fund and Development, Repayment of Loan and Contingencies Reserve Fund:)** *Whether in the facts and circumstances of the case, Id. CIT(A) is justified to rely upon the ratio of decision passed by the Hon'ble ITAT for the A/Y:2007-08 and to hold that interest on such funds are not in connection with the regular operation of the assessee, hence the addition of Rs.57 crores made by the AO deleted - When the AO specifically noticed on the notes of the accounts that interest earned on those funds directly credited to such fund's accounts without reflecting in the P&L a/c of the assessee as regular business activities resulting that income earned has not been offered for taxation.*

**05.( Non accountal of accrued income in the P&L a/c):** *Whether in the facts and circumstances of the case the Id.CIT(A) is justified*

*to reduce the addition made under this head from Rs.23,32,00,000 to Rs.12,65,18,000/- - When as per C&AG findings on account of defects and deficiencies in the P&L a/c ,assessee has quantified understatement of net surplus for the F/Y:2008-09 atRs.23.32 crores and assessee has offered net income of Rs.10,41,75,144 onlyfor taxation instead of actual amount of Rs.23.32 crores.*

*06.( **Capital expenditure claimed as revenue expenditure**) :In the facts and circumstance of the case, Id. CIT(A) is not justified to consider the( expenditures relating to capital expenses as revenue expenses of Rs.4,31,45,039/- - When during the assessment proceeding assessee failed to furnish any support of its claim as revenue expenses, only claiming such expenses inadvertently in the P&L a/c is not to be allowed as revenue expenditure.*

*07.( **Donations&Subscription**):In the facts and circumstances of the case, the Id.CIT(A) is not justified to delete the additions made on account of donation and subscription amounting to Rs.2,60,48,284/- - When the assessee failed to prove the nexus of the payments with the business activities .*

*08. In the facts and circumstances of the case, the Ld. CIT(A) is not justified to direct for allowance of depreciation at the higher rate @15% on Railways and Rolling Stock treating the same as "**Plant and Machinery**" as against depreciation of 10% allowed in the impugned assessment order treating the same as "**Building**". 09. Any other matter, if any, shall be urged at the time of hearing.*

12. Ground No.1 relates to restricting the addition made on prior period expenses.

12.1 Before us, Id. DR argued on first ground that the CIT(A) has erred in restricting the addition in respect of prior period expenses and the assessee has failed to substantiate its expenditure claimed related to earlier year and also financial statements are prepared based on mercantile system of accountancy.

12.2 Ld. AR submitted that the CIT(A) has dealt on the disallowances of prior period expenses on the four issues i.e. (i) compliance to audit objections of FY 2007-028, (ii) holding tax of Paradeep NSC for FY 2006-

07 & 2007-08, (iii) R&M of MCHP & (iv) excess provision of electricity charges, and perused Schedule -16 & 17 to the profit and loss account and also discussed on the remand report at page 2 of the order on the disputed issues and restricted the disallowance to Rs.1,11,96,858/-.

12.3 We heard the rival contentions and perused the record carefully and found that the finance and miscellaneous expenses relating to previous year has been shown by the assessee at Rs.1,55,81,270/- in Schedule-17 and in Schedule 16 it has been shown at Rs.43,84,412/-. We are of the opinion that the CIT(A) took a reasoned decision based on remand report in restricting the disallowance to Rs.1,11,96,858/-, which is in accordance with the accounting system and, accordingly, we are not inclined to interfere with the order of CIT(A) on this ground and uphold the same and dismiss the ground of appeal of revenue.

13. Ground No.2 is with regard to provision towards pension fund.

13.1 Ld. DR before us submitted that the assessee has not submitted the basis of quantification of the contribution towards pension fund of Rs.25 crores for the relevant accounting year. Ld. DR further submitted that any contribution to the pension fund made prior to 03.02.2009 cannot be allowed as a deduction u/s.36(1)(iv) of the Act, since the fund was formalized vide trust deed dated 03.02.2009 and the AO has rightly made the addition in this regard.

13.2 On the other hand, Id. AR of the assessee submitted that although the recognition to the fund was accorded by the CIT, Cuttack w.e.f.03.02.2009 but in second appeal, the Tribunal has directed that the

funds should be recognized from the date of application made by the assessee. Ld. AR further submitted that since the application was made during 2005-06, the recognition should be made from 2005-06.

13.3 We have heard rival contentions and perused the record carefully. The CIT(A) deleted the addition made by the AO in respect of provision for pension fund of Rs.25,00,00,000/- following the decision of coordinate bench of the Tribunal in assessee's own case. We perused the findings of the CIT(A) on the disputed issue where the assessee has made the provision of Rs.25 crores towards pension funds and was remitted to the pension fund accounts as per the schedule, whereas recognition of fund was granted by CIT on 3.2.2009. The Id. CIT(A) relied on coordinate bench decision in assessee's own case and allowed the grounds of appeal of the assessee and observed at para 7.3 page 5 as under :-

*"7.3 The Hon'ble ITAT, Cuttack Bench, Cuttack in the case of the appellant for the AY 2007-028 (ITA No.099/CTK/2011) held :*

*Now coming to the other aspect of claim of the assessee of Rs.40 crore and Rs.2,22,524/- to Pension Provision Fund and Contributory Provident Fund respectively, it is found that the disallowance was made on the ground that the 'funds' were yet to be recognized by the Commissioner of Income-tax. But it is made out by the assessee that the applications for recognition of the funds was pending before the CIT, Cuttack, for a long time without any fault on the part of the assessee and ultimately the CIT, Cuttack has given permission to those funds w.e.f. 03.02.2009. Therefore, the action of the CIT in grating the recognition to the said funds from 03.02.2009 is unfounded and hence, it is to be recognized from the date of application made by the assessee. Consequently for the current period also the fund recognition is applicable. Accordingly, the disallowance made by the Department is not sustainable under law and it is hereby directed to be deleted".*

*In view of the above order of the Hon'ble Tribunal, the addition of Rs.25,00,00,000/- made by the AO is deleted.*

We are of the substantive view that the order of CIT(A) on the disputed issue relied on the Tribunal decision and accordingly, we uphold the action of CIT(A) on this ground and dismiss this ground of appeal of revenue.

14. Third ground relates to employer's contribution towards provident fund.

14.1 Ld. DR before us submitted that the Id. CIT(A) has erred in deleting the addition of Rs.20,86,903/- on account of employer's contribution of provident fund relying on the decision of Tribunal in assessee's own case.

14.2 Ld. AR on the other hand, relied on the order of CIT(A).

14.3 We have heard rival contentions and found the CIT(A) has considered the findings of the AO and submission of Id. AR that recognition should be granted from assessment year 2005-06 and relied on the orders of the coordinate bench of the Tribunal and observed that the disputed issue is squarely covered in assessee's own case, and deleted the addition. We, considered the facts and submissions, are of the opinion that the CIT(A) has correctly dealt on the disputed issue based on the order of Tribunal. Accordingly, we uphold the action of CIT(A) on this ground and dismiss the ground of appeal of the revenue.

15. Ground No.4 relates to interest accrued on investment on capital asset replacement reserve fund and development repayment of loan and contingencies reserve fund.

15.1 Ld. DR before us submitted that the income from investments of different funds have been credited directly to respective fund accounts

and interest income so earned has not been credited to the profit and loss account and accordingly has not been offered as income for purpose of taxation. Therefore, the AO has rightly brought to tax the accrued interest on investments.

15.2 Ld. AR, on the other hand, relied on the order of CIT(A).

15.3 We have heard rival contentions and perused the record carefully and found that the Id. CIT(A) observed that interest on funds are in connection with the regular operations of the assessee and the AO observed as per the notes on accounts, the income from investment of funds are credited directly to the respective fund accounts and interest income is not credited to profit and loss accounts, whereas the assessee submitted that the funds were created as per specific directions of Govt. of India and the interest on the funds are utilised for specific development of Port and is not in connection with regular operation of the business. Ld. CIT(A) observed that the issue is squarely covered by the decision of the Tribunal in assessee's own case for assessment year 2007-08 in ITA No.099/CTK/2011 and ITA No.114/CTK/2011, observed at page 8 of the CIT(A) order, which reads as under:-

*“Considering the issue of treatment of Rs.42 crore being interest on investment on Capital Asset Replacement Reserve Fund and on investment on Development Repayment of Loan and Contingency Reserve Fund, as income of the assessee, it is found that these funds were created under the specific directions of the Govt. of India contained in its Memo No.GR-15024/7/93-PG, dated 16.6.1994 and No.P&F-25/78 dated 20.3.1978. As per the said directions, the interests on the funds along with the corpus therefore required to be utilized for the specific purposes of development of the Port and not in connection with the regular operations of the assessee. In that view of the matter, we are of the considered view that this is a diversion of the interest amounts at source and thereby the said interest amounts cannot be added to the revenue income*

*of the assessee. Hence, the contention taken by the department is not sustainable for legal scrutiny. Accordingly, the additions made by the Department are hereby directed to be deleted.”*

We found that this issue is settled by the coordinate bench of the Tribunal for the assessment year 2007-08 in assessee's own case and accordingly, we uphold the action of CIT(A) on this ground and dismiss the ground of revenue.

16. Ground No.5 relates to non-accountal of accrued income in the profit and loss account.

16.1 Ld. DR before us submitted that the assessee has not offered the actual income for taxation. As per the C&AG findings on account of defects and deficiencies in the profit and loss account, the assessee has quantified understatement of net surplus for F.Y.2008-09 is at Rs.23.32 crores and the assessee has offered for taxation at Rs.10,41,75,144/-. Therefore, the AO has rightly made the addition of Rs.23.32 crores.

16.2 Ld. AR for the assessee on the other hand, submitted that the assessee has already given effect in the computation statement on the audit observation of C&AG in respect of the AO's observation regarding non-accountal of income in the profit and loss account amounting to Rs.23.32 crores, however, the AO has again added the same to the total income.

16.3 We have heard rival contentions and perused the record carefully and found that the CIT(A) has reduced the addition made by AO to Rs.12,65,18,000/-, whereas Id. DR emphasized on the finding of C&AG on the defects and deficiencies in the profit and loss account, where the

assessee has quantified understatement of net surplus at Rs.23.32 crores and the assessee has actually offered net income of Rs.10,41,75,144/- only for taxation instead of Rs.23.32 crores. The CIT(A) found that the assessee has not properly made computation and observed at page 12 of the appellate order and restricted the addition to Rs.12,65,18,000/- and observed as under :-

*“In view of the above, there is no merit in the contention of the appellant in not taking into account the income understated of Rs.8,35,00,000/-; Rs.59,77,000/- & Rs.4,53,08,000/-. There is also no merit in the contention of the appellant in not taking into account the income overstated of Rs.82,67,000/-. The net addition to be made is determined at Rs.12,65,18,000/- (income understated of Rs.8,35,00,000 + Rs.59,77,000 + Rs.4,53,08,000 – income overstated of Rs.82,67,000). The addition of Rs.23,32,00,000/- made by the AO is thus reduced to Rs.12,65,18,000/-“*

We find the Id. CIT(A) has discussed the issue elaborately and also considered the explanation and took a reasonable view, therefore, we find no reason to interfere with the order of CIT(A) on this ground and uphold the same and dismiss the ground of appeal of the revenue.

17. Sixth ground relates to capital expenditure claimed as revenue expenditure.

17.1 Before us, the contention of Id. DR that the CIT(A) has erred in considering the expenditures relating to capital expenses as revenue expenses.

17.2 On the other hand, Id. AR relied on the order of CIT(A).

17.3 We heard rival contentions and perused the record carefully and found that the CIT(A) has observed that the work relates to operation at Balijhara, “MAC of Multibeam Survey”, “Electrification of Station” and

Design Engineer and details were submitted before the AO and CIT(A) observe that the AO had no material evidence while making the disallowance and deleted the addition. We are of the opinion that the assessee has submitted the details before the AO during the assessment proceeding as the expenditure incurred by the assessee is revenue in nature, which could not be controvert by the revenue even before us. Therefore, we find no reason to interfere with the order of CIT(A) on this ground and uphold the same and dismiss the ground of appeal of revenue.

18. Seventh ground relates to donations & subscription.

18.1 Before us, Id. DR submitted that the CIT(A) has erred in deleting the additions made on account of donations and subscriptions.

18.2 On the other hand, Id. AR relied on the order of CIT(A).

18.3 We heard rival contentions and perused the record carefully and found that the CIT(A) observed that the donations and subscriptions of Rs.3,11,029/- to Principal Paradeep College, Rs.2,37,37,255/- to Kendriya Vidyalaya, Paradeep and Rs.20,00,000/- to Chief Minister's Relief Fund for flood affected people of Odisha, are genuine business expenditure and deleted the addition. We find the assessee has produced the documents relating to donations and subscriptions with the AO and genuineness is not disputed and CIT(A) has deleted the addition. Accordingly, we do not see any reason to interfere with the order of the CIT(A) on this ground and uphold the same and dismiss the ground of appeal of the revenue.

19. The last ground raised by the revenue on the allowance of depreciation at higher rate @15% on railways and rolling stock treating the same as plant and machinery as against depreciation of 10% is allowed in the impugned assessment order.

19.1 Before us, Id. DR submitted that the railways and rolling stock should come under the head building qualifying for depreciation @10% and relied on the order of AO.

19.2 Contra, Id. AR for the assessee relied on the order of CIT(A).

19.3 We have heard rival contentions and perused the record carefully and found that the fixed assets serve some special purposes in the working of the assessee and should be treated as plant and machinery in the operating process of the assessee. The CIT(A) relied on the order of ITAT in assessee's own case and observed at page 16 para 16.3 of the order as under :-

*16.3 The Hon'ble ITAT.Cuttack Bench, Cuttack in the case of the appellant (ITA No.099/CTK/2011 for assessment year 2007-08 & ITA No.114/CTK/2011 for assessment year 2007-08) held:*

*"The assessee was denied of the higher rate of depreciation on the assets finding that they are not "plant & machinery". But as can be seen from the admitted facts and circumstances of the case, the fixed assets serve some special purpose of the working and thereby they are considered as "plant & machinery" in the working process of the assessee. This claim of the assessee is fortified by the decision of Hon'ble Supreme Court rendered in the case of CIT v. Dr. B.Venkatrao(243 ITR 82), CCI(Admn) v. Viswesarayya Iron & Steel Ltd.,Karnataka(199 ITR 98) and Kalinga Tubes Ltd. v. CIT (96 ITR 20). In the light of the dictums stated supra, the assessee's claim is substantiated and hence found entitled to higher rate of depreciation at 15% on the fixed assets as claimed by the assessee."*

*In view of the above order of the Hon'ble Tribunal the appellant is entitled to depreciation @15% on railways and rolling stock*

We are not inclined to interfere with the order of the CIT(A) on this ground and dismiss the ground of appeal of the revenue. Thus, appeal of the revenue is dismissed.

20. Now, we shall take appeal of the assessee i.e. ITA No.332/CTK/2013 for assessment year 2009-2010, wherein the assessee has raised the following grounds :-

*1 The orders passed by the lower authorities are arbitrary, erroneous, without proper reasons, invalid and bad in law.*

*2.(a). On the facts and in the circumstances of the case, the learned CIT(A) erred in upholding the action of A.O. by disallowing the net of prior period expenditure and income amounting to Rs.1.73 crores.*

*2.(b). On the facts and in the circumstances of the case, the learned CIT(A) erred in upholding the action of the A.O. by adding Rs.12.65 crores to the income of the appellant.*

*2.(c). On the facts and in the circumstances of the case, the learned CIT(A) erred in upholding the action of the A.O. by adding 25% of the total consumption of stores & spares of Rs.23.82 crores, which comes to Rs.5.76 crores.*

21. The first ground is on disallowance of net of prior period expenditure and income amounting to Rs.1.73 crores.

21.1 Before us, Id. AR for the assessee submitted that the restriction made by the CIT(A) is excess of expenses over income. Since the assessee is following the mercantile system of accounting, therefore, prayed for a reasonable reduction to the restriction made by the CIT(A).

21.2 Contra, Id. DR relied on the order of Assessing Officer.

21.3 We have heard rival contentions and perused the record carefully.

We find that the CIT(A) has dealt on the issue and restricted the disallowance, which Id. AR has agreed during the course of appellate

proceedings. In our opinion, the order of the CIT(A) on this issue is in accordance with law and the same cannot be interfered. Accordingly, we uphold the action of CIT(A) and dismiss this ground of appeal of the assessee.

22. The second ground relates to disallowance of Rs.12.65 crores.

22.1 Ld. AR for the assessee before us stated that the assessee has already given effect in the computation statement on the audit observation of C&AG in respect of AO's observation regarding non-accountal of income in the profit and loss account amounting to Rs.23.32 crores, however, the AO again added same to the total income of the assessee. The AR of the assessee further stated that in the revised return filed by the assessee the observation of the audit has been accepted and additional income has been offered for taxation.

22.2 Contra, Id. DR for the revenue relied on the order of lower authorities.

22.3 We heard rival contentions and perused the record carefully. Prima facie, we find that the AO found that as per the audit observations of C&AG, there are defects and deficiencies in the accounts which have affected the financial statements of the previous year in question i.e. F.Y.2008-09 including balance sheet and profit and loss account. The AO found that the assessee has offered a net income of Rs.10,41,75,144/- only for taxation instead of actual amount of Rs.23.32 cores and made addition of Rs.23.32 crores, whereas in the appellate proceedings the CIT(A) has discussed elaborately and considered the submission of Id.

AR and findings of the AO and reduced the addition to Rs.12,65,18,100/- and observed at para 12 of the order as under :-

*“In view of the above, there is no merit in the contention of the appellant in not taking into account the income understated of Rs.8,35,00,000/-; Rs.59,77,000/- & Rs.4,53,08,000/-. There is also no merit in the contention of the appellant in not taking into account the income overstated of Rs.82,67,000/-. The net addition to be made is determined at Rs.12,65,18,000/- (income understated of Rs.8,35,00,000 + Rs.59,77,000 + Rs.4,53,08,000 – income overstated of Rs.82,67,000). The addition of Rs.23,32,00,000/- made by the AO is thus reduced to Rs.12,65,18,000/-“*

We find the Id. CIT(A) on this disputed issue has dealt exhaustively and, took a reasonable view and accordingly, we uphold the action of CIT(A) on this ground and dismiss the ground of appeal of the assessee.

23. The last ground raised by the assessee that the CIT(A) erred in upholding the action of AO by adding 25% of the total consumption of stores and spares of Rs.23.82 crores, which comes to Rs.5.76 crores. The Ld. AR submitted that this ground is raised for the first time before the Tribunal. We found the assessee has to follow the due procedure in raising the ground and also this ground of appeal arose out of the assessment order and the Id. DR objected to the submissions of the assessee.

23.1 We heard the rival submissions and perused the material on record. Prima facie, this ground of appeal was not raised by the assessee before the CIT(A) and, adjudicating on this ground without providing proper opportunity to the AO is against the principle of natural justice and we rely on the decision of Hon'ble Supreme Court in the case of **National**

**Thermal Power Co. Ltd. vs Commissioner Of Income Tax 229 ITR 383**

**(SC)**, wherein it is held as under :-

*Held*

*Under section 254, the Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit. The power of the Tribunal in dealing with appeals is thus expressed in the widest possible terms. The purpose of the assessment proceedings before the taxing authorities is to assess correctly the tax liability of an assessee in accordance with law. If, for example, as a result of a judicial decision given while the appeal is pending before the Tribunal, it is found that a non-taxable item is taxed or a permissible deduction is denied, there is no reason why the assessee should be prevented from raising that question before the Tribunal for the first time, so long as the relevant facts are on record in respect of that item. There is no reason to restrict the power of the Tribunal under section 254 only to decide the grounds which arise from the order of the Commissioner (Appeals). Both the assessee as well as the department have a right to file an appeal/cross objections before the Tribunal. There is no reason why the Tribunal should be prevented from considering questions of law arising in assessment proceedings although not raised earlier.*

*The view that the Tribunal is confined only to issues arising out of the appeal before the Commissioner (Appeals) takes too narrow a view of the powers of the Tribunal. Undoubtedly, the Tribunal will have the discretion to allow or not allow a new ground to be raised. But where the Tribunal is only required to consider a question of law arising from the facts which are on record in the assessment proceedings there is no reason why such a question should not be allowed to be raised when it is necessary to consider that question in order to correctly assess the tax liability of an assessee.*

*In the instant case, therefore, the Tribunal had jurisdiction to examine a question of law which arose from the facts as found by the lower authorities and having a bearing on the tax liability of the assessee.*

**Note:** The case has been decided in favour of the assessee.

Respectfully following the decision of the Hon'ble Supreme Court we admit the ground raised by the assessee before us and remit the issue to the file of AO for fresh consideration and the assessee should be provided adequate opportunity of hearing before disposal of the order and the ground of appeal of the assessee is allowed for statistical purposes. Thus, appeal of the assessee is allowed partly for statistical purposes.

24. In the result, appeal of the revenue i.e. ITA No.395/CTK/2013 for A.Y.2008-2009 is allowed in part for statistical purposes and revenue's appeal i.e. ITA No.356/CTK/2013 for assessment year 20092010 is dismissed, and appeal of the assessee i.e. ITA No.332/CTK/2013 for assessment year 2009-2010 is allowed partly for statistical purposes.

Order pronounced in the open court on this 09/08/2017.

**Sd/-**

**(N. S. SAINI)**

लेखा सदस्य / ACCOUNTANT MEMBER

कटक Cuttack; दिनांक Dated 09/08/2017

प्र. कु. मि / PKM, Senior Private Secretary

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant-
2. प्रत्यर्थी / The Respondent-
3. आयकर आयुक्त(अपील) / The CIT(A),
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, कटक / DR, ITAT, Cuttack
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

**Sd/-**

**(PAVAN KUMAR GADALE)**

न्यायिक सदस्य / JUDICIAL MEMBER

आदेशानुसार BY ORDER,

**(Senior Private Secretary)**

आयकर अपीलीय अधिकरण, कटक / ITAT, Cuttack