<u>आयकर अपीलीय अधिकरण, कटक न्यायपीठ, कटक</u>

IN THE INCOME TAX APPELLATE TRIBUNAL CUTTACK BENCH, CUTTACK

BEFORE SHRI C.M. GARG, JM & SHRI MANISH BORAD, AM

आयकर अपील सं./ITA No.141/CTK/2020

(**निर्धारण वर्ष /** Assessment Year :2015-2016)

Mahanadi Coalfields Limited, Jagruti Vihar, Burla, Sambalpur-768020	Vs	Pr.CIT, Sambalpur
PAN No. : **AABCM 5188 P**		

(अपीलार्थी **/Appellant**)	..	(प्रत्यर्थी / **Respondent**)

निर्धारिती **की ओर से** /Assessee by	:	Shri S.S.Poddar, AR
राजस्व **की ओर से** /Revenue by	:	Shri M.K.Gautam, CITDR

सुनवाई की तारीख **/ Date of Hearing**	:	29/10/2021
घोषणा की तारीख**/Date of Pronouncement**	:	10/12/2021

<u>आदेश / O R D E R</u>

<u>Per Bench</u>:

This appeal is filed by the assessee against the order passed by the Pr.CIT, Sambalpur, u/s.263 of the Act, dated 21.04.2020 for the assessment year 2015-2016, on the following grounds :-

1. *That the notice issued and order passed U/s.263 of the Income Tax Act, 1961 (Act) by the Learned Principal Commissioner of Income Tax, Sambalpur (Pr. CIT) is unjustified, arbitrary, excessive, contrary to evidences and bad in law.*

2. *That having regard to the facts and circumstances of the case, Pr. CIT has erred in law and in facts in assuming jurisdiction in issuing the notice and passing the order u/s.263 of the Act, more so when the assessment order passed u/s.143(3) of the act is neither erroneous nor prejudicial to the interest of the Revenue.*

3. *That having regard to the facts and circumstances of the case, Pr. CIT has further erred in law and in facts in assuming jurisdiction in issuing the notice and passing the order u/s.263 of the Act, as the subject matter of proceedings u/s.263 of the Act were duly considered by the Ld. Assessing officer during the course of assessment proceedings and the assessment order was passed after making all the enquiries and verification and with due application of mind.*

4. *That having regard to the facts and circumstances of the case, Pr. CIT has further erred in law and in facts in assuming jurisdiction in issuing the notice and passing the order u/s.263 of the Act, as the relevant issues were disposed off by the Commissioner of Income Tax (Appeals) and subsequently the Departmental Appeal has also been dismissed by ITAT, Cuttack Bench, Cuttack.*

5. *That the Pr. CIT would not have assumed jurisdiction in issuing notice and passing the order u/s.263 of the Ac, as the assessment order passed u/s.143(3) of the act is neither erroneous, nor prejudicial to the interest of the Revenue.*

6. *That the appellant craves leave to add, amend or alter the grounds of appeal before or at the time of hearing of appeal.*

2. Facts in brief are that the assessee is a mini-ratna public undertaking company engaged in the extraction and sale of coal. It filed the return of income on 27.11.2015 showing total income at Rs.50,95,39,40,710/-. Subsequently, the case was taken for scrutiny and assessment was completed u/s.143(3) of the Act on 31.12.2017 assessing the total income at Rs.7,893.229 crores.

3. Subsequently, the ld Pr. CIT called for the assessment record for the assessment year 2015-16 by virtue of powers conferred on him u/s.263 of the Act and examined the record. Ld Pr. CIT noticed that the Assessing Officer had initially disallowed 99% of the expenditure claimed under the head “over burden removal adjustment” in short OBR in its profit and loss account for the financial year 2014-15, which was subsequently rectified vide order u/s.154 of the Act dated 31.1.2018 to disallow 90% of the claimed expenditure. An amount of Rs.2123.53 crores debited in P&L account on account of OBR was only a long term provision as no actual

expenditure was incurred. Hence, provision on account of OBR cannot be allowed.

4. Similarly, Ld. Pr. CIT noticed that the assessee company had debited a sum of Rs.73.81 crores under sub-head " rehabilitation charges" debited to "other expenses" . The Coal India Ltd., in its board's meeting on 12.2.2004 passed a resolution to charge Rs.6 per ton of coal dispatched as contribution of rehabilitation expenses and to create a corpus of Rs.395 crores per year for rehabilitation of two loss making subsidiaries i.e. Eastern Coalfield ltd.,(ECL) and Bharat Coking Coal Ltd (BCCL). Accordingly, a decision was taken to charge additional levy of Rs.6 per ton of dispatch of coal from all subsidiaries of CIL expect ECL and BCCL in the process. Therefore, the assessee company has contributed Rs.73.81 crores towards rehabilitation charges during F.Y. 2014-15. The payment of Rs.CIL for rehabilitation of its two subsidiaries has nothing to do with assessee company's own business. Since, the AO has allowed the same in the order u/s.143(3) of the Act, thereby, prima facie making the order erroneous and prejudicial to the interest of the revenue. Further, Ld. Pr. CIT noticed that the assessee had claimed expenses of Rs.0.74 crore under the sub-head "loss on sale/discard/surveyed of assets" under the broad head "other expenditure". The Assessing Officer has allowed the claim of expenses without examining the fact that there is no provision in the Act to allow any loss incurred on "loss/discard/surveyed off asset" as such amount represents capital loss but not revenue loss. Therefore, the allowance of

loss by the AO makes the assessment order erroneous and prejudicial to the interest of the revenue.

5. In view of above, ld Pr. CIT issued a show cause notice u/s.263 of the Act to explain as to why the assessment order passed under section 143(3) of the Act on 31.12.2017 should not be cancelled or modified. After receiving the reply from the assessee, the Pr. CIT set aside the assessment order dated 31.12.2017 and directed the AO for conducting enquiry/verification of the issues and make fresh assessment order by making additions on the above three issues alongwith the additions made in the assessment order u/s.143 of the Act.

6. Against the revisonary order, the assessee is in appeal before the Tribunal.

7. At the time of hearing, ld A.R. of the assessee submitted that the Pr. CIT passed the order u/s.263 in a hasty manner without considering the submission of the assessee in proper factual or legal perspective. Ld A.R. submitted that against the order of the department for the year under consideration in allowing partial relief by the ld, CIT(A), the Tribunal has endorsed the findings of the ld CIT(A) in the matter of addition under the head “over burden removal expenses” vide order dtd 24.9.2019. Further to substantiate its claim, written submission has been filed on behalf of the assessee, which read as under :-

> *a. That the appellant is a Public Sector undertaking company, a wholly owned subsidiary of Coal India Limited, a company which is owned by President of India. The appellant company was formed on 03-04-1992 by taking over all the assets and liabilities of Southern Eastern Coalfields Limited in the state of Orissa. That*

being a public sector enterprise the appellant company is under the direct control of Government of India and day to day affairs are subject to well defined policy guidelines. Further, well defined and tested Internal Control & Check are at place. There is a well defined process for estimation, budget and approval for each & every expenditure. The accounting system is also as per the laid down system, policy, process and guidelines. The accounts are subject to internal audit, statutory audit and audit by Comptroller & Audit General of India.

b. That the appellant filed its Return of Income on 27.11.2015 vide acknowledgement no. 893879181271115 showing total income of 5,09,539.40 Lacs and claimed a refund of 3,131.07 Lacs. A copy of Computation of Income and Acknowledgement of Income Tax Return filed are placed at Page No.334- 335 & 333 of the P IB respectively.

c. That the Return was selected for scrutiny and the assessment U/s. 143(3) of the 1. T. Act, 1961 was completed vide order dated 31.12.2017 in which the total income was assessed at 7,83,922.90 Lacs by making huge additions/ disallowances resulting into raising of further tax demand of 1,96,731.21 Lacs including interest u/s.234B Rs.30,349.27 Lacs and Tax/ Interest on distributed profit Rs.74,414.46 Lacs. A copy Assessment Order is placed at Page No.301-329 of the P/B.

d. Subsequently, vide order u/s.154/143(3) dated 31.01.2018 the assessed income was reduced to 7,70,211 Lacs and demand was reduced to Rs.113676.70 Lacs due to rectification of certain mistakes apparent from the record. A copy of the order passed u/s.154 of the Income Tax Act, 1961 is placed at Page No.330-332 of the P/B.

e. That being aggrieved the appellant company filed an appeal before the Hon'ble CIT (A), Sambalpur. The Hon'ble CIT (A) was kind enough in deleting majority of the additions vide order dated 28/03/2018. A photocopy of the order is placed at Page No.263-300 of the P/B.

f. That the Income Tax Department preferred an appeal before the Hon'ble ITAT, Cuttack Bench, Cuttack in the matter of relief allowed by the CIT(A). The Bench was kind enough in dismissing the appeal filed by the Department. A photocopy of the order dated 24/09/2019 is placed at Page No.224-233 of the P/B.

g. That the appellant also preferred appeal on rest of the disputed issues before the Hon'ble ITAT, Cuttack Bench, Cuttack. The Bench was kind enough in allowing substantial relief. A photocopy of the order dated 05/06/2020 is placed at Page NO.173-223 of the P/B.

11. FACTS OF THE CASE:

a. That in the meantime the Hon'ble Pr. CIT, Sambalpur issued a show cause notice u/s.263 of the Income Tax Act, 1961 on 30/08/2019 to explain why the following expenditures allowed by

Ld. AO u/s.143(3) of the LT. Act, 1961 vide order dated 31/12/2017 should not be considered as erroneous and prejudicial to the interest of Revenue:

i. Allow ability of Over Burden Removal (OBR) expenses - { 21.23 Crares;
ii. Expenses of {73.81 Crares under the head "Rehabilitation Charges";

iii. Expenses under head "Loss on Sale/Discard/Surveyed of Assets".

A photocopy of the Show Cause Notice is placed at Page NO.29-40 of the P/B.

b. That in response to the show cause notice the appellant filed a detailed submission, a copy of which is placed at Page No.41-172 of the P/B. The Hon'ble Pr. CIT passed an order u/s.263 of the Income Tax Act, 1961 treating the assessment order passed by the Ld. AO u/s.143(3) of the Income Tax Act, 1961 erroneous and prejudicial to the interest of the revenue and set aside the above issues to the file of Ld. AO to decide the issue afresh. A copy of the Order dated 21/04/2020 is placed at Page NO.1-28 of the P/B.

c. That the order u/s.263 was passed on 21/04/2020 in a haste without considering the submission of the appellant in proper factual or legal perspective and irrespective of the fact that Hon'ble ITAT had already dismissed the departmental appeal for the year under consideration in the matter of the addition under the head Over Burden Removal Expenses and others vide its order dated 24/09/2019.

d. The Ld. AO has duly verified the alleged expenditures. To verify the nature of expenditure and it's admissibility the AO issued following notices from time to time and only after considering the submissions of the appellant and being satisfied passed the assessment order: -
(i) Notice dated 5.5.2017:

Question No.9: It is noticed that you have claimed 2,123.53 Crores as Over Burden Removal Adjustment. Please state why in valuing the closing stock, the proportionate adjustment of Over Burden Removable expenses not made.

Question No. 14: Please give details and justification of the following expenses:

F. Loss on sale/ Discard/ Surveyed of Assets 0.74 Crores,
G. Rehabilitation Charges 73.81 Crores.
A copy of the Notice and submission thereto are placed at Page No.251-253 and 254-262 of the P /B respectively.

(ii) Notice dated 24th November:

Question No. 1: Please submit the statement of OBR Adjustment for the financial year 2014-15 in the following format:

You are also show caused as to why the cost of OBR should not be included as the cost of closing stock of production of coal.

Question No. 6: Please explain the exact nature of the expenditure involved in Over Burden Removable. Also justify as to why Over Burden Removable expenses of 2,123.53 Cr. should not be treated as Capital Expenditure and disallowed accordingly.

A copy of the Notice and submission thereto are placed at Page No.241-243 and 244-250 of the P/B respectively.

Ill. Initiation of proceedings U/s.263 of the Income Tax act, 1961- Provisions of the section are not applicable to the facts and circumstances of the present case:
a. That in light of the above facts it will be pertinent to analyze the provisions of section 263 of the LT. Act, 1961, as under:

"263(1) The Principal Commissioner or Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the Assessing Officer is erroneous in so far as it is prejudicial to the interest of the revenue, he may, after giving the Appellant an opportunity "

In this regard it is submitted that the power of suomotu revision under Sub-section (1) of Section 263 of the Act, 1961, is in the nature of supervisory jurisdiction and can be exercised only if the two circumstances specified therein must exist:

(i) The order should be erroneous; and
(ii) By virtue of the order being erroneous prejudice must have been caused to the interests of the Revenue.

An order cannot be termed as erroneous unless it is not in accordance with law. If the AO is acting in accordance with law makes certain assessment, the same cannot be termed as erroneous simply because the order should have decided otherwise and could have raised demand. This section does not visualize a case of substitution of another view over the view of the AO unless the decision is held to be erroneous. Cases may be visualized where the AO while making an assessment examines the accounts, makes enquires, applies his mind to the facts and circumstances of the case and determines the income either by accepting the accounts or by making some estimates himself. The CIT, on perusal of the records, may be of the opinion that certain expenditures might not have been allowed. But that by itself does not simply mean to be the order of the AO is erroneous. It may be said in such a case that in the opinion of the CIT the order in question is prejudicial to the interests of the Revenue.

The expressions "erroneous" means "involving error; deviating from the law". "Erroneous assessment" refers to an assessment that deviates from the law and is therefore, invalid, and is a defect that is jurisdictional in its nature, and does not refer to the judgement of the Assessing Officer in fixing the amount of disallowance. Similarly, "erroneous judgement" means "one rendered according to course and practice of court, but contrary to law, upon mistaken view of law; or upon erroneous application of legal principles" - Hindustan Construction Co. Ltd. v. Dy. CIT [2008] 25 SOT 359 (Mum.)An order cannot be termed as erroneous unless it is not in accordance with law. If the AO is acting in accordance with law makes a certain assessment, the same cannot be branded as erroneous simply because certain expenditure would have been disallowed.

As observed by Hon'ble Calcutta High Court in the case of Dawjee Dadabhoy and Co. vs. S. P. Jain reported in 31 ITR 872 "the words 'prejudicial to the interests of the Revenue have not been defined, but it must mean that the orders of assessment challenged are such as are not in accordance with law, in consequence whereof the lawful revenue due to the State has not been realized or cannot be realized. It can mean nothing else." The aforesaid observations were also applied by the Gujarat High Court in Addl.CIT v. Mukur Corporation [1978] 111 ITR 312.

Further, every erroneous order cannot be the subject-matter of revision, there must be some prima facie material on record to show that tax which was lawfully exigible has not been imposed or that by the application of the relevant statue, on an incorrect or incomplete interpretation, a lesser tax than what was just been imposed.

In support of our contention your honour may kindly take note of the following judgements:
- CIT v Gabriel India Ltd [1973] 203 ITR 108 (Bom).
- Dhruv N Shah V DCIT [2005] 273 ITR (Bom. Trib.)
Further, in the case CIT v. Sunbeam Auto Ltd. [2009] 289 Taxman 436 (Delhi) (HC), the Court is of the view that "If no inquiry at all was made by the AO at the time of assessment only then section 263 invokable."

b. Further, it will be pertinent to take note of the Explanation-2 to the section 263(1) inserted w.e.f. 01/06/2015 as reproduced below:

"For the purposes of this section/ it is hereby declared that an order passed by the Assessing Officer shall be deemed to be erroneous in so far as it is prejudicial to the interests of the revenue/ it/ in the opinion of the Principal Commissioner or Commissioner: '
(a) The order is passed without making inquiries or verification which should have been made;

(b) The order is passed allowing any relief without inquiring into the claim;

(c) The order has not been made in accordance with any order, direction or instruction issued by the Board under section 119; or

(d) The order has not been passed in accordance with any decision which is prejudicial to the appellant, rendered by the jurisdictional High Court or Supreme Court in the case of the appellant or any other person.

These prescribed conditions vis-a-vis the factual position in the present case may be summarized as under:

Sl.No	*Conditions/Circumstances*	*Factual Position*
1.	*the order is passed without making inquiries or verification which should have been made*	*It is crystal clear from our submission above that order was passed after making all inquiries and verification which should have been made.*
2.	*the order is passed allowing any relief without inquiring into the claim*	*Not Applicable.*
3.	*the order has not been made in accordance with any order, direction or instruction issued by the Board under section 119; or*	*Not Applicable.*
4.	*the order has not been passed in accordance with any decision which is prejudicial to the appellant, rendered by the jurisdictional High Court or Supreme Court in the case of the appellant or any other person*	*The decisions referred to in the show Cause Notice are not applicable to fact & circumstances of the case and clearly distinguishable. Moreover, some of the decisions cited by the Pr.CIT are passed by other than jurisdictional High Court.*

Hence, for the purpose of section 263 of the Income Tax Act, 1961, the relevant order passed by the Assessing Officer is not erroneous and prejudicial to the interests of the revenue.

IV. Explanation in respect of relevant additions:

Without prejudice to above we do here by submit as under:

i) Allowability of Over Burden Removal (OBR) expenses – Rs.21.23 Crores.

a. It is reiterated that the issue has already been considered by the Hon'ble CIT (A) and he was kind enough in allowing the full expenditure of Rs.2102.30 crores although the Ld. AO had allowed only Rs.21.23 crores.
b. That sub section (1) of section 263 of the Income Tax Act, 1961 empowers the Principal Commissioner or the Commissioner to call for and examine the record of any proceeding and revise the same if he considers that the order passed therein by the Assessing Officer was erroneous insofar as it is prejudicial to the interest of the Revenue.

Moreover, the Hon'ble Apex Court in the case of CIT v. Jayakumar B. Patii [1999J 236 ITR 469 (SC) and CIT v. Shri Arbuda Mills Ltd. [1998]231 ITR 50, has held that the Commissioner has jurisdiction and powers to initiate proceedings under section 263 in respect of issues not touched by the Commissioner (Appeals) in his appellate order.

Clause (c) of Explanation 1 of sub- section (1) provides that for removal of doubts it is hereby declared that, for the purpose of the said sub-section,- "(c) where any order referred to in this sub-section and passed by the Assessing Officer had been the subject matter of any appeal [filed on or before or after the 1st day of June, 1988], the powers of the [Principal Commissioner or] Commissioner under this sub-section shall extend [and shall be deemed always to have extended] to such matters as had not been considered and decided in such appeal.]"

The aforesaid explanation clearly spells out that the power of revision of order prejudicial to revenue extends only to such matters of an assessment order which are not considered and decided during appellate proceedings. This particular issue of Over Burden Removal (OBR) expenses has already been considered by the Hon'ble CIT (A) accordingly that relevant portion of the assessment order get merged with the order of CIT (A) and hence, the provisions of section 263 of the Income Tax Act, 1961 are not applicable to this particular issue.

a. Moreover, the departmental appeals in the above matter for all earlier years have already been dismissed. More specifically the departmental appeal before the ITAT in the aforesaid matter for the assessment year under consideration is also dismissed.

b. Without prejudice to our submission above, it is respectfully submitted that the said expenditure was incurred wholly & exclusively for the purpose of the business of the appellant and thus the same is an admissible expense.

c. That similar disallowance was made during the A.Y. 2010-11, 2011-12, 2012-13, 2013-14 and 2014-15 in the case of the appellant. On appeal, CIT (A) has deleted the total addition in this respect and allowed full relief to the appellant. Copy of the relevant pages of appellate order for AY 2014-15 may be referred to at Page No.150-154 of the PIB and in a recent order dated 20.03.2018, Hon'ble Bench have dismissed the departmental appeals for the above assessment years on this issue. Copy of the relevant pages of order may be referred to at Page NO.155- 159 of the P/B.

d. Moreover, as stated above in a very recent order dated 24/09/2019 Hon'ble Bench, in case of appellant itself has dismissed the departmental appeal for the AY 2015-16 on this issue. A photocopy of the order is placed at Page No. 224-233 of the P lB.

e. That the Ld. Pr. CIT, Sambalpur has referred to certain judicial pronouncements:

i. Rotork Controls India (P.) Ltd. Vs. CIT (2009) 341 ITR 62

"That the Apex Court has held that in case the appellant makes provisions for product warranty, the same would be allowable only if such estimation is made on some scientific basis based on historical trend."

That as submitted above accounting of expenditure towards Overburden Removal is made on the basis of well defined, scientific and historical trend of actual Overburden removal expenses which is prescribed by Coal India Limited for all its subsidiaries on the basis of scientific and historical trend as well as guidance and study undertaken by the expert. Hence, in light of this decision of Apex Court, the same is an allowable expenditure. Hence, the above referred decision is in favor of the appellant rather than against.

Moreover, the Ld. Pr.CfT has mentioned that both the CIT (A) and ITAT have allowed the expenditure from A. Y. 2010-11 to A. Y.2014- 15. But the above noted facts and the ratio of decision of Supreme Court were not discussed in the earlier order of the AD. Therefore, probably both the CfT (A) and fTAT took the decision in favor of the appellant..... Therefore, in light of the changed facts and legal position both the CfT (A) and fTAT may take a different view in the present assessment year.

In this regard please take note of the fact that both the CIT (A) as well as ITAT has allowed the expenditure; hence, there is no room of any presumption as to any error in the assessment order.

In view of the facts as stated above, Opinion of the jurisdictional ITAT and judgments cited above, the expenditures is incurred wholly & exclusively for the purpose of business and is an admissible deduction as per the provisions of Income Tax Act, 1961. Moreover, the ld. AO has allowed a sum of Rs.21.32 crores only and the CIT (Appeal) has allowed the full expenditure incurred amounting to Rs.2102.30 crores. Moreover, as the matter under consideration was duly and extensively considered/discussed during the course of assessment proceedings and there does not exist any element of error in the assessment order. Therefore, the order passed by ld. Pr.CIT U/s.263 of the Income Tax Act, 1961 may kindly be quashed.
ii) Expenses of Rs.73.81 Crores under the head "Rehabilitation Charges"

a. It is reiterated that the appellant company is a wholly owned subsidiary of Coal India Limited (CIl), a Govt. of India Enterprise. Hence, all the operations of the appellant company are controlled and directed by the Govt. of India through CIl.

b. This is to state that the LAO has accepted the above expenditures and has not disputed for the A Y. 2008-09, 2009-10, 2012-13, 2013-14 & 2014-15.

c. This is to bring to your honour's kind notice that the CIT(A) had allowed the expenditure under the head" Rehabilitation Charges" for the assessment years from 2004-05 to 2007-08, 2010-11 and 2011-12; photocopy of relevant pages of order for the assessment year 2010-11 may be referred to at Page No.160-162 of the P /B. Further, the second appeal filed by the Departments on this issue for the respective assessment years were dismissed by the Hon'ble Bench. The detail of status of appeals are given here under:

Assessment Year	*Appeal filed by the assessee before CIT(A)*		*Appeal filed by Department before the Hon'ble ITAT*	
2004-05	*0048/2007-08*	*Allowed*	*50/CTK/2011*	*Dismissed*
2005-06	*0210/2007-08*	*Allowed*	*51/CTK/2011*	*Dismissed*
2006-07	*405/2008-09*	*Allowed*	*52/CTK/2011*	*Dismissed*
2007-08	*0230/2009-10*	*Allowed*	*53/CTK/2011*	*Dismissed*
2010-11	*0401/2012-13*	*Allowed*	*397/CTK/2011*	*Dismissed*
2011-12	*0557/2013-14*	*Allowed*	*330/CTK/2011*	*Dismissed*

d. That as stated above the assessing officer had issued notice on this particular issue during the assessment proceedings and has made due enquiry in an extensive manner. The Ld. AO has allowed the expenditure after making inquiries and verification which should have been made.

Hence, on this particular issue the assessment order cannot be deemed to be erroneous in so far as it is prejudicial to the interest of the revenue in terms of clause (a) of the explanation -2 to the section 263(1) of, the Income Tax Act, 1961.

e. Further, clause (b) & (c) of the explanation -2 to the section 263(1) of the Income Tax Act, 1961 are not applicable in respect of this particular issue; hence, the assessment order cannot be deemed to be erroneous in so far as it is prejudicial to the interest of the revenue.

f. That the Ld. Pr. CIT has cited decisions of High Courts of Delhi and Madras to treat the assessment order erroneous in so far as it is prejudicial to the interest of the revenue. It is humbly submitted that clause (d) of the explanation -2 to the section 263(1) of the Income Tax Act, 1961 clearly spells that the assessment order shall be deemed to be erroneous in so far as it is prejudicial to the interest of the revenue only when the order has not been passed in accordance with any decision which is prejudicial to the appellant, rendered by the jurisdictional High Court or Supreme Court in the case of appellant or any other person. As the decisions cited are those of non-jurisdictional High Court; the assessment order cannot be deemed to be erroneous in so far as it is prejudicial to the interest of the revenue. Moreover, the decisions are not applicable to the fact and circumstance of the case.

g. That Explanation-2 to the section 263(1) inserted by the Finance Act, 2015, w.e.f. 1-6-2015 clearly and specifically explains the conditions in clause (a) to (d) under which an order passed by the assessing officer shall be deemed to be erroneous in so far as it is prejudicial to the interest of the revenue. That it is crystal clear from our submission above that section 263(1) of the Income Tax Act, 1961 is not applicable to the present issue/case.

h. That Ld. Pr. CIT has further mentioned in the show cause notice that "Therefore, in light of the additional facts and decisions of various High Courts quoted herein above, the ITAT take a different view in the present assessment year" as placed in para 2.8 of page 35 of P/B. In this regard it is humbly submitted that this issue is not a subject matter of appeal before the ITAT for the present assessment year 2015-16; hence question of taking different view does not arise. Therefore, the order passed by Ld. AO on this issue cannot be treated as erroneous on the presumption that ITAT may take a different view.

i. That in the show cause notice the Pr. CIT has referred to the following decisions:
i. Kwality Restaurant & Ice Cream Ltd. Vs. CIT(2002) 253 ITR 689 (DEL)
ii. CIT Vs. Amalgamations Pvt. Ltd. (1977) 108 ITR 895

That both the above decisions were pronounced in the matter of companies in the private sector; they are not public sector undertakings. These decisions are not applicable to the fact & circumstances of the case; in this regard it will be pertinent to take note of the following judicial pronouncements:

• Decision of Hon'ble High Court of Kerala in the case of Travancore Titanium Products Ltd. "

The relevant findings of the Hon'ble Court are as under:

"Being a company under the control of the Government, it is bound to comply with all the Government orders and the Board of Directors itself is constituted with the Government secretaries and other nominees as members. Therefore, the claim of deduction has to be considered with reference to the peculiar circumstances of the company which has no discretion in regard to the payment of the service charges to the government as it is bound to comply with the government orders. So much so, we are of the view that the parameters applicable in the case of a private company that too with respect to the claim for business expenditure, are exactly not applicable in the case of Public Sector Company whether it is under the control of the State Government or Central Government.

In fact, many public sector companies are not formed just to make profit alone but are supposed to achieve larger objectives for the society and the State.

By making payment of service charge, the respondent company has discharged only the obligation under Government orders. It cannot carryon business by violating Government orders and remains as a defaulter to the Government.

• *The ITAT Mumbai bench in the case of Hindustan Petroleum Corporation Ltd. (96 ITO 186) had held as under:*
Expenditure incurred by Government Undertaking is an allowable deduction. The relevant finding of the ITAT Mumbai Benches reads as follows: -

"Expenditure incurred by appellant, a company owned by the Government of India and working under its control and directions, towards implementation of 20 point programme as per specific directions of the Government though voluntary in nature and not forced by any statutory obligation, is allowable as business expenditure.

Merely because expenditure is in the nature of donation, it does not cease to be expenditure deductible under s. 37(1)."

In view of the facts as stated above, overriding title of Government of India, opinion of the jurisdictional ITAT and judgments cited above the expenditures is incurred wholly & exclusively for the purpose of business and admissible deductions as per the provisions of Income Tax Act, 1961. Moreover, our submission above clearly establishes overriding title in the hands of the state.

iii) Expenses under head "Loss on Sale/Discard/~urveyed of Assets (Store & Spares):

It is in the inherent nature and volume of business of MCL that it has to maintain heavy stock of consumable stores and spare parts for maintaining continuous production. There is a policy of the company for periodical inspection of such store & spares by a committee to identify unusable items. The committee undertakes physical inspection and reports such unusable sores and spares which are surveyed off and considered as scraped. Such scraps are disposed off by sale from time to time. The value of such items are charged to profit and loss account and at the time of sale the full sales consideration is recoded as sales in the books of account without any adjustments as to residual value etc. and offered for taxation. Photocopy of relevant portion of Balance sheet and profit and loss account is attached herewith showing the sales of scrap, which is offered for taxation.

Sometimes, certain fixed assets of very small value are also surveyed off by the committee which could not be identified and the remaining value of such fixed assets are charged to profit and loss account and considered as scraps. Subsequently, on sale of such scraped items of fixed assets the full consideration is offered for taxation.

> *Lastly, this is to bring to your Honor's notice that all the aforesaid matter/issues were duly examined and verified by the Ld. AO/ Appellate Authorities with the documents, evidences, submissions etc. and was allowed. Hence, the present proposition of section 263 under the Income Tax Act, 1961, amounts to a change of opinion/interpretation in the matter of facts and laws which with due respect not as per the provisions of the Act.*
>
> *In light of the above the order passed by the Ld. Pr. CIT u/s.263 of the Income Tax Act, 1961 may kindly be quashed.*

8. On the other hand, ld.DR relied on the order of Pr.CIT, however, could not controvert the above submission of ld. AR of the assessee.

9. We have heard arguments of both the sides and carefully perused the relevant materials placed on record of the Tribunal including written submissions filed by the assessee on 16.12.2020 as well as paper book spread over 335 pages. From the copy of the impugned order passed by the ld. Pr.CIT u/s.263 of the Act, we observe that he has picked up mainly 3 issues viz. (i) allowability of Over Burden Removal (OBR) expenses (ii) expenses under the head rehabilitation charges and (iii) expenses under the head loss on sale/discard/surveyed of assets(store & spares). Ld. AR of the assessee drew our attention towards paras 102 to 105 of the order of ITAT Cuttack Bench dated 20.03.2018 in assessee's own case for A.Y.2010-2011 to 2014-2015 in ITA nos.421/CTK/2013 and other related appeals and submitted that identical issue for immediately previous five years has been settled by the Tribunal in favour of the assessee by holding that the expenditure incurred on removal of over burden of coal mines is allowable as revenue expenditure, therefore, the ld. Pr.CIT in the garb of power available to him u/s.263 of the Act wants to re-agitate and reopen the issue again which is not permissible as per the provisions of

Section 263 of the Act. Ld. CITDR could not controvert the fact that the Tribunal has decided the issue in favour of the assessee by holding that the expenditure incurred on over burden removal has to be allowed as revenue expenditure to the assessee. The relevant portion of the Tribunal's order at paras 102 to 105 read as under :-

> *102. The next raised by the revenue is against deletion of addition on account of overburden removal expenditure of Rs.50383.53 lakhs, Rs.9875.22 lakhs, Rs.159043.50 lakhs, Rs.129209.00 lakhs and Rs.126929.70 lakhs for the assessment years 2010-11, 2011-12, 2012- 13, 2013-14 and Rs.2014-15, respectively.*
>
> *103. The Assessing Officer has disallowed the expenditure incurred by the assessee towards overburden removal expenditure of Rs.50383.53 lakhs, Rs.9875.22 lakhs, Rs.159043.50 lakhs, Rs.129209.00 lakhs and Mah anad i Coa lf ield Lt yd., Rs.126929.70 lakhs for the assessment years 2010-11, 2011-12, 2012- 13, 2013-14 and Rs.2014-15, respectively.*
>
> *104. Before the CIT(A), the assessee relied on various judicial decisions including the decision of this Bench in the case of ACIT vs. Patnaik Minerals Pvt Ltd., and others for A.Y. 2009-10, wherein, it has been categorically held that the expenditure incurred on removal of overburden in coal in mining is a revenue expenditure, The CIT(A) following the decision of ITAT, Jabalpur in the case of Northern Coalfields Ltd vs ACIT in ITA No.42 & 43 of 2002 and also the decision of this Bench of the Tribunal in the case of Patnaik Minerals Pvt Ltd. (supra) has deleted the addition made by the Assessing Officer.*
>
> *105. We heard the rival submissions, perused the orders of lower authorities and materials available on record. The dispute arise in this ground of appeal is whether the expenditure incurred on removal of overburden in coal is allowable expenditure or not. We find that similar issue arose in the case of Northern Coalfield ltd, wherein, on similar facts, the Jabalpur Bench of the Tribunal after a thorough and detailed discussion on the issue, has deleted the addition. The relevant portion is reproduced hereunder:*
>
> > *"40. We are unable to find any legally sustainable merits in this objection either. "The criterion on the basis which call is taken as to be whether a mine can be treated as a development mine or as a revenue mine is, as we have noted in paragraph 22 earlier in this order, is uniform all along not only in this case of this assessee but Mah anad i Coa lf ield Lt yd., in the case of other similarly placed assessees, and the revenue authorities have accepted that criterion all along. It is a purely a factual matter which permeates through different*

assessment years, and for the detailed reasons discussed earlier, there is no good reason to disturb this criterion. In any case, the authorities below have neither suggested any alternative criterion, which will be appropriate on the facts of this case, nor have they have demonstrated that the facts implicit in their stand actually exist. As a matter of fact, the apprehensions of the Assessing Officer seem to be purely hypothetical and in the realm of conjectures and surmises inasmuch as not one instance is shown in which the overburden removal expenses, booked in the accounts as revenue expenditure, actually pertain to removal of overburden only at the surface level and should be, therefore, treated as capital expenditure. Similarly, while -declining the deduction of overburden removal as capital expenditure, the Assessing Officer, as also the CIT(A), has not treated any part of this expenditure, which essentially includes the expenditure incurred on removing overburden in the process of coal mining and production, as revenue expenditure. It seems to be more or less an undisputed position, given the nature of overburden removal expenses as we have discussed earlier, that a part of the overburden removal expenses is admittedly revenue expenditure, but if we have to uphold the stand of the authorities below, entire overburden removal expenses is required to be treated as capital expenditure eligible only for amortization under section 35D. In any case, there is nothing on record to establish, or even suggest, that expenses incurred on removal of overburden at the surface level, which were capital expenditure in nature, have been claimed as revenue deduction on the strength of coal mining in another piece of land within that coal mine.

41. In view of these discussions, as also bearing in mind entirety of the case, we consider it fit and proper to direct the Assessing Officer to delete the disallowance of Rs 2,05,616.72 lakhs. The assessee gets the relief accordingly."

This findings of the Tribunal has been upheld by the Hon'ble M.P.High Court in ITA No.71/Jab/2014 order dated 24.4.2015.Following the above decision, The Jabalpur Bench of this Tribunal in the case of Northern Coalfield Ltd for the assessment year 2011-12 has deleted the similar addition. We also find that similar addition made in the case of Western Coalfields Ltd., for the assessment year 1978-79 to 1984-85 by the Mahanadi Coalfield Lt yd., Assessing Officer was deleted by the CIT(A) and on further appeal, the Nagpur Bench of this Tribunal has upheld the findings of the CIT(A). Before us, ld D.R. could not place any contrary judgment of the higher forum to controvert the above decisions of the Tribunal and also High Court. The CIT(A) has followed the decision of the Tribunal while deleting the addition made by the Assessing Officer. Hence, we do not find any reason to interfere with the order of the CIT(A), which is hereby confirmed and this ground of appeal of revenue is dismissed for the assessment years 2010-11 to 2014-15.

10. It is more relevant to note that from the copy of the order of the ITAT Cuttack Bench dated 11.09.2019 in ITA No.181/CTK/2018 for present A.Y.2015-2016, we clearly observe that the Tribunal following its earlier order dated 20.03.2018, has again reiterated the earlier findings favouring the assessee that the expenses incurred by the assessee towards over burden removal are revenue in nature, and, thus, allowable. Therefore, there was no valid reason for the ld. Pr.CIT to exercise revisionary power u/s.263 of the Act for the same A.Y.2015-2016 on the same issue on identical facts and circumstances.

11. In view of the above, when the issue has been settled by the Tribunal in favour of the assessee, then the ld. Pr.CIT was not correct and justified in picking up the same issue again and directing the AO to make addition on this count, therefore, we are compelled to hold that exercise of revisionary power u/s.263 of the Act of the ld. Pr.CIT on this first issue is not valid and, thus, bad in law. Accordingly, we hold that the order of ld. Pr.CIT on this count is not sustainable.

12. The next issue picked up by the ld. Pr.CIT is with regard to expenses incurred by the assessee on rehabilitation charges. In this regard, ld. AR of the assessee submitted that the ld. CIT(A) has allowed the expenditure under the head rehabilitation charges from assessment years 2004-2005 to 2007-2008 and 2010-2011 to 2011-2012 and the appeals of the revenue against these said first appellate orders have been dismissed by the ITAT Cuttack Bench. Ld. AR vehemently pointed out that when the issue of allowability of rehabilitation charges has been

settled in favour of the assessee at the level of the ITAT Cuttack Bench for several preceding years, then the issue cannot be agitated again by exercising revisionary powers u/s.263 of the Act. Ld. AR referring to the show cause notice submitted that although the issue was not a subject matter of appeal before the ITAT for A.Y.2015-2016, therefore, the question of taking different view does not arise and, thus, the assessment order cannot be alleged to be erroneous and prejudicial to the interest of revenue. Ld. Counsel further submitted that in the show cause notice, the ld. Pr.CIT relied on the decision in the case of Kwality Restaurant & Ice Cream Ltd. (2002) 253 ITR 689 (Del) and in the case of Amalgamations Pvt. Ltd. (1977) 108 ITR 895, these decisions are in the matter of companies in the private sector, whereas the present assessee is a public sector undertaking doing mining business, and, thus, it is duty bound to incur rehabilitation charges for those villagers/tribes residing in the surrounding area of the mines and their habitation is disturbed due to mining activities, therefore, rehabilitation charges were inseparable relation with the minding activities of the assessee and, thus, the ld. CIT(A) allowed the same and the orders for several previous assessment years have been upheld by the ITAT Cuttack bench dismissing the appeals of the revenue. Ld. CITDR, in all fairness, accepted that the facts and circumstances along with the issue are identical and the same. It was also accepted by the ld. CITDR that the issue has been settled in favour of the assessee at the level of ITAT Cuttack Bench by its several orders. In view of the above, we are of the considered view that the ld. Pr.CIT

was also not correct and justified in picking up the issue of expenses incurred by the assessee on rehabilitation charges as the same was settled in favour of the assessee by several orders of the Tribunal, and, thus, exercising of revisionary powers u/s.263 of the Act to review the issue is not sustainable.

13. The next issue is with regard to expenses under the head loss on sale/discard/surveyed of assets (store & spares). In this regard, ld. Counsel of the assessee submitted that in the inherent nature and volume of business of the assessee, it has to maintain heavy stock of consumable stores and spare parts for maintaining continuous production and there is a policy of the company for periodical inspection of such store & spares by a committee to identify unusable items, which also undertakes physical inspection and reports such unusable sores and spares which are surveyed off and considered as scraped. Ld. AR further explained that such scraps are disposed off by sale from time to time. The value of such items are charged to profit and loss account and at the time of sale the full sales consideration is recoded as sales in the books of account without any adjustments as to residual value etc. and offered for taxation. Ld. AR also drew our attention to the photocopy of relevant portion of Balance sheet and profit and loss account showing the sales of scrap, which is offered for taxation. Ld. AR explaining the factual matrix of the issue also submitted that certain fixed assets of very small value are also surveyed off by the committee which could not be identified and the remaining value of such fixed assets are charged to profit and loss account and

considered as scraps. Subsequently, on sale of such scraped items of fixed assets the full consideration is offered for taxation. Ld. AR further submitted that the said issues were duly examined and verified by the AO/ Appellate Authorities with the documents, evidences, submissions etc. and thereafter the same was allowed. Hence, the ld. Pr.CIT cannot direct the AO to revisit the issue on which sufficient enquiry has been conducted by the AO before allowing the same. Ld. AR strenuously contended that the ld. Pr.CIT for exercising power u/s.263 of the Act is required to first hold that the order is erroneous and prejudicial to the interest of revenue but there is no such observation on this issue.

14. Ld. CITDR drew our attention to para 10 of the impugned order and submitted that there is no provision in the Act to allow any loss incurred on loss/discard/surveyed off of asset because such amount represents capital loss and not revenue expenditure/loss. Hence, the AO has not made any enquiry on this issue and allowed the same without any logical reasoning and basis.

15. On this issue, placing rejoinder, ld. AR submitted that the assessee is repeatedly stating that at the time of purchase, such items are charged to profit and loss account and at the time of sale the full sales consideration is recoded as sales in the books of account without any adjustments as to residual value etc. and offered for taxation, therefore, the same cannot be treated as capital loss and the ld. Pr.CIT was not correct in re-agitating the issue on the basis of unreasonable and unjustified reasoning and logic.

16. On careful consideration of the above submissions, on the third issue, we are of the considered opinion that the assessee is contending that at the time of purchase value of such items are charged to profit and loss account and at the time of sale the full sales consideration is recoded as sales in the books of account without any adjustments as to residual value etc. and offered for taxation, therefore, it is a correct and right term of purchase and sale by the assessee in the books of accounts and any loss relating to sale/discard/surveyed of assets of such stores and spares has to be charged to the profit and loss account as expenditure incurred and inextricably linked with the business activity of the assessee. Therefore, the assessment order framed by the AO on this issue cannot be held as erroneous and prejudicial to the interest of revenue.

17. On the basis of foregoing discussion, we reached to the logical conclusion that the ld. Pr.CIT was not correct and justified in revising the order by exercising powers u/s.263 of the Act on all the three issues raised by the assessee before us. Thus, the impugned order of ld. Pr.CIT is bad in law and not sustainable. Consequently, the impugned order as well as all subsequent orders in pursuance thereto are hereby quashed.

18. In the result, appeal of the assessee is allowed.

Order pronounced as per rule 34(4) of ITAT Rules, 1963 on 10/12/ 2021, at Cuttack

Sd/-	**Sd/-**
(मनीष बोरड़)	**(सी.एम.गर्ग)**
(MANISH BORAD)	**(C.M.GARG)**
लेखा सदस्य / ACCOUNTANT MEMBER	**न्यायिक सदस्य / JUDICIAL MEMBER**

कटक Cuttack; दिनांक Dated 10/12/2021

Prakash Kumar Mishra, Sr.P.S.

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

1. अपीलार्थी / The Appellant-
   Mahanadi Coalfields Limited,
   Jagruti Vihar, Burla, Sambalpur-768020
2. प्रत्यर्थी / The Respondent-
   Pr.CIT, Sambalpur
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//

आदेशानुसार/ BY ORDER,

(**Senior Private Secretary**)
आयकर अपीलीय अधिकरण, कटक/ITAT, Cuttack