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

IN THE INCOME TAX APPELLATE TRIBUNAL CUTTACK BENCH CUTTACK

BEFORE SHRI C.M. GARG, JM & SHRI L.P. SAHU, AM

आयकर अपील **सं./ITA No.276/CTK/2015**

(**निर्धारण वर्ष /** Assessment Year :2010-2011)

M/s Jaidurga Minerals, C/o Sri Dipu Jaiswal, At-Hudi Sahi, Joda, Keonjhar-758034	Vs.	The Pr. CIT, Cuttack
PAN No. : **AAFFJ 3456 L**		

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

निर्धारिती **की ओर से** /Assessee by	:	Shri S.N.Sahu, Advocate
राजस्व **की ओर से** /Revenue by	:	Shri M.K.Gautam, CIT-DR

सुनवाई की तारीख **/ Date of Hearing**	:	04/08/2020
घोषणा की तारीख**/Date of Pronouncement**	:	10/08/2020

<u>आदेश / O R D E R</u>

<u>Per L.P.Sahu, AM</u>:

The assessee has filed this appeal against the order of Pr. CIT, Cuttack, dated 30.03.2015 for the A.Y.2010-2011, on the following grounds of appeal :-

1) *That the order u/s. 263 of the IT. Act, 1961 dated 30.03.2015 is illegal, arbitrary, uncalled for, unjust and against the facts on record.*

2) *That show cause notice issued on 20.03.2015 requiring the assessee to furnish clarification on 27.03.2015 without giving adequate opportunity to the assessee is illegal, uncalled for and against the principle of natural justice.*

3) *That the assessee stays in Hudi Sahi, Joda and his local lawyer is situated at Barbil but the Counsel of the assessee to present before the CIT is at Cuttack the notice was served on the assessee on 23.03.2015 hardly giving four days time is not proper adequate and proper opportunity and it is against the principle of natural justice when the notice was communicated to the lawyer at Cuttack to take adjournment for preparation of the case to represent properly, the learned CIT told that he has*

already passed 263 order because of limitation and he did not receive the adjournment petition. Hence, the order under section 263 is unjustified and illegal.

4) *That under similar situation Hon'ble Andhra Pradesh High Court has strongly remarked their displeasure as follows in the case of Bernal Tiwari Vs. CIT, 173 ITR 280 (AP).*

"We must express our disapproval of the way in which Income Tax officers drag on assessment proceeding till almost the last minute and rush through the entire process of assessment when the limitation is about to set in without giving adequate opportunity to the assessee. The CIT exercising administrative jurisdiction over these officers should keep a close watch on the proceeding and should discourage any attempt on the part of the tax officers to drag on assessment proceeding till the last moment causing difficulties both to the assessee and to the department."

Therefore, similar action has also been inflicted by the learned CIT which is not to approved.

5) *That, the notice U/s 263 is not valid since it contravened clause (b) to explanation of section 263(1) for not examining the record available at the time of examination for issuance of notice U/s 263. Similarly it also lacked jurisdiction since the twin conditions of Assessment order being erroneous as well as being prejudicial to the interest of the revenue were not satisfied (refer CI.T. Vrs. Jain Construction Co. (2013) 215 Taxman 127 (May) Raj) (H.C.) , Similar views have also been expressed in the judicial decision referred below.*

a) CI.T. Vrs. Green World Corporation (2009) 314 ITR 81
b) Malabar Industrial Co. Ltd Vrs. CI.T. (2000) 243 ITR 83

6) *That the assessee having adopted the same method of accounting year after year consistently with regard to valuation of closing stock the ultimate result will be nullified because it reduces the profit of the relevant year under consideration, then it will increase the profit to that extent in the next year and ultimately the assessee will not gain. Hence, the action of the CIT is not justified.*

7) *That learned AO after due verification of each and every points of Balance Sheet had completed the assessment and now setting aside the said assessment directing the Assessing Officer to redo the assessment and start roving enquiries is not legal and therefore, the order u/s. 263 is not justified under law.*

8) *That other grounds if any will be urged at the time of hearing of appeal.*

2. Subsequently, the assessee vide letter dated 10.10.2017 has filed additional grounds of appeal, which read as under :-

> *1) That there was no proper service of notice on the assessee as the same was neither served on the assessee nor on any person or authorized agent appointed by the assessee. Hence the service of the notice is void in ab initio and therefore the order u/s 263 consequent upon that is liable to be quashed.*
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> ***Case Laws Referred** :*
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> *a) Hind Book House Vs. ITO 274 61 (Delhi Bench)*
> *b) Prahalada Maharana Vs. ACIT 42 ITR (Trib) 35, (Cuttack Bench)*
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> *2) That the tribunal while dealing with the appeals before it has power in widest possible term to examine the question of fact and law which has a bearing on the liability of the assessee. (National Thermal Corporation Ltd. Vs. CIT 157 CTR 249, 229 ITR 383 (SC)).*
>
> ***PRAYER***
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> *Under the facts and circumstances of the case, the above additional grounds of appeal, may kindly be admitted, And for this Act of your kindness the appellant as in duty bound shall ever pray.*

3. Brief facts of the case are that the assessee is deriving income from business of crushing and trading of iron ore. The return of income for the assessment year 2010-2011 was filed electronically on 14.10.2010 disclosing income of Rs.6,15,910/-. Later on the case was taken up for scrutiny u/s.143(3) of the Act and completed on 22.03.2013 determining the total income at Rs.10,37,182/-. The PCIT by virtue of powers vested under Section 263, called for the records for examination and after verification of records, he noted that the order passed by the ld. AO was erroneous and prejudicial to the interest of revenue. On perusal of the trading profit and loss account, the Pr. CIT noticed that the assessee had valued the closing stock of Rs.69,78,657/-

from the tax audit report, the quantitative details noticed by the Pr. CIT read as under :-

Iron ore	Quantity (in qtl)	Amount in Rs.	Rate (in Rs.)
Opening stock	10620.07	82,04,532	772.54
Purchase	18624.41	1,25,57,973	674.27
Sales	6717.96	17,022,738	2533.91
Closing Stock	12386.29	69,78,657	563.41

From the above table, it was noticed that the value of closing stock at the end of the year has been valued at Rs.563.41 which valued was less than the rate i.e. 674.27 at which purchase was made. Therefore, he concluded that the value of the closing stock must be higher than the valuation done by the assessee at the end of the year because the goods were purchased at the above rate i.e. 674.27 per quintal. In the audit report i.e. Form No.3CD it has been gathered that the valuation has been done of the value of closing stock at cost/market price, whichever is lower. Accordingly, the Pr.CIT issued show cause notice on 20.03.2015 fixing the date for hearing on 27.03.2014 and the said show cause notice was served on the assessee on 23.03.2015 but the Pr. CIT noted that on the date fixed for hearing nobody was appeared before him. In absence of non-compliance of show-cause notice issued u/s.263 of the Act, the ld. Pr. CIT after relying many judgments held that the AO had not done proper enquiry and verification, which should have been done and it was the failure on the part of the AO, the order passed by

him is considered to be erroneous and prejudicial to the interest of revenue. Accordingly, he set aside the order passed by the AO u/s.143(3) of the Act and directed the AO for fresh adjudication of facts and proper application of law in fresh assessment proceedings after giving reasonable opportunity of being heard to the assessee.

4. Against the above order of Pr. CIT, the assessee filed an appeal before the Income Tax Appellate Tribunal.

5. Ld. AR had also submitted his written synopsis on 02.02.18, which reads as under :-

> *The appellant in this case contests the order under section 263 of the IT. Act, 1961 under the following grounds :-*
>
> ***Facts of the case** : The assessee firm carries on business of crushing and trading of iron ore, maintains proper accounts audited u/s. 44AB of the I.T. Act, 1961. On a plain reading of the assessment order, it will be evident that the assessment was completed after due examination of Audited Accounts in accordance with law.*
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> ***Submissions** :*
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> *1. Therefore, the assessment order was **neither erroneous nor prejudicial to the interest of revenue, so as to attract provision of section 263 of the I.T. Act. In page 1, the Assessing Officer observed as follows** :-*
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> *"In the course of assessment proceeding, the assessee was asked to submit copy of audited accounts along with audit report and statement of bank accounts and other details. The A/R of the assessee filed the details as called for." **"the documents have been verified on test check basis".***
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> ***Further, Please Refer Page-2, Para-2 of the Asst. Order :***
> *"In course of hearing, the assessee was asked to produce copy of audited accounts for the Assessment Year-2010-11. On going through the same, it is seen that the assessee has credited a sum of Rs. 4,03,581/- in its P&L account under the head interest on loan from partners. The A.R. was asked to explain the reasons for not showing any interest income on loan advanced to the partners when in the immediate preceding assessment year the assessee has charged interest on loan to its*

partners. However, the A.R. could not furnish any satisfactory reply in this regard".

Further, allegation of learned CIT is in order u/s 263 ***regarding valuation of closing stock.*** *The statutory auditor has in item no. 11(b) of the Form-3CD has categorically mentioned that there was no change in method of accounting as compared to the immediately preceding previous year and item no. 12(a) method of valuation of closing stock employed -* ***lower of cost or market value.***

Regarding Importance of Audited Accounts *:*

It has been held by Honourable Gujrat High Court in the case of CIT Vs. Amit Bhai Gunuanthbhai, 129 TTJ 573 (Guj) which has been followed in Gurudev Singh Vs. ITO, 56 ITR (Trib)503 (Cuttack) that due consideration needs to be given by the Revenue to the importance of audited accounts. The court has further observed that:-

"It is true that due consideration needs to be given by the Revenue to the important fact that the accounts have been audited.

In the case of CIT Vs. Amit Bhai Gununtbhai, 129 ITR 573 (Guj) the Hon'ble Gujrat High Court has held that the basic principle is the < same in law relating to income tax as well as in civil law namely if there is no challenge to the transaction represented by the entries then it is not open to the Revenue or other side to contend that what is shown by the entries is not the real state of affairs.

It is therefore follows that when a return is furnished and accounts are submitted in support of that return is furnished and accounts are submitted in support of that return, the accounts should be taken as the basis for assessment and that an assessee cannot discard his own profit and loss account and balance sheet and more particularly the audit report in form no. 3 CD signed by a Chartered Accountant in terms of section 44AB of the I.T. Act. A tax auditor is required not only by professional ethics but also by law i.e. the legislative scheme of section 44AB(1) to be impartial and objective in his reporting. Apart from being an expert in accounting, audit tax and financial matters, a Chartered Accountant in his role of a tax auditor is also trusted by the legislature and that is why he has been assigned the role of a tax auditor under several provisions of the Income Tax Act. The accounts audited by him have very high evidentiary value".

Therefore the allegation by the CIT that proper enquiries and verification is not made by the A.O. is not correct.

"where two views are possible and the Income-tax Officer 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 Income-tax officer is unsustainable in law.

2. The assessment order dated 22.03.13 as noted by the CIT to be u/s 143(3)/147 of the IT Act 1961 is also not correct. It indicates that he was confused, because no such order u/s 143(3)/147 is in existence. It was u/s. 143(3) only.

3. The Supreme Court in the case of Malbar Industries Company Ltd, 243 ITR 83(SC) has categorically held that the commissioner has to be satisfied to twin conditions, namely,(i) the order of the A.O sought to be revised is erroneous; and (ii) it is prejudicial to the interests of the Revenue. If one of them is absent -if the order of the Income Tax Officer is erroneous but is not prejudicial to the Revenue or if it is not erroneous but is prejudicial to the Revenue - recourse cannot be had to section 263(1) of the Act. The provision cannot be invoked to correct each and every type of mistake or error committed by the Assessing officer, it is only when an order is erroneous that the section will be attracted. ***An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous.*** *In the same category fall orders passed without* ***applying the principles of natural justice or without application of mind.***

Case Law cited –

CIT Vs. Gabriel India Ltd (1993) 203 ITR 108,114(Bom)

In the grab of exercising power u/s. 263, the Commissioner cannot initiate proceedings with a view to ***starting fishing and roving enquiries in matters or orders which are already concluded.*** *Such action will be against the well-accepted policy of law that* ***there must be a point of finality in all legal proceedings,*** *that state issues should not be* ***reactivated beyond a particular stage and that lapse of time must induce repose in and set at rest*** *judicial and quasi-judicial controversies as it must in other spheres of human activity.*

In view of the above facts and circumstances of the case and the case laws of various High Courts and Supreme Court. The order u/s 263 is not in accordance with law.

4. Regarding under valuation of closing stock, because the method of account adopted for valuation of closing stock is consistently and regularly employed by the appellant, as reported by the Statutory Auditor, there is no scope for application of section 263(1) of the IT. Act, 1961.

<u>Case laws cited</u> *–*

1. Berger Paint India Ltd Vs. CIT, 188 ITR 44 (SC).
2. CIT Vs. Indo Nippon Chemicals Co. Ltd, 261 ITR 275 (SC).

5. The order u/s. 263 is not valid as it contravened (b) to explanation of section 263(1) of the IT. Act for not examining the records available at the time of examination of the issue of notice. Similarly, it lacked

jurisdiction for not fulfilling the two conditions for assessment being erroneous as well as pre judicial to the interest of revenue.

Case Law cited - (Please refer Pg-9 Para-6 of the above paper book)

6.The order of the CIT is illegal and not in accordance with law following case laws cited by CIT are ***distinguishable in facts*** *(please refer Page-9 Para-7) hence has no applicable to the instant case.*

a) In the case of ***Ram Priya Devi Sarogi, 67 ITR 84 (SC)*** *the case relates to assessment under Income Tax Act 1922, Section 33(B) prior to its repeal. The said facts relates to acceptance of initial capital, the gift received and the sale of jewellery etc which is not the facts here. In the instant case, it is regarding valuation of closing stock etc and hence distinguishable.*

b) The case law cited by CIT Vs. Smt. Tara Devi Agarwal, 88 ITR 323(SC) relates to matter prior to repeal of IT. Act, 1922. There the matter was whether the income has not been earned and is not assessable whether belongs to her or his in order to assessed someone else who would have been assessed to a larger amount. Therefore, the said case has no relevance to the facts of the instant case.

c) In the case of Uma Shankar Rice Mills, 187 ITR 638 (Ori) related to restriction to the power of the CIT u/s. 263. There also the High Court has not mentioned as to whether in a case where the ***A.O. had already examined the Audited ' Accounts and the entire material on record to be examined, by invoking section 263. Hence, the case is distinguishable.***

d) In case of Gee Vee Enterprises Vs. Addl CIT 99 ITR 375 (Del). It is matter regarding failure to make enquiries before granting registration. Appeal to Tribunal not preferred. Honourable Delhi High Court did not entertain remedy in writ under Article 226 or 227 of the Constitution of India.

More so, the latest and leading case on the point has been decided by Supreme Court by ***Malbar Industrial Company Ltd,243 ITR 83(SC)*** *which has been followed by this Honorable Bench of Tribunal in similar several other cases and therefore it is earnestly requested to follow the same.*

The brief facts of the case is that - the valuation of stock made by the assessee recorded in the audited accounts is ***not agreed*** *by the revenue, without considering the facts that the said facts has already been verified by the auditor as per his Form-3CD report. Normally for low and inferior quality of materials less rate is calculated. As per settled principle of accountancy "the purchase price or market price whichever is lower" which has been certified by the Auditor. The accounts are duly audited u/s. 44AB, the closing stock is valued on the basis of quality of material in the stock and not on generalization of market rate of*

purchase as alleged by the revenue. However, the same has been duly taken note in Item 11(b) of the Form 3CD report of Audit Report.

Further the appellant is an old assessee maintaining regular books of accounts and the methods of account adopted for valuation of closing stock consistently and regularly followed. Therefore assuming but not admitting that even if in one year he will show less closing stock, thereby reducing the profit. Then, the same would have the effect more income in the subsequent year and the net result will be not beneficial to the assessee.

Case laws cited in page 7 of the Paper Book Berger Paints, 188 ITR 44 (SC) relied upon on the point of valuation of stock - Principle - Method of accounting- Consistent in practice to be adopted.

7. There was no valid service of notice hence the orders is invalid. ***Case Laws*** *:*

Prahallad Maharana Vs. ACIT, 42 ITR (Trib) 35 (Copy enclosed in page-12 of this paper book) followed ***Hind Book House Vs. ITO, 274 ITR 61 (Delhi Bench) :***

Assessment - Notice - Firm - Service of Notice - effect of section - 282 - Burden of proof regarding service of notice -Burden on revenue - Notice on firm served on person who was neither a partner an agent authorised to receive notice - Notice and consequent assessment - Not valid I.T. Act., 1961, s.s. 142, 282. Held that a conjoint reading of section 282 of the I.T. Act, 1961 and the relevant provisions of the civil procedure code shows that notices under the Income Tax Act are required to be served on the assessee in accordance with the provisions of the civil procedure code shows that notices under the Income Tax Act are required to be served on the assessee in accordance with the provisions of section 282 and may be served personally upon the person named therein or upon his agent duly authorised. The onus is on the Revenue to establish that the service was made either on the assessee himself or on somebody duly authorised by him to receive such notice. The assessee is a partnership firm the notice u/s 263 was neither served on the partners nor on any employees authorized by the partners to receive Income Tax Notices. Hence, the order is illegal for non service of valid notice.

Kindly refer to a copy of the affidavit dated 19.12.2015 sworn in by managing partner Sri Dipu Jaiswal - ***available in page 5 & 6 of the paper book*** *denying proper services of notice. In this context the judgment in the case of this Cuttack Bench of tribunal cited above may kindly be allowed :*

In the case of ***Nripendra Mishra Vs. ITO, 121 TTJ 701,*** *the notice was served by the Inspector on one R. From a letter written by the ITO to the DR it is clear that the Revenue has not established the identity of R. There is no material on record to establish that "R" was an agent of the*

assessee. In fact Revenue has not established the identity of R or an agent of the assessee. Therefore, the assessment order passed by the Assessing Officer is annulled.

Decision of co-ordinate Bench of Tribunal to be followed.

Case Laws : The Society of Presentation Sisters Vs. Income Tax Officer, 318 ITR Page 287 at page 295 (para 2&3) (Cochin Bench)

In this decision, the tribunal following the judgement of Supreme Court of India in the case of " Union of India Vs. Raghubir Singh, 178 ITR 548 (SC)" have decided the matter in favour of the assessee-

8. In the instant case the order was served on 04.04.2015 which beyond the date of limitation.

An order of an authority cannot be said to be passed unless it is in someway pronounced or published or the party affected has the means of knowing it. It is not enough if the order is made, signed, and kept in the file, because such order may be liable to change at the hands of the authority who may modify it, or even destroy it, before it is made known based on subsequent information, thinking or change of opinion. To make the order complete and effective, it should be issued, so as to be beyond the control of the authority concerned, for any possible change of or modification therein. This should be done within the prescribed period through the actual service of the order may be beyond that period (Commissioner of Income-Tax Vs. Shree Narayan Chandrika Trust 212 ITR 456 (Ker)), Secondary Board of Education Vs. ITO, 86 ITR 408 (Orissa) Shelat (BJ) Vs. State ofGujrat, AIR 1987 SC 1109.

9. No adequate opportunity given for compliance to the notices, hence the order is invalid in the interest of natural justice.

The alleged notice dated 20.03.2015 served on somebody other than the assessee on 23.03.2015 hardly ***giving 4 days time*** *is neither proper nor adequate opportunity. The following decisions cited are relied on Page 7 of the paper book on point of* ***adequate opportunity.*** *Therefore the order is invalid.*

Case laws** : - **Page 423, para-47.7 (Evidence in Income Tax - By G.C. Das, IRS (Retd) <u>Principle of natural justice :</u>

***Adequate opportunity of being heard** : The opportunity of being heard should be real, reasonable and effective. The same should not be for namesake. The same should not be a paper opportunity. It was so held in CIT Vs. Panna Devi Saraogi [1970] 78 ITR 728 (Cal.) In Smt Ritu Devi Vs. CIT [2004] 271 ITR 466 (Mad), time of just one day was given to the assessee to furnish reply. This was held as denial of opportunity under the principles of natural justice. As held in I.E. Vittal V. Appropriate Authority [1996] 221 ITR 760 AP, where a decision is based upon a document in a proceeding, a copy of the same should be provided*

to the affected party. Otherwise, it would violate the principles of natural justice as the opportunity of being heard should be an effective opportunity and not an empty formality. Denial of opportunity may make an order void. Limitation of time cannot stand in the way of not giving adequate opportunity. The principle is inviolable (Page 423 Evidence Income Tax Para 47.7).

It may kindly be noted that it has been decided by Honorable Jurisdictional High Court in the case of A. Venkata Rao, 203 ITR Page-64 that the Tribunal is duty bound to examine the point raised by the parties and record definite conclusion in respect of each one of them.

P RAYER

Therefore it is humbly submitted that the points raised may kindly be judicially considered and allow the appeal of the appellant and for this act of your kindness the appellant as in duty bound shall ever pray.

Apart from the above written submissions, the ld. AR has also filed paper book containing page Nos.1 to 48. In addition to the above, ld. AR further made oral arguments also and submitted that by way of additional ground taken by him that the notice issued by the Pr.CIT was not served upon the assessee nor any authorized agent appointed by the assessee, therefore, service of notice was *void ab initio*. He also submitted that the order passed by the Pr.CIT was not served within the limitation prescribed under the Income Tax Act. It should be served to the assessee at the end of the financial year i.e. 31.03.2015. In support of his arguments, ld. AR relied on the following case laws :-

i) National Thermal Corporation Vs. CIT, 229 ITR 383(SC)
ii) Mahalaxmi Textile Mills Ltd. Vs. ITO, 66 ITR 710 (SC)

6. Ld. AR also submitted that during the course of original assessment proceedings, all the facts were submitted before the AO i.e. audited financial statements and other documents as required by him

from time to time and he had accepted the profit shown by the assessee. The AO did not make any question regarding valuation of closing stock and the methods adopted by the assessee. The assessee is following consistent method adopted this year. Thereafter the AO passed the assessment order. In view of this, the order passed by the AO is not erroneous and prejudicial to the interest of revenue. Accordingly, ld AR submitted that the impugned order passed by the Pr.CIT deserves to be quashed.

7. Defending to the ld. AR's argument, ld. CITDR vehemently submitted that the order of the Pr.CIT is correct and he distinguished all the arguments of the assessee. Ld. DR before us submitted the copy of dispatch register and referred to the paper book at page No.19 in which it has been mentioned that the show-cause notice has been received by this office staff on 23.03.2015 by way of speed post. Ld.DR also referred to the page No.21, which is an order passed u/s.263 of the Act dated 30.03.2015 which has been received by the office staff on 04.04.2015 through speed post. Therefore, the assessee cannot say that the show cause notice has not been received by the assessee as well as the order has not been passed within the stipulated time. Ld. DR also submitted that in the original grounds of appeal, the assessee has clearly mentioned that notice was served upon the assessee on 23.03.2015 at ground No.3, whereas he has filed an additional ground

in which he has stated that the show cause notice has not been served upon the assessee. There is a contradictory ground taken by the assessee. He further submitted that the AO should have been calculated the value of closing stock which are less than the purchase price as mentioned in the audited report and some price is also very high which is Rs.2533.91/-, therefore, the Pr. CIT has rightly invoked his power u/s.263 of the Act. In addition to the above submissions, ld. DR has also submitted a written synopsis, which reads as under :-

> *i.) This is assessee's appeal against the revision order dated 30.03.2015 u/s. 263 of the Income Tax Act passed by Pr. CIT, Cuttack. The issue relates to the incorrect valuation of closing stock as on 31.03.2010.*
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> *ii.) In this case, the AR of the assessee has challenged the service of show-cause notice dated 20.03.2015 on the assessee. In this connection, I had filed copy of dispatch register on 03.08.2020 which clearly shows that said show-cause notice had been handed over to the postal department on 20.03.2015 vide receipt no.6199. It was sent through speed post (acknowledgement affixed on dispatch register) at the correct address i.e. M/s. Jaydurga Minerals C/o Shri Dipu Jaiswal, Hudi Sahi, Keonjhar. It is pertinent to mention here that Shri Dipu Jaiswal is the managing partner of the assessee firm and same address had been mentioned in the return of income filed for AY 2010-11. It was served on the assessee on 23.03.2015. In the grounds of appeal as per Form-36, the third ground clearly mentions that said notice was served on the assessee on 23.03.2015. However as his counsel was based at Cuttack therefore it took time for the assessee to communicate with him. As a result, no compliance could be made before the Pr. CIT.*
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> *iii.) In the additional ground of appeal filed on 27.10.2015, it has been alleged that the show-cause notice dated 20.03.2015 had been served on a wrong person who was neither the employee nor the authorized representative of the assessee.* ***However there is a serious contradiction in the stand of the assessee.*** *It is requested that the additional ground of appeal, being in the nature of an afterthought, is required to be rejected.*
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> *iv.) No grievance is caused to the assessee as the Pr. CIT, Cuttack has directed the A.O. to pass the order afresh after giving reasonable opportunity to the assessee.*

v.) Reliance is placed on the decision of Hon'ble Jharkhand High Court in the case of Milan Poddar vs. CIT (24 taxmann.com 27) wherein it was held that service of any notice in terms of section 282 of the Income Tax Act through ***speed post*** *by postal department is valid. It was further held that Registered post would take within its sweep not only speed post but also other mails. It was held that speed post was a new mode of sending post. It was immaterial whether acknowledgement receipt was there or not. Thus any notice could be sent by Registered post, Speed post and also ordinary post.*

vi.) The Hon'ble Delhi High Court in the case of CIT vs. Madhsy Films (P) Ltd. (301 ITR 69) held that where a notice u/s. 143(2) had been dispatched by speed post at the address as per return of income and same was not received back, then it would be deemed to have been served upon the assessee. The Hon'ble Mumbai ITAT in the case of P. A. Chacko Muthalaly vs. ACIT (50 taxmann.com 54) held that once the notice u/s.143(2) has been sent by speed post and it has been sent on the correct address then it can't be said that its service was done on some other person.

vii.) Coming to the merit of the case, it is clear that the Assessing Officer while completing the original assessment had not applied his mind to the aspect of valuation of closing stock. In the original assessment dated 22.03.2013, the A.O. had only made disallowance of interest. There is not a whisper in the assessment order about the valuation of the closing stock. No effort was made by the A.O. to obtain the market value of such goods lying in the closing stock though their valuation was much below the purchase cost. The average sale price was also much higher than the rate at which it was valued on 31.03.2010. No enquiry of any sort was made by the Assessing Officer. Thus the order of the A.O. was not only erroneous but also prejudicial to the interests of the Revenue. Reliance is placed on the decision of Hon'ble Supreme Court in the case of Malabar Industrial Co. Ltd. vs. CIT (243 ITR 83) wherein it was held that incorrect application of law or wrong assumption of facts would mean the order being erroneous. The order passed without application of mind would also fall in the same category. Lack of enquiry by the Assessing Officer would also mean the assessment order being erroneous. (Smt. Taradevi Agarwal vs. CIT- 88 ITR 323 SC). Reliance is also placed on the decision of Hon'ble Gauhati High Court in the case of CIT vs. Jawahar Bhattacharjee (20 taxmann.com 652).

8. After hearing both the sides and perusing the entire material available on record, orders of authorities below along with the case laws cited by both the parties, we noticed that the assessee has taken an additional ground in which he has challenged that the service of

notice on the assessee has not been served either upon the assessee or upon any authorised person. But on perusal of the original grounds of appeal taken by the assessee i.e. in ground No.3 in which the assessee has clearly stated that the notice served upon the assessee on 23.03.2015. Further on perusal of the Doc register of the department placed by the ld. CITDR before us is dated 20.03.2015, in which the name of the assessee is appeared with the narration that show cause notice issued u/s.263 of the Act for the A.Y.2010-2011 and receipt of the postal department has also been affixed. On analysis of the original grounds and the additional ground filed by the assessee, it is clear from the attending facts that the notice was served to the assessee on 23.03.2015, which the assessee has himself accepted in ground No.3 filed with the Form No.36 before the Tribunal. Further pleading with the aid of additional ground that no proper notice was served on the assessee, cannot be accepted. Even there is no such application nor any revised grounds filed by the assessee on record substantiating that there is any mistake in the grounds of appeal filed along with Form No.36. Therefore, the additional ground taken by the assessee is dismissed.

9. Now, we shall decide the grounds as raised by the assessee in the grounds of appeal filed along with Form No.36.

10. In ground No.1 ld. AR raised an issue regarding service of order which has been served by the assessee on 04.04.2015, which is placed in paper book at page No.21 wherein in the right side top, it has been mentioned that the order dated 30.03.2015 passed u/s.263 of the Act received through speed post by the office staff on 04.04.2015. According to the arguments of the assessee the order should be served upto the end of the financial year i.e. 31.03.2015 but the order has been received by the assessee on 04.04.2015, which is illegal. In this regard, we refer to the provisions of Section 263(2) of the Act, which reads as under :-

> *"263(2) No order shall be made under sub-section (1) after the expiry of two years from the end of the financial year in which the order sought to be revised was passed."*

From the record, it is clear that the assessment order u/s.143(3) of the Act was passed on 22.03.2013 and the Pr. CIT has passed his order on 30.03.2015, therefore, the order is within two years from the relevant date. From the reading of the provisions of Section 263(2) of the Act, it is clear that there is no mention about the "service" of the order, however, it is only mentioned that the order shall be "made". With regard to "service" it has clearly been defined in the section 143(2) of the Income Tax Act but in section 263 of the Act nowhere about service of order has been mentioned. Therefore, this argument of the assessee with regard to ground No.1, is dismissed.

11. In ground Nos.2, 3 & 4, the centripetal issue is with regard to no adequate opportunity of hearing has been provided by the Pr. CIT before passing the order. In this regard, ld. AR submitted that the assessee stays in Hudi Sahi, Joda and his local lawyer is situated at Barbil but the Counsel of the assessee to present before the CIT is at Cuttack. The notice was served on the assessee on 23.03.2015 hardly giving four days time is not proper adequate and proper opportunity and it is against the principle of natural justice when the notice was communicated to the lawyer at Cuttack to take adjournment for preparation of the case to represent properly, the learned CIT told that he has already passed order because of limitation and he did not receive the adjournment petition. It was further submitted by the ld. AR that the Pr.CIT was determined to pass order on or before the end of the financial year, however, he has not bothered to consider as to whether any reasonable opportunity has been provided to the assessee to represent his case, which affects the rights of an assessee. Therefore, the order passed by the Pr. CIT is unjustified and illegal and deserves to be dismissed. To support his contention, ld. AR relied on the following case laws :-

i) Bernal Tiwari Vs. CIT, 173 ITR 280 (AP)
ii) Panna Devi Saraogi [1970] 78 ITR 728 (Cal.)
iii) Smt. Ritu Devi [2004] 271 ITR 466 (Mad)

12. Ld. DR, on the other hand, relied on the order of Pr. CIT and submitted that the opportunity of hearing was given to the assessee to furnish the clarification of the show cause notice issued on 20.03.2015 and the case was fixed on 27.03.2015, however, the assessee neither appeared nor furnished any explanation to the show cause notice. Therefore, the Pr. CIT was duty bound to pass order on or before the end of the financial year without waiting further the assessee to furnish any clarification. Accordingly, the ld. DR submitted that this ground taken by the assessee is not sustainable and the same deserves to be dismissed.

13. After hearing the submissions of both the sides and perusing the order of Pr. CIT at last para of page No.2, we find that the Pr. CIT has issued show cause notice u/s.263 of the Act on 20.03.2015 requiring the assessee to furnish the clarification by 27.03.2015 and thereafter the Pr. CIT passed the order on 30.03.2015 stating that he was constrained to dispose off the revision proceedings on or before the end of the relevant financial year. It is clear that the Pr. CIT has provided opportunity to the assessee on 27.03.2015 for appearing before him, which, in our opinion, causes denial of opportunity under the principles of natural justice. Before us, ld. AR submitted that the assessee stays in Joda which is near about 275 kms from Cuttack and the notice received on 23.03.2015, therefore, the assessee had no

sufficient time to contact his local lawyer, who is staying at Barbil and the Counsel to appear before the Pr. CIT, Cuttack is staying at Cuttack. When the authorized representative of the assessee appeared before the Pr.CIT, the order u/s.263 of the Act was already passed. It is trite that right to fair hearing is a guaranteed right of an assessee and granting of effective opportunity is a *sin qua non* in Section 263 of the Act for unsetting a statutory order. It was the duty of the Pr. CIT to provide the assessee an effective opportunity to enable it to substantiate its claim. In any case, it is one of the fundamental principles of natural justice that no person can be condemned unheard i,e. *audi alteram partem*, and the impugned revision order was thus passed in violation of the principles of natural justice in absence of any effective/reasonable opportunity of hearing provided to the assessee. To support our view, reliance can be placed on the decision of the Division Bench judgment of the Hon'ble Allahabad High Court in the case of Jagannath Prasad Bhargava V. Lala Nathimal, AIR 1943 All. 17, wherein the Hon'ble High Court Court has held as under:-

> *"It is very obvious legal principle that there should be no decision against a person who has not had an opportunity of being heard upon the point which is to be decided."*

It is mandatory to apply the principles irrespective of the fact as to whether there is any statutory provision or not. In the present case, we find that the assessee was not afforded opportunity, much less the

sufficient opportunity to give reply to the show cause notice. Therefore, it is clear that the Pr. CIT in a hurriedly manner without affording opportunity of hearing to assessee had passed impugned order by violating principle of *audi alteram partem*. In view of above factual position as well as the judicial pronouncements cited supra, we are of the opinion that the Pr.CIT has committed a gross error in not providing any effective/reasonable opportunity of being heard to the assessee before passing the order. Accordingly, we quash the revisional proceedings framed u/s.263 of the Act by the Pr. CIT and allow grounds No.2, 3 & 4 of the appeal of the assessee.

14. With regard to grounds No.5, 6 & 7, since we have already quashed the impugned revisional order passed by the Pr. CIT, therefore, the above grounds have become infructuous and the same are dismissed.

15. In the result, appeal of the assessee is allowed partly to the extent as indicated hereinabove.

Order pronounced in the open court on 10/08/ 2020.

Sd/-	**Sd/-**
(C.M.GARG)	**(L.P.SAHU)**
न्यायिक सदस्य / JUDICIAL MEMBER	**लेखा सदस्य / ACCOUNTANT MEMBER**

कटक Cuttack; दिनांक Dated 10/08/2020

Prakash Kumar Mishra, Sr.P.S.

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

1. अपीलार्थी / The Appellant-
   M/s Jaidurga Minerals,
   C/o Sri Dipu Jaiswal,
   At-Hudi Sahi, Joda,
   Keonjhar-758034
2. प्रत्यर्थी / The Respondent-
   The Pr. CIT, Cuttack
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