



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

**BEFORE SHRI GEORGE MATHAN, JUDICIAL MEMBER
AND
MANISH AGARWAL, ACCOUNTANT MEMBER**

ITA No.139/CTK/2023
Assessment Year : 2018-19

M/s. Brahmani River Pellets Limited., 4 th floor, IPICOL House, Janapath, Sahid Nagar, Bhubaneswar.	Vs.	Pr. CIT-1, Bhubaneswar
PAN/GIR No.AACCB 9418 Q		
(Appellant)	..	(Respondent)

Assessee by : Shri A.K.Sabat and B.K.Mahapatra, CAs
Revenue by : Shri Sanjay Kumar, CIT DR

Date of Hearing : 22/05/2024
Date of Pronouncement : 22/05/2024

ORDER

Per Bench

This is an appeal filed by the assessee against the order of the Id Pr. CIT, Bhubaneswar-1 passed u/s.263 of the Act dated 15.3.2023 in Appeal No. PCIT, Bhubaneswar-1/Revision-263/100000433482/2022 for the assessment year 2018-19..

2. Shri A.K.Sabat and Shri B.K.Mahapatra, Id ARs appeared for the assessee and Shri Sanjay Kumar, Ld CIT DR appeared for the revenue.

3. It was submitted by Id AR that the assessee has submitted the reply to the show cause notice u/s.263 of the Act issued by the Pr. CIT with all the details. It was the submission that the Pr.CIT has not considered any of the explanation given by the assessee but has simply remitted the matter back to the file of the Assessing Officer to decide the matter after giving adequate opportunity of being heard. It was the submission that the assessee had filed its original return of income for the impugned assessment year on 26.10.2018. The assessee had also filed its revised return on 11.3.2019. The return had been processed and the assessment completed u/s.143(3) of the Act on 22.2.2021 by NFAC assessment. It was the submission that this assessment order was the subject matter of revision u/s.263 and the show cause notice had been issued to the assessee on 29.11.2022. It was the submission that the assessee had filed its reply to the show cause notice on 23.11.2022. It was the submission that without pointing out any specific error in the reply and evidence submitted by the assessee, the Pr. CIT though agreed that the issues had been raised by the Assessing Officer, held that the issues had not been examined in the perspective it deserves. It was the submission that no enquiry itself has been done by the Pr. CIT even after all the evidences were put before him. It was the submission that the order passed u/s.263 of the Act is liable to be quashed.

4. In reply, Id CIT DR vehemently supported the order of the Pr. CIT. He drew our attention to various paragraphs of the order of the Pr. CIT to submit that though the Assessing Officer has examined various issues, which are the subject matter of revision u/s.263 of the Act, the Assessing Officer had failed to examine them in the perspective it deserves. It was the submission that in view of the decision of the Hon'ble Supreme Court in the case of Malbar Industrial Co. 243 ITR 83 (SC), the Pr. CIT was very much within his powers to invoke the jurisdiction u/s.263 of the Act when he found that the assessment order was erroneous and prejudicial to the interest of the revenue. It was the submission that though the replies have been given by the assessee but on many of the issues, there still remains lacunae which has been considered by the Assessing Officer in the consequential order passed on 30.3.2024 where additions have been made. It was the submission that as the consequential order has already been passed, the appeal filed by the assessee is liable to be rejected as infructuous as alternative remedy is available to the assessee against the consequential order passed. Id CIT DR has also relied on the decision of the Hon'ble Supreme Court in the case of CIT vs Pavile Projects (P) Ltd., (2023) 453 ITR 447 (SC), wherein, the Hon'ble Supreme Court has restored the order passed u/s.263 of the Act by the CIT insofar as the Hon'ble Supreme Court had found that the order passed by the AO in that case was

erroneous and prejudicial to the interest of the revenue. It was the submission that the order passed by Pr. CIT is liable to be upheld.

5. We have considered the rival submissions. A perusal of the order passed u/s.263 of the Act by the Pr. CIT clearly shows that from para 5 page 4 of the order, Id Pr. CIT Id. Pr. CIT has extracted the written submissions filed by the assessee. This goes on till para 6 page 14 of the order of the Pr. CIT. In para 6 of the order of Id Pr. CIT, in reply filed by the assessee, the assessee has specifically provided a chart wherein, the issues raised in the show cause notice has been pointed out and tallied with the question raised by the Assessing Officer in the notice u/s.142(1) of the Act on various dates and the reply given by the assessee to such queries. Further, independent answer has been given to the show cause notice during the proceedings u/s.263 of the Act. In para 6, Id Pr. CIT gives his findings. It has been held by him that the claim of the assessee that the original assessment with 'Limited Scrutiny' was not correct and that it was a case of 'Complete Scrutiny. In para 6.3, he raises the issue of 'excess debit' of carry forward loss. He mentions that the issue has been considered by the Assessing Officer but he remits the matter back to the file of the Assessing Officer for re-verification. In para 6.4, he raises the issue of "other expenses", which appear to be disproportionate and in para 6.4.2, he says that these issues were considered by the Assessing Officer but no comparison with previous year's figure has been done. In para 7, he

mentions 'Non deduction of TDS on interest paid' and in para 7.1.1, the issue was dropped. In para 7.2, he raises the issue of 'applicability of section 40A(3) and in page 23, he mentions that the duty drawback is not specifically mentioned in the notes forming part of the accounts. He does not give any finding as to whether the figures and submissions given by the assessee in any of the issues were erroneous or wrong. Nowhere the explanation given was found against the assessee. In these circumstances, it would be worthwhile to refer to the decision of the Co-ordinate Bench of this Tribunal in the case of M/s. Earth Minerals Co. Ltd. Vs ACIT in ITA No.223/CTK/2019 for A.Y. 2009-2010, wherein, the Co-ordinate Bench of this Tribunal has in paras 10 to 17 held as follows:

"10. We have considered submissions of the Id. 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 Id. 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 Id. 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 Id. Pr.CIT is liable to be annulled and we do so.

13. The decision relied on by the Id. 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 Id. 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 Id. Pr.CIT before passing the order u/s.263 of the Act, the impugned order passed u/s.263 of the Act by the Id. Pr.CIT is held to be bad in law and the same is hereby annulled.”

6. The Co-ordinate Bench in para 17 has categorically held that “on account of the absence of any enquiry being done by the Id. Pr.CIT before passing the order u/s.263 of the Act, the impugned order passed u/s.263 of the Act by the Id. Pr.CIT is held to be bad in law and the same is hereby annulled.”

7. A perusal of the decision of Hon’ble Supreme Court in the case of Paville Projects (P) Ltd., clearly shows that the Hon’ble Supreme Court took into consideration the fact in para 3.2 of that order that the Commissioner therein categorically held that the expenditure claimed therein by the assessee neither constituted expenditure that is capital in nature nor resulted in any additions or alterations that provide an enhanced value of an enduring nature to the capital asset. The Commissioner also held that the payment as contended was not made by the assessee to remove encumbrances. It was on account of this clear cut finding by the CIT in the case of Paville Projects (P) Ltd (supra), the Hon’ble apex Court had upheld the order passed u/s.263 by the CIT therein.

8. In the present case, there is no finding by the Pr. CIT that how the order of the Assessing Officer is wrong on any of the issues and he has merely collected the details and then claimed the assessment order to be erroneous and prejudicial to the interest of the revenue and remitted the matter back to the file of the Assessing Officer for readjudication. This clearly shows that there was absence of any enquiry by the Pr. CIT before passing the order u/s.263 of the Act. The Co-ordinate Bench of this Tribunal in Earth Minerals Co Ltd (supra) was the subject matter of appeal before the Hon'ble Jurisdictional High Court and the Hon'ble High Court has vide its order dated 6.3.2023 upheld the order of the Tribunal. The Co-ordinate Bench of this Tribunal while passing the order, followed the principles laid down by the Hon'ble Jurisdictional High court in the case of Orissa State Police Housing & Welfare Corporation Ltd., reported in (2022) 139 taxmann.com 207(Orissa). The decision of the Hon'ble Jurisdictional High Court upheld the decision of the Co-ordinate Bench in the case of Earth Minerals Co. Ltd (supra) reported in (2024) 162 taxmann.com 272 (Orissa). It would be worthwhile to mention that the decision of the Hon'ble Jurisdictional High Court in the case of Earth Minerals Co./ Ltd (supra) has been approved by the Hon'ble Supreme Court by dismissal of the SLP reported in 162 taxmann.com 273 (SC). In these circumstances as the facts of the present case clearly show that there is absolute absence of any enquiry being done by the Pr. CIT before passing the order u/s.263 of

the Act, the impugned order passed u/s.263 of the Act by the Pr. CIT is held to be bad in law and same stands quashed.

9. In the result, appeal of the assessee stands allowed.

Order dictated and pronounced in the open court on 22/05/2024.

Sd/-
(Manish Agarwal)
ACCOUNTANT MEMBER
Cuttack; Dated 22/05/2024
B.K.Parida, SPS (OS)

sd/-
(George Mathan)
JUDICIAL MEMBER

Copy of the Order forwarded to :

1. The Appellant : M/s. Brahmani River Pellets Limited., 4th floor, IPICOL House, Janapath, Sahid Nagar, Bhubaneswar
2. The Respondent: Pr. CIT-1, Bhubaneswar
3. DR, ITAT,
4. Guard file.
//True Copy//

By order

Sr.Pvt.secretary
ITAT, Cuttack