



**IN THE INCOME TAX APPELLATE TRIBUNAL,  
CUTTACK BENCH, CUTTACK**

**BEFORE S/SHRI GEORGE MATHAN, JUDICIAL MEMBER  
AND ARUN KHODPIA, ACCOUNTANT MEMBER**

**ITA No.355/CTK/2019**

Assessment Year : 2013-14

Dy. CIT, Corporate Circle-1(2), 3 <sup>rd</sup> floor, Aayakar Bhavan, Bhubaneswar.	Vs.	Paradeep Phosphate Limited, Bayan Bhawan, J.N.Marg, Kharvel Nagar, Bhubaneswar.
PAN/GIR No.AABCP 3276 D		
<b>(Appellant)</b>	..	<b>( Respondent)</b>

**C.O.No.11/CTK/2020**

(arising of ITA No.355/CTK/2019)

**ITA No.327/CTK/2019**

Assessment Year : 2013-14

Paradeep Phosphate Limited, Bayan Bhawan, J.N.Marg, Kharvel Nagar, Bhubaneswar..	Vs.	Dy. CIT, Corporate Circle-1(2), 3 <sup>rd</sup> floor, Aayakar Bhavan, Bhubaneswar
<b>PAN/GIR No.AABCP 3276 D</b>		
<b>(Appellant)</b>	..	<b>( Respondent)</b>

Assessee by : S/Shri A.K.Sabat/B.K.Mahapatra, ARs  
Revenue by : Shri M.K.Gautam, CIT DR

**Date of Hearing : 12 /10/2022**

**Date of Pronouncement : 12/10/2022**

**ORDER**

**Per Bench**

These are cross appeals filed by the revenue and assessee against the order of the Id CIT(A)-1, Bhubaneswar dated 19.8.2019 in Appeal No.

0259/17-18 for the assessment year 2013-14. The assessee has also filed cross objection against the appeal filed by the revenue.

2. S/Shri A.K.Sabat and B.K.Mahapatra, Id ARs appeared for the assessee and Shri M.K.Gautam, Id CIT DR appeared for the revenue.

3. At the time of hearing, Id AR submitted that he does not wish to press cross objection filed by the assessee. Consequently, the cross objection filed by the assessee stands dismissed as withdrawn. Id AR has also endorsed to this effect in the appeal.

4. In respect of revenue's appeal, Id CIT DR submitted that the only issue was against the action of the Id CIT(A) in allowing the claim of 35AD made by the assessee by admitting fresh evidences in violation of provisions of Rule 46A of IT Rules. Id CIT DR has filed written submission as follows:

" As regards claim u/s.35AD, fresh evidences were admitted by the Id. CIT(A) without calling for a remand report from the A.O. or confronting the A.O. with such evidences.

a) These evidences were taken on record by the Id. CIT(A) without recording any reasons for the same. It is a settled law that a litigant has to demonstrate that it was prevented by sufficient cause to lead such evidence before the A.O. i.e. Whether the AO refused to take such evidence or the assessee failed to submit these for sufficient reasons or the AO did not provide him sufficient opportunity. As per sub-rule 1, 2 and 3 of Rule-46A, firstly the CIT(A) has to record his reasons for taking such evidences on record. Secondly reasonable opportunity has to be given to the AO to verify/refute such evidences. In this regard, reliance is placed on following decisions:

**1) Hon'ble Gauhati High Court in the case of CIT vs. Ranjit Kumar Choudhury (288 ITR 179).**

**2) Hon'ble Kerala High Court in the case of C. Unnikrisnan vs. CIT (233 ITR 485)**

**3) Hon'ble Mumbai High Court in the case of Prabhavati S. Shah vs. CIT (231 ITR 1)**

**b.)** Therefore in the present case, there has been gross violation of principles of Natural Justice as the Id. CIT(A) has not allowed any opportunity to the AO to verify such evidences. Rule-46A(3) is mandatory and indispensable and noncompliance of same will require re-adjudication of the matter by the CIT(A). In this regard, reliance is placed on following decisions:

1) Hon'ble Himachal Pradesh High Court in the case of CIT vs. Shree Kangra Steel (P) Ltd. (320 ITR 691) (para-8)

2) Hon'ble Madras High Court in the case of CIT vs. Subbu Shashank (327 ITR 577)(para-6)

3) Hon'ble Delhi High Court in the case of CIT vs. United Towers (P) Ltd. (296 ITR 106)

4) Hon'ble Delhi High Court in the case of Manish Build Well (P) Ltd. (16 [taxmann.com](http://taxmann.com) 27)

In view of above facts and circumstances, the matter should be restored to the file of A.O. so as to examine these fresh evidences."

5. Ld CIT DR drew our attention to para 4.2 of the order of the Id CIT(A) to submit that he has admitted the evidences in the form of commissioning report dated 28.1.2013 of the new plant Zypmite, which was certified by the Vice President (Operation & Corporate Planning). He has also admitted fresh evidences in the form of installation/completion report showing the Executive Authorisation No.E.A.No.42/12-13 dt.5.7.2012. It was the submission that these evidences were not before the Assessing

Officer nor were the remand reports were called for from the AO. It was the prayer that the order of the Id CIT(A) be reversed.

6. In reply, Id AR submitted that the Assessing Officer had disallowed the assessee's claim of deduction u/s. 35AD on the ground that in the certificate in Form 3CD, the tax auditor had not certified anything in respect of the claim of deduction u/s.35AD. It was the submission that since assessee's operation were in existence prior to 1.4.2012, the AO did not allow the claim of deduction u/s.35AD. It was the submission by Id AR that there was no requirement for the audit report in Form 3CD for the tax auditors for mentioning regarding the deduction u/s.35AD during the relevant assessment year. The requirement of specifying the details of deduction in the tax audit report in Form 3CD came into existence w.e.f. 25.7.2014, whereas the impugned assessment year is 2013-14. It was fairly admitted by Id AR that at present he is not in a position to confirm whether the certificate dated 28.1.2013 by the Vice President (Operation & Corporate Planning) and the completion report dated 5.7.2012 was before the Assessing Officer. It was, however, the submission that the AO has only raised the issue in regard to certifying the amount of deduction in the audit report not being there. It was the submission that in the tax audit report for the relevant assessment year, the auditors had specifically excluded the assets eligible for deduction u/s.35AD while determining the

value of the assets for the purpose of depreciation under the I.T.Act. It was the submission that thus, the information was before the AO. It was the submission that the order of the Id CIT(A) is liable to be upheld.

7. We have considered the rival submissions. Admittedly, the Assessing Officer has disallowed the claim of deduction u/s.35AD on the ground that in the tax audit report filed, nothing is stated in respect of the said claim. It is also an admitted fact that for the relevant assessment year in the tax audit report, there was no requirement for stating regarding deduction u/s.35AD and the requirement of specifying the deduction u/s.35AD came into existence w.e.f 25.7.2014, much after the relevant assessment year. It is also noticed that in the audit report, the auditors have reduced the value of the assets from the total value of the assets eligible for deduction on the ground that such assets were being claimed against the deduction u/s.35AD. However, it is noticed that the primary evidence being the completion certificate and the commissioning report dated 28.1.2013 certified by the Vice President (Operation & Corporate Planning) and Executive Authorisation dated 5.7.2012 confirming the installation and completion report was not before the AO. Hence, the issue in the appeal is restored to the file of the AO for verification of the said two certificates. If the certificates are found to be correct, then the assessee would be entitled to deduction u/s.35AD.

8. In the result, appeal of the revenue is partly allowed for statistical purposes and the cross objection of the assessee stands dismissed.

**ITA No.327/CTK/2019-Assessee's appeal.**

9. Ld A.R. submitted that the only issue was against the action of the Id CIT(A) in confirming the order of the AO denying the assessee's claim of deduction of leave encashment u/s.43B(f) of the Act.

10. It was fairly agreed that this issue is identical to the issue in appeal filed by the assessee in ITA No.326/CTK/2019 for the assessment year 2012-13. As we have already restored the issue of allowability of leave encashment u/s.43B(f) of the Act in line with the principles laid down by Hon'ble Supreme Court in the case of Exide Industries Ltd , reported in 425 ITR 1 (SC), on identical findings, the issue is restored to the file of the AO for this year also.

11. In the result, appeal of the assessee is partly allowed for statistical purposes.

Order dictated and pronounced in the open court on 12/10/2022.

Sd/-  
**(Arun Khodpia)**  
**ACCOUNTANT MEMBER**

sd/-  
**(George Mathan)**  
**JUDICIAL MEMBER**

Cuttack; Dated 12/10/2022  
B.K.Parida, SPS (OS)

**Copy of the Order forwarded to :**

1. The assessee : Paradeep Phosphate Limited, Bayan Bhawan, J.N.Marg, Kharvel Nagar, Bhubaneswar.
2. The Revenue: Dy. CIT, Corporate Circle-1(2), 3<sup>rd</sup> floor, Aayakar Bhavan, Bhubaneswar.
3. The CIT(A)-1, Bhubaneswar
4. Pr.CIT-1, Bhubaneswar
5. DR, ITAT, Cuttack
6. Guard file.  
//True Copy//

**By order**

Sr.Pvt.secretary  
**ITAT, Cuttack**