

**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.216/CTK/2014

(निर्धारण वर्ष / Assessment Year :2009-2010)

M/s Odisha Power Generation Corporation Ltd., 7 <sup>th</sup> Floor, Fortune Tower, Bhubaneswar-751023	Vs.	CIT, Bhubaneswar,
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : <b>AAACO 1759 R</b>		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

निर्धारिती की ओर से /Assessee by : Shri Dillip Ku. Mohanty  
& Shri Bhagaban Panda, AR  
राजस्व की ओर से /Revenue by : Shri Kunal Singh, CITDR  
सुनवाई की तारीख / Date of Hearing : **09/08/2017**  
घोषणा की तारीख/Date of Pronouncement **29/08/2017**

**आदेश / O R D E R**

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

The assessee company has filed an appeal against the order of CIT, Bhubaneswar, passed u/s.263 of the Income Tax Act, 1961 for the assessment year 2009-2010, and has raised the following grounds of appeal :-

1. *For that the notice issued by the 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 24.03.2014 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 CIT has erred in invoking his jurisdiction under section 263 of the Act without satisfying the pre-conditions necessary for assumption of such jurisdiction & therefore the order U/s. 263 are liable to be set aside only on this ground.*
4. *For that the finding of the CIT in the order U /s. 263 in respect of the two issues/ grounds are nothing but a direction to the Ld. A.O. for substituting his own opinion with that of the Assessing Officer or for making a fishing and roving enquiry are not a case of erroneous order and nevertheless, it is prejudicial to the interest of revenue. The order*

*U/s.263 are bad in law, without jurisdiction and excess of jurisdiction and legally untenable.*

5. *For that when the department has examined the nature of transaction in the subsequent years and its nature remained unchanged. The department is not entitled to reopen the assessment based on the pretext of dubbing them as erroneous and as such the present order u/s. 263 without any clear finding are liable to be set aside.*
6. *For that the CIT has erred in setting aside and restored to the file of the Ld' AO with a direction to re-examine the issue with reference to the facts of the case and judicial decision of the issue proves beyond that the order has neither erroneous nor prejudicial to the interest of revenue and therefore the order u/s. 263 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 CIT has erred in law with regard to the second issue is concerned, ordering that since on the 1<sup>st</sup> issue is set aside, the A.O. is directed to re-examine this issue also in course of the fresh assessment, which are nothing but ex facie illegal, excessive to invoke the provision of Section 263.*
8. *For that the appellant craves leave to add to supplement modify the grounds herein above before or at the time of hearing of the appeal.*

2. Although the assessee company has raised eight grounds of appeal in number, however, the sole substantive ground raised by the assessee is that the proceedings and order passed by the CIT u/s.263 of the Act is bad in law.

3. Brief facts of the case are that the assessee company is a Govt. of Odisha Undertaking engaged in the business of generation and sale of power and filed the return of income electronically for the assessment year 2009-2010 on 29.9.2009, with total income at Nil. Subsequently, the assessee filed a revised return of income on 7.5.2010 disclosing total income of Rs.62,94,53,484/- and the assessment was completed u/s.143(3) of the Act dated 29.12.2011 computing total income of Rs.67,66,83,890/-.

4. After completion of assessment u/s.143(3) of the Act, the CIT under revisionary powers u/s.263(1) of the Act called for the assessment records

and found that the assessment framed by the AO is erroneous and prejudicial to the interest of revenue and issued show cause notice dated 6.2.2014 to the assessee with a direction to explain as to why the assessment order passed by the AO for A.Y.2009-10 should not be cancelled/modified u/s.263 of the Act. In response the, Id. AR of the assessee appeared and submitted a written submissions referred at para 4 page 2 of the order. Ld. CIT was not satisfied with the submissions of assessee and observed that the AO has not examined or ignored whether the claim of expenditure is capital or revenue because of enduring benefit and in the annual report the of C&AG of India has observed on expenses referred at para 5 of the order and Id. CIT found the expenditure as perpetual benefit and restored the disputed issue to the AO for re-examination with facts and judicial decisions and on the second disputed issue the CIT observed that the liability so created by the assessee does not satisfy the criteria of Accounting Standard (AS-29) and whether such liability is ascertained or unascertained liability and lacks the degree of measurement, accordingly, directed to AO to verify in the fresh assessment proceedings and passed order u/s.263 of the Act, dated 24.3.2014.

5. Against the order of Id. CIT passed under Section 263 of the Act, assessee has filed an appeal before the Tribunal. Before us, Id. AR of the assessee submitted that the order passed by the CIT u/s.263 of the Act is without application of mind as there has been absolutely no issue and much less prejudicial to the interest of revenue. Ld. AR of the assessee

further submitted that the two pre-conditions necessary to invoke the provisions of Section 263 of the Act do not exist in the present case and also expenditure debited to the profit and loss account in the financial year 2008-09 for upgradation of Controller with advanced technology have been subsequently capitalized in the financial year 2009-10 and the tax liability has been discharged by the assessee for A.Y.20010-2011 and placed reliance on the judicial decisions and prayed for allowing the appeal.

6. Contra, Id. DR for the revenue submitted that the expenditure incurred by the assessee is the nature of long term benefit for the future years and is capital in nature, which should be added to the total income of the assessee. Further, Id. DR submitted that the AO has not examined as to whether the claim of expenditure is capital or revenue though it was mentioned in the annual report the C&AG of India on existence and prayed to sustain the order of CIT.

7. We heard rival contentions and perused the material on record. In the instant case, the CIT observed that the assessee has debited the disputed amount of Rs.1.65 crore to profit and loss account for F.Y.2008-09 relevant to A.Y.2009-2010 which was subsequently rectified by crediting the said amount to the profit and loss account for the financial year 2009-10 relevant to the assessment year 2010-2011. The CIT further observed that when the assessee has claimed deduction of expenditure u/s.37(1) of the Act, the AO ought to have conducted an enquiry as to whether the assessee has satisfied all the requirement of the provisions,

therefore, the CIT has restored the matter to the file of AO to re-examine the issue with reference to the facts of the case and judicial decisions on the issue. Secondly, the assessee has created a provision and require verification of facts whether such liability is ascertained liability or unascertained liability and the assessee has not filed these. The basis on which such a provision was created is not ascertainable from the records. Further, on perusal of provisions and guidelines of Accounting Standard (As-29) of the ICAI "provisions contingent liabilities and contingent assets is a liability which can be measured only by using a substantial degree of estimation. A liability is a present obligation of the enterprise arising from past events, the settlement of which is expected to result in an outflow for the enterprise of resources embodying economic benefit. The liability so created fails to the criteria of accounting standard (AS-29) as the estimation lacks the degree of measurement." Such provisions cannot be allowed u/s.37 of the I.T.Act. The expenditure should not have been allowed by the AO as revenue expenditure for the assessment year under consideration. In the instant case, the provision for variable pay was made for the first time in the FY 2008-09 relevant to AY 2009-10. The basis on which such a provision has been made has not been examined by the AO in course of assessment proceedings. We would like to place reliance on the decision of Hon'ble Allahabad High Court in the case of CIT Vs. Bhagwan Das, 272 ITR 367, wherein it is held as under :-

**HELD**

*It was found that in the assessment order, there was no discussion regarding the question as to whether the amount of income shown by the assessee which was being claimed to be exempt, had*

*actually been earned by him or not and, further, whether the entire amount of income from agriculture and poultry farming was exempt from tax. The Commissioner had rightly initiated proceedings under section 263 as exemption had been granted without any application of mind. [Para 4]*

*An order, which has been passed without application of mind, will fall under the expression 'erroneous and prejudicial to the interest of the revenue'. Since the ITO had granted exemption to the assessee in respect of income from agriculture and poultry farming without any discussion and without any application of mind, the Tribunal had committed error in holding that the assessment order, insofar as it granted exemption to income from agriculture and poultry farming, was not erroneous or prejudicial to the interests of the revenue. [Para 5]*

We rely on the judicial decisions and fact discussed above and accordingly, we see no reason to interfere in the just and proper order passed by the CIT u/s.263 of the Act and the same is hereby upheld.

8. In the result, appeal of the assessee is dismissed.

Order pronounced in the open court on this 29/08/2017.

**Sd/-**  
**(N. S. SAINI)**

लेखा सदस्य / ACCOUNTANT MEMBER

**Sd/-**  
**(PAVAN KUMAR GADALE)**

न्यायिक सदस्य / JUDICIAL MEMBER

कटक Cuttack; दिनांक Dated 29/08/2017

प्र.कु.मि/PKM, Senior Private Secretary

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

1. अपीलार्थी / The Appellant-  
M/s Odisha Power Generation Corporation Ltd.,  
7<sup>th</sup> Floor, Fortune Tower, Bhubaneswar-751023
2. प्रत्यर्थी / The Respondent-  
CIT, Bhubaneswar
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.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

**(Senior Private  
Secretary)**

आयकर अपीलीय अधिकरण, कटक / ITAT, Cuttack