IN THE INCOME TAX APPELLATE TRIBUNAL,
CUTTACK BENCH, CUTTACK

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

ITA Nos.34 & 35/CTK/2019
Assessment Years : **2013-14 & 2014-15**

M/s. Grid Corporation of Orissa Ltd., GRIDCO House, Janpath, Bhubaneswar.	Vs.	DCIT, Circle -1(1), Bhubaneswar.
PAN/GIR No.AABCG 5398 P		
(Appellant)	..	(**Respondent**)

ITA Nos.324 & 358/CTK/2019
Assessment years: 2013-14 & 2014-15

M/s. Grid Corporation of Orissa Ltd., GRIDCO House, Janpath, Bhubaneswar.	Vs.	DCIT, Corporate Circle - 1(1), Bhubaneswar.
PAN/GIR No.AABCG 5398 P		
(Appellant)	..	(**Respondent**)

ITA Nos.325 & 359/CTK/2019
Assessment years: 2013-14 & 2014-15

DCIT, Corporate Circle - 1(1), Bhubaneswar.	Vs.	M/s. Grid Corporation of Orissa Ltd., GRIDCO House, Janpath, Bhubaneswar.
PAN/GIR No.		
(Appellant)	..	(**Respondent**)

Assessee by : Shri Ved Jain & Shri Venugopal Rao, ARs
Revenue by : Shri M.K.Gautam, Pr. CIT (OSD)

Date of Hearing : 29 /03/2023
Date of Pronouncement : 29 /03/2023

O R D E R

Per Bench

ITA No.34 & 35/CTK/2019; Asst.Years: 2013-14 & 2014-15

These are appeals filed by the assessee against the order of the ld Pr. CIT-1, Bhubaneswar, both dated 28.3.2018 in Appeal No. PCIT-1/BBSR/263/14/AABCG 5398/2017-18 and PCIT-1/BBSR/263/15/AABCG 5398/2017-18 for the assessment years 2013-14 & 2014-15.

2. S/Shri Ved Jain and Venugopal Rao, ld ARs appeared for the assessee and Shri M.K.Gautam, ld Pr. CIT (OSD) appeared for the revenue.

3. The appeals filed by the assessee are barred by limitation by 269 days. In the petition, it is stated that though the orders received by the Pr. CIT were received by the clerk working in the office of Chartered Accountant for taking further appropriate action but the clerk kept the above mentioned orders in the drawer and no further action was taken. Only when the consequential order under section 263/143(3) of the Act passed on 24.12.2018, the counsel advised the assessee to provide the status of the order passed u/s.263 of the Act. Accordingly, the assessee took the immediate step to file the appeals before the Tribunal and there was delay in filing the appeals. It was submitted that the delay in filing the appeals is not intentional and prayed to admit the appeals by condoning the delay. After hearing both the sides, we are convinced that the delay in

filing the appeals was reasonable cause. Consequently, we condone the delay of 269 days and admit the appeals for hearing on merits.

4. It was submitted by ld AR that for the assessment year 2013-14, the original assessment came to be completed u/s.143(3) on 19.2.2016 and for assessment year 2014-15 on 26.2.2016. For the assessment year 2013-14, the Pr. CIT initiated proceedings u/s.263 of the Act in respect of issue of TDS not deducted on the payments made to Power Grid Corporation of India Ltd (PGCIL) and consequential disallowance liable to be made u/s.40(a)(ia) of the Act (i) on the differed tax liability, (ii) in respect of wheeling charges paid, (iii) excess claim of regulatory asset and (iv) non recognition of income arising out of subsidy.

5. For the assessment year 2014-15, the Pr. CIT has invoked his powers u/s.263 in respect of issue of (i) excess claim in the regulatory asset, (ii) non recognition of the income arising out of subsidy and (iii) in respect of consequential computation of assessee's income by applying the provisions of Section 115 JB (MAT).

6. For both the assessment years, the assessee had filed its reply on 26.3.2018. The Pr. CIT vide his order dated 28.3.2018 invoked the provisions of Explanation 2 to Section 263 and without considering the replies filed by the assessee nor giving the findings as to how the orders passed by the Assessing Officer for the respective assessment years were

erroneous and prejudicial to the interest of the revenue, especially after receiving the replies filed by the assessee in respect of the issues raised in the show cause notice u/s.263 set aside the respective assessment orders and directed the Assessing Officer to redo the same denovo on the issues discussed in the orders passed u/s.263 of the Act. It was the submission that as the Pr. CIT has not considered the explanation given by the assessee and has not done any verification much less an enquiry after the receipt of the replies filed by the assessee nor has the Pr. CIT pointed out as to how the order passed by the AO u/s.143(3) was erroneous and prejudicial to the interest of the revenue after the receipt of the reply of the assessee, the order passed u/s.263 is liable to be set aside. It was the submissions that the orders passed u/s.263 were without application of mind and in a mechanical manner and in violation of the provisions of section 263 of the Act. It was the submission that the issue was squarely covered by the decision of the Co-ordinate Bench of this Tribunal in the case of Earth Minerals Co Ltd in ITA No.223/CTK/2019 dated 29.8.2022, wherein, the Co-ordinate Bench has held as follows:

> "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
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> > (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.
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> 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."

7. It was the submission that the order of the Tribunal has been upheld by the Hon'ble Jurisdictional High Court of Orissa in IT No.23/2023 dated 6.3.2023. It was the further submission that in view of the decision of Co-ordinate Bench of ITAT Mumbai in the case of JRD Tata Trust vs DCIT, (2020) 122 taxmann.com 275 (Mumbai-Trib), wherein, it has been held as under:

> "19. The question that we also need to address is as to what is the nature of scope of the provisions of Explanation 2(a) to Section 263 to the effect that an order is deemed to be "erroneous and prejudicial to the interests of the revenue" when Commissioner is of the view that "the order is passed without making inquiries or verification which should have been made".
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> 20. Undoubtedly, the expression used in Explanation 2 to Section 263 is "when Commissioner is of the view," but that does not mean that the view so formed by the Commissioner is not subject to any judicial scrutiny or that such a view being formed is at the unfettered discretion of the Commissioner. The formation of his view has to be in a reasonable manner, it must stand the test of judicial scrutiny, and it must have, at its foundation, the inquiries, and verifications expected, in the ordinary course of performance of duties, of a prudent, judicious and responsible public servant- that an Assessing Officer is expected to be. If we are to proceed on the basis, as is being urged by the learned Departmental Representative and as is canvassed in the impugned order, that once Commissioner records his view that the order is passed without making inquiries or verifications which should have been made, we cannot question such a view and we must uphold the validity of revision order, for the recording of that view alone, it would result in a situation that the Commissioner can de facto exercise unfettered powers to subject any order to revision proceedings. To exercise such a revision power, if that proposition is to be upheld, will mean that virtually any order can be subjected to revision proceedings; all that will be necessary is the recording of the

Commissioner's view that "the order is passed without making inquiries or verification which should have been made". Such an approach will be clearly incongruous. The legal position is fairly well settled that when a public authority has the power to do something in aid of enforcement of a right of a citizen, it is imperative upon him to exercise such powers when circumstances so justify or warrant. Even if the words used in the statute are prima facie enabling, the courts will readily infer a duty to exercise a power which is invested in aid of enforcement of a right—public or private—of a citizen. [L Hirday Naran Vs Income Tax Officer [(1970) 78 ITR 26 (SC)]. As a corollary to this legal position, when a public authority has the powers to do something against any person, such an authority cannot exercise that power unless it is demonstrated that the circumstances so justify or warrant. In a democratic welfare state, all the powers vested in the public authorities are for the good of society. A fortiorari, neither can a public authority decline to exercise the powers, to help anyone, when circumstances so justify or warrant, nor can a public authority exercise the powers, to the detriment of anyone, unless circumstances so justify or warrant. What essentially follows is that unless the Assessing Officer does not conduct, at the stage of passing the order which is subjected to revision proceedings, inquiries and verifications expected, in the ordinary course of performance of duties, of a prudent, judicious and responsible public servant- that an Assessing Officer is expected to be, Commissioner cannot legitimately form the view that "the order is passed without making inquiries or verification which should have been made". The true test for finding out whether Explanation 2(a) has been rightly invoked or not is, therefore, not simply existence of the view, as professed by the Commissioner, about the lack of necessary inquiries and verifications, but an objective finding that the Assessing Officer has not conducted, at the stage of passing the order which is subjected to revision proceedings, inquiries and verifications expected, in the ordinary course of performance of duties, of a prudent, judicious and responsible public servant that the Assessing Officer is expected to be.

21. That brings us to our next question, and that is what a prudent, judicious, and responsible Assessing Officer is to do in the course of his assessment proceedings. Is he to doubt or test every proposition put forward by the assessee and investigate all the claims made in the income tax return as deep as he can? The answer has to be emphatically in negative because, if he is to do so, the line of demarcation between scrutiny and investigation will get blurred, and, on a more practical note, it will be practically impossible to complete all the assessments allotted to him within no matter how liberal a time limit is framed. In scrutiny assessment proceedings, all that is required to be done is to examine the income tax return and claims made therein as to whether these are prima facie in accordance with the law and where one has any reasons to doubt the correctness of a claim made in the income tax return, probe into the matter deeper in detail. He need not look at everything with suspicion and investigate each and every claim made in the income tax return; a

reasonable prima facie scrutiny of all the claims will be in order, and then take a call, in the light of his expert knowledge and experience, which areas, if at all any, required to be critically examined by a thorough probe. While it is true that an Assessing Officer is not only an adjudicator but also an investigator and he cannot remain passive in the face of a return which is apparently in order but calls for further inquiry but, as observed by Hon'ble Delhi High Court in the case of Gee Vee Enterprises Vs ACIT [(1195) 99 ITR 375 (Del)], "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. (Emphasis, by underlining, supplied by us). It is, therefore, obvious that when the circumstances are not such as to provoke an inquiry, he need not put every proposition to the test and probe everything stated in the income tax return. In a way, his role in the scrutiny assessment proceedings is somewhat akin to a conventional statutory auditor in real life situations. What Justice Lopes said, in the case of Re Kingston Cotton Mills [(1896) 2 Ch 279, 288)], in respect of the role of an auditor, would equally apply in respect of the role of the Assessing Officer as well. His Lordship had said that an auditor (read Assessing Officer in the present context) "is not bound to be a detective, or, as was said, to approach his work with suspicion or with a foregone conclusion that there is something wrong. He is a watch-dog, but not a bloodhound.". Of course, an Assessing Officer cannot remain passive on the facts which, in his fair opinion, need to be probed further, but then an Assessing Officer, unless he has specific reasons to do so after a look at the details, is not required to prove to the hilt everything coming to his notice in the course of the assessment proceedings. When the facts as emerging out of the scrutiny are apparently in order, and no further inquiry is warranted in his bonafide opinion, he need not conduct further inquiries just because it is lawful to make further inquiries in the matter. A degree of reasonable faith in the assessee and not doubting everything coming to the Assessing Officer's notice in the assessment proceedings cannot be said to be lacking bonafide, and as long as the path adopted by the Assessing Officer is taken bonafide and he has adopted a course permissible in law, he cannot be faulted- which is a sine qua non for invoking the powers under section 263. In the case of Malabar Industrial Co Ltd Vs CIT [(2000) 243 ITR 83 (SC)], Hon'ble Supreme Court has held that "Every loss of revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interests of the revenue, for example, when an ITO adopted one of the courses permissible in law and it has resulted in loss of revenue; or where two views are possible and the ITO has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the revenue unless the view taken by the ITO is unsustainable in law." The test for what is the least expected of a prudent, judicious and responsible Assessing Officer in the normal course of his assessment work, or what constitutes a permissible course of action for the Assessing Officer, is not what he should have done in the ideal circumstances, but what an Assessing Officer, in the course of his performance of his duties as an Assessing Officer should, as a prudent,

judicious or reasonable public servant, reasonably do bonafide in a real-life situation. It is also important to bear in mind the fact that lack of bonafides or unreasonableness in conduct cannot be inferred on mere suspicion; there have to be some strong indicators in direction, or there has to be a specific failure in doing what a prudent, judicious and responsible officer would have done in the normal course of his work in the similar circumstances. On a similar note, a coordinate bench of the Tribunal, in the case of Narayan T Rane vs ITO [(2016) 70 taxmann.com 227 (Mum)] has observed as follows:

> 20. Clause (a) of Explanation states that an order shall be deemed to be erroneous, if it has been passed without making enquiries or verification, which should have been made. In our considered view, this provision shall apply, if the order has been passed without making enquiries or verification which a reasonable and prudent officer shall have carried out in such cases, which means that the opinion formed by Ld Pr. CIT cannot be taken as final one, without scrutinising the nature of enquiry or verification carried out by the AO vis-a-vis its reasonableness in the facts and circumstances of the case. Hence, in our considered view, what is relevant for clause (a) of Explanation 2 to sec. 263 is whether the AO has passed the order after carrying our enquiries or verification, which a reasonable and prudent officer would have claimed out or not. It does not authorise or give unfettered powers to the Ld Pr. CIT to revise each and every order, if in his opinion, the same has been passed without making enquiries or verification which should have been made."

8. It was the submission that the true test in finding out whether the Explanation 2 (a) to section 263 has been rightly invoked or not is not a simple existence of the view professed by the ld Pr. CIT about the lack of necessary enquiry and verification by the AO. The objective finding has to be taken that the AO has not conducted the requisite enquiries or verification when passing the assessment orders which is the subject matter of revision u/s.263. It was the submission that this objective finding, which is required from the side of the Pr. CIT, is lacking in the impugned orders under appeal.

9. Ld. Pr. CIT(OSD) submitted that in Ground Nos.3 & 4 of assessee's appeal, the assessee has challenged the order u/s.263 on the ground that necessary enquiries had been conducted by the AO. It was the submission that the assessee has not placed the proof of the verification or examination as done by the Assessing Officer in the course of original assessment. It was the submission that this should be considered as a case of no enquiry by the Assessing Officer and in the case of no enquiry, , the Pr. CIT is not expected to do any enquiry but expected to direct the AO to make enquiry. Only in such cases, where there is inadequacy of enquiry, that the Pr. CIT is required to do further enquiry to show how the orders passed by the AO was erroneous and prejudicial to the interest of the revenue. It was the further submission that the word used in the provisions of section 263 is to do enquiry as the Pr. CIT deems necessary. There is discretion available with the Pr. CIT to do or not to do enquiry. Ld Pr. CIT (OSD) drew our attention to the decision of the Hon'ble Jurisdictional High Court of Orissa in the case of Pr. CIT vs. Orissa State Police Housing & Welfare Corporation Ltd., (20220 139 taxmann.com 207)Orissa), wherein, in para 14, it has been held as follows:

> "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 insofar 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."

10. It was the submission that the words used in the said decision was such an enquiry as he deems necessary. He placed reliance on the decision of the Hon'ble Supreme Court in the case of Malbar Industrial Co. Ltd vs CIT, 243 ITR 83 (SC), wherein, in para 10, it has been held as follows:

> "10, In the instant case, the Commissioner noted that the Income-tax Officer passed the order of nil assessment without application of mind. Indeed, the High Court recorded the finding that the Income-tax Officer failed to apply his mind to the case in all perspective and the order passed by him was erroneous. It appears that the resolution passed by the board of the appellant- company was not placed before the Assessing Officer. Thus, there was no material to support the claim of the appellant that the said amount represented compensation for loss of agricultural income. He accepted the entry in the statement of the account filed by the appellant in the absence of any supporting material and without making any inquiry. On these facts the conclusion that the order of the Income-tax Officer was erroneous is irresistible. We are, therefore, of the opinion that the High Court has rightly held that the exercise of the jurisdiction by the Commissioner under Section 263(1) was justified."

11. Ld Pr. CIT (OSD) also relied upon the decision of Hon'ble High Court of Himachal Pradesh in the case of Virbhadra Singh (HUF) vs Pr. CIT (2017) 86 taxmann.com 113 (HP), wherein, in paras 119 and 120, it has been held as under:

> "119. We reiterate that sub-section (1) of Section 263 confers sufficient powers upon the Commissioner to decide all issues of law, after recording its satisfaction that the order passed by the Assessing Officer is erroneous and prejudicial to the interest of the Revenue. The power is wide enough to take in its sweep the action of modifying, cancelling or directing fresh assessment, particularly when it is a case of "no inquiry". We are of the considered view that no inquiry, as envisaged in law, was carried out,

hence, question of the Commissioner taking an alternate possible view does not arise. The Assessing Officer cannot be said to have taken a plausible view, as envisaged in law, and the view taken by the Commissioner to be an alternative one. Finding of the Commissioner that the order is erroneous is not on account of his mere disagreement with the view taken by the Assessing Officer. Any inquiry, without application of mind, is nonest. The given facts warranted the Assessing Officer to have conducted complete and proper inquiry and only thereafter, assessed the income so declared by the Assessee. He ought to have considered that the Assessee had sought to revise the return by declaring an income 1872% higher than what was originally returned and that too after action for scrutinizing the return was initiated. All transactions of sale of agricultural produce were in cash. Income declared was (a) disproportionately high only with respect to the relevant year and never in the preceding or succeeding years, (b) investment of huge amount of Rs.3.8 crore was carried out by the Assessee himself, be from whatever source and there was no reference thereof in the original return. As such, omission or wrong statement cannot be said to be bonafide. Prima facie returns, being invalid, ought to have been rejected.

120. The case in hand being that of no inquiry, and the amplitude of the powers of the Commissioner being wide enough to pass "such order" as the circumstances of the case justify, including (a) cancelling the assessment, (b) modifying the order of assessment, (c) directing fresh assessment, as such, the Commissioner was well within his right to pass an appropriate order of remission."

12. He also relied upon the decision of the Co-ordinate Bench of Jaipur Tribunal in the case of Krishan Gopal (HUF) vs CIT, (2013) 39 taxmann.com 122 (Jaipur-Trib), wherein, in paras 8 & 9, it has been held as under:

"8. The Ld. CIT in the present case only gave direction to decide afresh. Such a direction does not cause prejudice to the assessee as has also been held by the Hon'ble Madhya Pradesh High Court in the case of CIT Vs. Deepak Kumar Garg 8 (2008) 299 ITR 435 (M.P.). The Ld. Commissioner of Income Tax, therefore, is found justified in setting aside the order of the Assessing Officer to be erroneous in so far as prejudicial to the interest of revenue on this issue.

9. In so far as the issue of TDS reconciliation and trading account in various agricultural items are concerned, the assessing officer has not made due and proper enquiry. The Ld. CIT merely gave direction to decide afresh. This causes no prejudice to the assessee, as has

also been held by the Hon'ble Madhya Pradesh High Court in the case of CIT Vs. Deepak Kumar Garg (supra)."

13. It was submitted by ld Pr. CIT(OSD) that the assessee having deducted TDS in respect of part payment to PGCIL, it was incumbent on the assessee to deduct TDS on the balance payment also. In respect of excess claim of regulatory asset, the issue revolve around the claim made by the assessee of Rs.1414 crores made by the assessee before OERC. OERC had granted the assessee permission to collect 1/6th of the amount over a period of six years. Consequently, the amount liable to be collected and offered to tax was Rs.235 crores whereas in the assessment year 2013-14, the assessee has offered Rs.325.75 crores and for the assessment year 2014-15, the assessee has offered Rs.328.71 crores. It was the submission that it was only subsequent that OERC has given breakup of the amount and had permitted the assessee to collect the specified amount over a period of six years. In regard to the issue of deferred tax liability, and the issue on is in regard to contractual liability, the income arose on a contingent basis and the tax was liable to be offered by the assessee. On the issue of subsidy, the assessee was obliged to offer the same to tax if it was on revenue field by showing in the profit and loss account. If it was in the capital field, it has to be taken to capital reserve account and if it was for the machinery, the same was liable to be reduced from the cost of machinery for the purpose of claiming depreciation. It was the submission

that Pr. CIT was not obliged to make any enquiry insofar as nothing has been brought to show that the AO had conducted any enquiry on these issues. It was the submission that the fact that the issues having not been considered clearly showed erroneous application of mind by the Assessing Officer. It was the prayer that the orders passed under section 263 are to be upheld.

14. We have considered the rival submissions. Shorn of all the frills in respect of the arguments, the simple issue before the Tribunal is whether the Pr. CIT has applied his mind to the issues on which he has invoked his powers u/s.263 to hold the assessment orders passed u/s.143(3) for the impugned assessment years as erroneous and prejudicial to the interest of the Revenue. A perusal of the orders passed u/s.263 show that the Pr. CIT in his orders u/s.263 has extracted the issues in verbatim from the show cause notice in the initial paragraph of his orders. Then, he has extracted the replies filed by the assessee on 26.3.2018 and after that has invoked the provisions of Explanation 2 to Section 263 and has held the assessment orders as erroneous and prejudicial to the interest of the revenue. Nowhere in the order passed u/s.263, the Pr. CIT has discussed anything about the replies filed by the assessee. He has not even rejected the replies filed by the assessee much less found fault in the replies filed by the assessee. A perusal of the provisions of section 263 shows that the word used therein is "after giving the assessee an opportunity of being heard". These words are

put on the provisions of section 263 for putting the assessee a notice. Once the assessee is put to notice and he has replied to the same, it is incumbent upon the authority to consider such reply and give a finding thereon. This has not been done by the Pr. CIT. After giving the assessee an opportunity of being heard and getting his reply, the Pr. CIT could have done any further enquiry or verification. In the present case, the absence of any enquiry made by the Pr. CIT in respect of the replies filed by the assessee clearly shows the non-application of mind by the Pr. CIT. Even if one is to consider the facts of the addition, the Co-ordinate Bench of this Tribunal in assessee's own case has already held that the assessee is not liable to deduct TDS on the wheeling charges paid to PGCIL. This has been directed in assessee' case for the assessment year 2009-10 vide order dated 7.1.2016. The revenue has been conscious in not appealing against the said order. However in order dated 28.3.2011, the Pr. CIT has ignored the reply on this issue in the order u/s.263. In regard to the issue of regulatory asset, it was very much before the Pr. CIT and in the replies filed by the assessee that OERC has directed to recover the specified amounts in six years and that amounts have been recovered and offered to tax and in short it is excess income that has been offered to tax and same could not have been treated as erroneous and prejudicial to the interest of the revenue under any circumstances. The order of OERC is also dated 18.3.2011 and this order was available before the Pr. CIT before passing

order u/s.263. In regard to deferred tax liability also, the assessee has collected the amounts on the basis of the order of OERC. This was also before the Pr. CIT. Even on cursor perusal of the reply filed by the assessee would show that the assessee has offered the incomes in the line with the order passed by the Regulatory Authority. In regard to the issue of subsidy also, the assessee has categorically mentioned that it has been following AS-12 and that net of the subsidy has been offered to tax. Thus, clearly this is a case of no enquiry by the Pr. CIT. A perusal of the order of the Hon'ble Jurisdictional High Court of Orissa in the case of Orissa State Police Housing & Welfare Corporation Ltd.,(supra) shows that in para 14, which has been extracted above, the Hon'ble High Court has categorically held that the purpose of such an enquiry would be to arrive at a subjective view. Even if such enquiry is not mandatory, there has to be some basis on which the CIT can form such a view. The basis for forming a view that the assessment order is passed is erroneous and prejudicial to the interest of the revenue is admittedly not coming out of the order of the Pr. CIT. The order of the Pr. CIT is admittedly non speaking one in respect of replies filed by the assessee before him. Even if we are to consider the decision of the Hon'ble Supreme Court in the case of Malbar Industrial Co Ltd (supra), a perusal of para 6 of the said order used the words "the Commissioner has to be satisfied with twin conditions". This satisfaction must be discernible from the order of the Pr. CIT. The order of the Pr. CIT should a speaking

one for the reasons to be discernible. Here, it is noticed that it is not so. The other decisions as relied upon by ld Pr. CIT (OSD) have no bearing to the facts of the present case and consequently have no applicability. This being so, as no enquiry has been done by the Pr. CIT, respectfully following the proposition laid down by the Co-ordinate Bench in the case of M/s. Earth Minerals Co. Ltd (supra), the order passed u/s.263 is unsustainable and consequently, same stands quashed.

15. In the result, both the appeals of the assessee stand allowed.

ITA No.324/CTK/2019 for A.Y. 2013-14–Assessee's appeal
ITA No.358/CTK/2019 for A.Y. 2013-14–Revenue's appeal

16. As we have already quashed the order u/s.263 of the Act passed by the Pr. CIT for the assessment year 2013-14, the appeals filed by the assessee and revenue in ITA No.324/CTK/2019 and ITA No.358/CTK/2019 have become infructuous and same stand dismissed.

17. In the result, both the appeals filed by the assessee and revenue stand dismissed.

ITA No.325/CTK/2019 for A.Y. 2014-15–Assessee's appeal
ITA No.359/CTK/2019 for A.Y. 2014-15–Revenue's appeal

18. As we have already quashed the order u/s.263 of the Act passed by the Pr. CIT for the assessment year 2014-15, the appeals filed by the assessee and revenue in ITA No.325/CTK/2019 and ITA No.359/CTK/2019 have become infructuous and same stand dismissed.

19. In the result, the appeals filed by the assessee and revenue stand dismissed.

Order dictated and pronounced in the open court on 29/03/2023.

Sd/-	sd/-
(Arun Khodpia)	**(George Mathan)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Cuttack; Dated 29/03/2023
B.K.Parida, SPS (OS)

Copy of the Order forwarded to :

1. The Assessee: M/s. Grid Corporation of Orissa Ltd., GRIDCO House, Janpath, Bhubaneswar
2. The Revenue: DCIT, Corporate Circle-1(1), 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