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

IN THE INCOME TAX APPELLATE TRIBUNAL CUTTACK BENCH CUTTACK

श्री जार्ज माथन, न्यायिक सदस्य **एवं** श्री अरुण खोड़पिया लेखा सदस्य के समक्ष ।

BEFORE SHRI GEORGE MATHAN, JUDICIAL MEMBER
AND
SHRI ARUN KHODPIA, ACCOUNTANT MEMBER

ITA No.223/CTK/2019

(**निर्धारण वर्ष /** Assessment Year :2009-2010)

M/s Earth Minerals Co. Ltd,
Plot No.38(P), Kirarama,
Bandhbahal,
Jharsuguda,
PAN No.AABCE 2015 K

.....Assessee

Versus

ACIT, Rourkela Circle, Rourkela .....Revenue

None for the assessee (Written Submission filed)
Shri M.K.Gautam, CIT-DR for the Revenue

Date of Hearing : 29/08/2022
Date of Pronouncement : 29/08/2022

<u>आदेश / O R D E R</u>

<u>Per Bench</u> :

This is an appeal filed by the assessee against the order of the ld. Pr.CIT, Sambalpur, passed in PCIT/SBP/263/67/2018-19, dated 29.03.2019, for the assessment year 2009-2010.

2. None represented on behalf of the assessee even the case was called for second round of hearing, however, the assessee has filed his written submission, therefore, the Bench proceeded to dispose off the appeal after hearing the arguments of Shri M.K.Gautam, ld. CIT-DR, who appeared on behalf of the revenue and considering the written submission

of the assessee filed in the paper book along with relevant material available on record.

3. On perusal of the written submission filed by the assessee consisting of 22 pages, which is placed in the paper book, it is found that the assessee has raised two following issues :-

i) That the assessing authority having taken a possible view on a given set of facts and circumstances, the Pr.CIT cannot use his powers of revision for imposing his view over that of the AO.

ii) That the ld. Pr.CIT has not done any enquiry before passing of the order u/s.263 of the Act.

4. In reply, ld.CIT-DR submitted that the assessee is engaged in the business of coal washery. There was a search on the premises of Hira Group of Companies in which the assessee is one of the sister concern on 29.07.2015. In the course of search, Shri B.L.Agrawal, CMD of Hira Group of Companies had offered undisclosed income of Rs.45,04,78,000/- on account of bogus share capital and the share premium received from Kolkata based companies in respect of eight (8) companies, which were the group of Hira Group of companies. It was the submission that in respect of the assessee-company for the assessment year 2009-2010, the surrendered amount was Rs.2,05,00,000/-. It was the submission that for the assessment year 2010-2011, the assessee had not offered the surrendered amount of Rs.1,19,00,000/- but the AO has added the same. It was the submission that this has been recognised by

the ld. Pr.CIT in his order at para 28 page 13. It was the submission that for the assessment year 2009-2010, being the impugned assessment year, though the information was provided to the AO by the DCIT, Raipur in respect of the surrendered amount made by Shri B.L.Agrawal, CMD of Hira Group of Companies on the basis of a letter filed by the assessee in response to the notice u/s.142(1) of the Act, did not make any addition of the amount of Rs.2,05,00,000/-. It was the submission that in respect of other seven companies of Hira Group of Companies, they had filed declarations before the Settlement Commission and had offered the bogus share capital received along with the premium as income for the relevant assessment years. It was the submission that as the AO had not made the said addition of Rs.2,05,00,000/- in the assessment year 2009-2010 but had on the observation that there was no nexus established between the assessee and Hira Group of Companies, no addition has been made. It was the submission that a clear error in the order of AO had been noticed by the ld. Pr.CIT and the ld. Pr.CIT has rightly invoked his powers u/s.263 of the Act directing the AO to re-examine the issue.

5. During the course of hearing, in reply to a specific query by the Bench as to what happened to the consequential assessment to the order passed u/s.263 of the Act, it was submitted by the ld. CIT-DR that out of eight bogus share capital, share application money received from the bogus share applicants, it was noticed that seven of the share application money received was during the assessment year 2008-2009 and no addition thereon had been made. In regard to one share applicant, being

Gupta Global Resources Pvt. Ltd., on the ground that the said company did not have the sources to make the share application, the same had been added. It was the submission that he has no information as to whether the assessee has filed any appeal against the said consequential assessment order. It was also submitted that the said Gupta Global Resources Pvt. Ltd. is now before the National Company Law Tribunal(NCLT).

6. In regard to second proposition raised by the assessee that no enquiry has been done by the ld. Pr.CIT before passing the order u/s.263 of the Act, ld. CIT-DR placed before us the decision of the coordinate bench of the Tribunal in the case of M/s Kalinga Mining Corporation Pvt. Ltd., passed in ITA No.168/CTK/2019, order dated 28.01.2020, wherein in para 7 the Tribunal has relied on the decision of the Hon'ble Delhi High Court in the case of Gee Vee Enterprises Vs. Addl. CIT, reported in 99 ITR 375, wherein it has been held as follows :-

> *"It is not necessary for the Commissioner to make further enquiries before canceling the assessment order of the Assessing Officer. The Commissioner can regard the order as erroneous on the ground that in the circumstances of the case the Assessing Officer should have made further inquiries before accepting the statements made by the assessee in his return. The reason is obvious. Unlike the civil court which is neutral to give a decision on the basis of evidence produced before it, an Assessing Officer is not only an adjudicator but is also an investigator. He cannot remain passive in the face of a return which is apparently in order but calls for further enquiry. It is his duty to ascertain the truth of the facts stated in the return when the circumstances of the case are such as to provoke an inquiry. The meaning to be given to the word 'erroneous' in section 263 emerges out of this context. The word 'erroneous' in that section includes cases where there has been failure to make the necessary inquiries. It is incumbent on the Assessing Officer to investigate the facts stated in the return when circumstances make such an inquiry prudent and the word 'erroneous' in section 263*

includes the failure to make such an enquiry. The order becomes erroneous because such an enquiry has not been made and not because there is anything wrong with the order if all the facts stated therein are assumed to be correct".

7. Ld. CIT-DR further drew our attention to para 11 of this order, wherein the coordinate bench of the Tribunal has relied upon the decision of Hon'ble Special Bench of ITAT in the case of Rajalakshmi Mills Ltd. Vs. ITO, reported in 121 ITD 343 (Chennai-SB), wherein it has been held as follows :-

"It is not necessary for the Commissioner to make further enquiries before canceling the assessment order of the Assessing Officer. The Commissioner can regard the order as erroneous on the ground that in the circumstances of the case the Assessing Officer should have made further inquiries before accepting the statements made by the assessee in his return. The reason is obvious. Unlike the civil court which is neutral to give a decision on the basis of evidence produced before it, an Assessing Officer is not only an adjudicator but is also an investigator. He cannot remain passive in the face of a return which is apparently in order but calls for further enquiry. It is his duty to ascertain the truth of the facts stated in the return when the circumstances of the case are such as to provoke an inquiry. The meaning to be given to the word 'erroneous' in section 263 emerges out of this context. The word 'erroneous' in that section includes cases where there has been failure to make the necessary inquiries. It is incumbent on the Assessing Officer to investigate the facts stated in the return when circumstances make such an inquiry prudent and the word 'erroneous' in section 263 includes the failure to make such an enquiry. The order becomes erroneous because such an enquiry has not been made and not because there is anything wrong with the order if all the facts stated therein are assumed to be correct.

8. It was also submitted by the ld. CIT-DR that as per the decision of the Hon'ble Delhi High Court as also the decision of the Special Bench of the Tribunal, it is not necessary for the Pr.CIT to make further enquiry before cancelling the assessment order of the AO. He also drew our attention to the provisions of Section 263(1) of the Act, which reads as under :-

Revision of orders prejudicial to revenue.

263. *(1) The [[Principal Chief Commissioner or Chief Commissioner or 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* ***[****or the Transfer Pricing Officer, as the case may be,****]*** *is erroneous in so far as it is prejudicial to the interests of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify,* ***[****including,—*

(i) an order enhancing or modifying the assessment or cancelling the assessment and directing a fresh assessment; or
(ii) an order modifying the order under section 92CA; or
*(iii) an order cancelling the order under section 92CA and directing a fresh order under the said section****]****.*

9. It was the submission that the provisions of Section 263 of the Act specifies that the Pr.CIT can “cause to be made enquiry”. It was also the submission that as per the provisions of Section 263 of the Act, it is only if the Pr.CIT deems necessary, he needs to even direct causing of the enquiry. Therefore, the ld. CIT-DR vehemently submitted that the order passed by the ld. Pr.CIT u/s.263 of the Act is liable to be upheld.

10. We have considered submissions of the ld. CIT-DR and the written submission of the assessee filed in the paper book as well as the relevant material available on the record.

11. At the outset, a perusal of the reading of the provisions of Section 263 of the Act, shows that, (i) the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner has to

(a) call for the record of any proceeding under this Act. This means the initiation should be from the Principal Chief Commissioner or Chief Commissioner or Principal

Commissioner or Commissioner. The initiation cannot come from any other point other than the persons mentioned in the provisions of Section 263 of the Act;

(b) Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner has to examine the record, which he has called for. The records would include any and all documents in relation to the assessee and in respect of the assessee which are available with the revenue;

(c) once Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner has initiated by calling for the records and on his examination of the records, he finds that there is an error in such records which has been passed by the AO or the TPO, as the case may be is;

(d) erroneous and prejudicial to the interest of revenue. It should be both erroneous and prejudicial to the interest of revenue. The only erroneous or only prejudicial to the interest of revenue is not adequate;

(e) Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner may give the assessee an opportunity of being heard. The word used is ‘may’ and not ‘shall’. There is no compulsion on the part of the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner to hear the assessee. There is no necessity to issue any show cause notice. However, the fundamental principle of law of *audi alteram partem* that no one shall be judged without being heard, comes into play and on account of the simple but

absolute principle of natural justice, demands that the assessee be put to notice in respect of the proceedings that are being initiated against him, the assessee should be heard.

(f) after making or causing to be made such enquiry as Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner deems necessary. Therefore, after putting the assessee to notice in regard to the proceedings being taken up against him the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner shall make or caused to make such enquiry as he deems necessary in respect of the issues which he has considered as causing the order to be erroneous and prejudicial to the interest of revenue in respect of the order from such records that he has called for;

(g) after Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner makes or causes to make such enquiry as he has deemed necessary then he shall pass the order thereon u/s.263 of the act as the circumstances in the case may justify. Such order could be an order directing an addition, directing a verification or examination, so on and so forth. The order shall be passed includes direction as given under sub-clause (i)(ii)&(iii) of sub-section (1) of Section 263 of the Act.

12. An examination of the order passed u/s.263 of the Act, in the impugned appeal, shows that the ld. Pr.CIT has “not made or caused to be made such enquiry” before passing the order u/s.263 of the Act. A

perusal of the order of the ld. Pr.CIT shows that in para 14, he starts his decision and it goes on to para 28 but other than discussing the facts that has led him to believe that the order passed by the AO was erroneous and prejudicial to the interest of revenue, there has been no enquiry by him nor he has caused any enquiry to be done before he has passed the order u/s.263 of the Act. This is not a case of inadequacy of enquiry. It is a case of absence of enquiry. On this ground alone, the order passed u/s.263 of the Act by the ld. Pr.CIT is liable to be annulled and we do so.

13. The decision relied on by the ld. CIT-DR in the case of M/s Kalinga Mining Corporation Pvt. Ltd. (supra), wherein the coordinate bench of this Tribunal has relied upon the decision of the Hon'ble Delhi High Court in the case of Gee Vee Enterprises (supra) would not apply, insofar as that was not a case where the Hon'ble Delhi High Court has given any findings that enquiry to be made or caused to be made by the Pr.CIT. That was a case in respect of the issue as to whether the AO has made a proper enquiry or not, so also in the decision in the case of the Special Bench of the ITAT in the case of Rajalakshmi Mills Ltd. (supra).

14. It must be mentioned here that in the decision of the coordinate bench of the Tribunal in the case of M/s Kalinga Mining Corporation Pvt. Ltd., (supra), in para 7 what has been extracted as being from the decision of the Hon'ble Delhi High Court in the case of Gee Vee Enterprises (supra), is not from the said decision but it is an extract from the decision of the Hon'ble Special Bench of Chennai Bench of the Tribunal in the case of Rajalakshmi Mills Ltd. (supra). In the decision of

the Hon'ble Delhi High Court in the case of Gee Vee Enterprises (supra), the issue was a decision in the writ petition and the said writ petition was dismissed in *limine* because the petitioner had not filed any appeal against such order of the CIT u/s.263 of the Act nor it had given any explanation as to why he did not file appeal against the order u/s.263 of the Act nor any exceptional circumstances were shown to persuade the Hon'ble High Court to depart from normal rule that writ petition complaining against order of Commissioner would not be entertained in absence of such adequate explanation by petitioner.

15. However, our view finds support from the decision of the Hon'ble Jurisdictional High Court of Orissa in the case of Orissa State Police Housing & Welfare Corporation Ltd., reported in [2022] 139 taxmann.com 207 (Orissa), wherein the Hon'ble High Court in para 14 has held as under :-

> ***14****. Section 263 of the Act requires the CIT, after hearing the Assessee, to pass an order by making "such enquiry as he deems necessary". The purpose of such an enquiry would be to arrive at a subjective view that the order of the AO was erroneous in so far as it is prejudicial to the interest of Revenue. Even if such enquiry may not be mandatory, there has to be some basis on which the CIT can form such a view. In the present case, the basis for forming a view that the profit element in the WIP was not accounted for by the Assessee is absent in the order of the CIT.*

16. In the above decision of the Hon'ble Jurisdictional High Court, the Hon'ble High Court has categorically held that in absence of any enquiry done by the ld. Pr.CIT, the order passed u/s.263 of the Act by the Pr.CIT would not survive.

17. In these circumstances, on account of the absence of any enquiry being done by the ld. Pr.CIT before passing the order u/s.263 of the Act, the impugned order passed u/s.263 of the Act by the ld. Pr.CIT is held to be bad in law and the same is hereby annulled.

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

Order dictated and pronounced in the open court on 29/08/2022.

Sd/-	**Sd/-**
(अरुण खोड़पिया**)**	**(**जार्ज माथन**)**
(ARUN KHODPIA)	**(GEORGE MATHAN)**
लेखा सदस्य/ **ACCOUNTANT MEMBER**	**न्यायिक सदस्य / JUDICIAL MEMBER**

कटक Cuttack; दिनांक Dated 29/08/2022

Prakash Kumar Mishra, Sr.P.S.

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

1. अपीलार्थी / The Appellant-
   M/s Earth Minerals Co. Ltd,
   Plot No.38(P), Kirarama,
   Bandhbahal,
   Jharsuguda,
2. प्रत्यर्थी / The Respondent-
   ACIT, Rourkela Circle, Rourkela
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//

(**Assistant Registrar**)
आयकर अपीलीय अधिकरण, कटक/ITAT, Cuttack