IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'E' BENCH, NEW DELHI

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND MS. SUCHITRA KAMBLE, JUDICIAL MEMBER

ITA No. 2784/DEL/2013
[A.Y 2008-09]
&
ITA No. 2785/DEL/2013
[A.Y 2007-08]
&
ITA No. 5368/DEL/2013
[A.Y 2009-10]

Tata Power Delhi Distribution Ltd [Earlier known as North Delhi Power Ltd NDPL House, Hudson Line, Kingsway Camp, New Delhi PAN No: AABCN 6808 R	Vs.	The Addl. C.I.T Range – 13, New Delhi

ITA No. 4055/DEL/2013
[A.Y 2008-09]
&
ITA No. 4054/DEL/2013
[A.Y 2007-08]
&
ITA No. 5676/DEL/2013
[A.Y 2009-10]

The A.C.I.T Range – 13, New Delhi	Vs.	Tata Power Delhi Distribution Ltd [Earlier known as North Delhi Power Ltd NDPL House, Hudson Line, Kingsway Camp, New Delhi PAN No: AABCN 6808 R
[Appellant]		[Respondent]

Date of Hearing : 11.06.2019
Date of Pronouncement : 14.06.2019

Assessee by : Shri S.D. Kapila, Adv
Shri R.R. Maurya, Adv
Shri Pravesh Sharma, Adv

Revenue by : Ms.Pramita M. Biswas, CIT- DR

ORDER

PER BENCH:-

The above captioned cross appeals by the assessee and Revenue are preferred against the order of the Commissioner of Income Tax [Appeals], XVI, New Delhi pertaining to assessment years 2007-08, 2008-09 and 2009-10. Since all these appeals pertain to same assessee and were heard together involving common issues, we are disposing them off by this common order for the sake of convenience and brevity.

2. The assessee has raised an additional ground which reads as under:

> *"That on the facts and circumstances of the case, the Assessing Officer erred in law in taxing book profits u/s 115JB of the Income-tax Act, 1961 [hereinafter referred to as 'the Act' for short]."*

3. The ld. DR strongly objected to the admission of the additional ground raised by the assessee. It is the say of the ld. DR that this issue was never raised before the first appellate authority, therefore, the same should not be entertained by the Tribunal.

4. Per contra, the ld. counsel for the assessee contended that it is purely a legal issue which requires no verification of facts. Strong reliance was placed on the decision of the Hon'ble Supreme Court in the case of NTPC 229 ITR 383.

5. We have carefully considered the case records. The appellant company is a joint venture of the Government of Delhi and Tata Power Ltd, registered under the Companies Act, 1956. Since 2002, the appellant is engaged in the business of distribution of electricity in the North Delhi Districts of the National Capital, set up in terms of Delhi Electricity Reforms Rules [Transfer Scheme] Rules 2001.

6. As the appellant company is governed by the Electricity Act, 2003, therefore, the provisions of the said Act prevail wherever they are inconsistent with the provisions of the Companies Act, 1956. We find that in the Return of Income, the assessee has declared total

income as per the book profit u/s 115JB of the Act. We are of the considered view that the additional ground raised by the assessee is well taken and requires no verification of any facts, whatsoever. The same is, accordingly, admitted.

7. In so far as the question of applicability of provisions of section 115JB of the appellant company is concerned, it has been answered by the Hon'ble Kerala High Court in the case of Kerala State Electricity Board 329 ITR 91 in favour of the assessee and against the revenue. The Hon'ble High Court has held as under:

> "Section on 115JB of the Income-tax Act, 1961creates a legal fiction regarding the total income of assessees which are companies. The book profit of the company is deemed to be the total income of the assessee in the circumstances specified in the section. The expression "book profit" for the purpose of the section is explained to mean the net profit as increased or decreased by the various amounts shown in the various sub-clauses of the section. The "net profit" itself must be the net profit as shown in the profit and loss account of the company. Sub-section (2) mandates that the profit and loss account of the company is required to be prepared in the manner specified therein. Section 115JB stipulates that the accounting policies, accounting standards, etc. shall be uniform both for the purpose of Income-tax as well as for the information statutorily required to be placed before the

annual general meeting conducted, in accordance with section 115JB of the Companies Act, 1956.

Though the Kerala State Electricity Board, a statutory corporation constituted by virtue of section 5 of the Electricity (Supply) Act, 1948 answers the description of an Indian company and therefore a company within the meaning of section 2(17) of the Income-tax Act, 1961it is not a company for the purpose of the Companies Act, 1956. It is not obliged to either to convene an annual general meeting or place its profit and loss account in such general meeting. On the other hand, under section 69 of the Electricity (Supply) Act, 1948, the Board is obliged to keep proper accounts, including the profit and loss account, and prepare an annual statement of accounts, balance sheet, etc. in such form as may be prescribed by the Central Government and notified in the Official Gazette. Such accounts of the Board are required to be audited by the Comptroller and Auditor-General of India or such other person duly authorised by the Comptroller and Auditor-General of India. The accounts so prepared along with the audit report are required to be laid annually before the State Legislature and also to be published in the prescribed manner.

At the earliest point of time when section 1151 was introduced, the section expressly excluded from its operation bodies like the Electricity Board. Though such express exclusion is absent in section 1153A , the Central Board of Direct Taxes issued Circular No. 762 dated February 18, 1998 excluding bodies like the

Electricity Board from the operation of the section. Circular No. 762 not only is binding on the Department, but also explains the purpose in introducing section 1153A which was to tax zero-tax companies. The CBDT understood that companies engaged in the business of generation and distribution of electricity and enterprises engaged in developing, maintaining and operating infrastructure facilities, as a matter of policy, are not brought within the purview of section 1153A for the reason that such a policy would promote the infrastructural development of the country. Such an understanding of the CBDT is binding on the Department. Section 1153B , which is substantially similar to section 1153A cannot have a different purpose and need not be interpreted in a manner different from the understanding of the CBDT of section 1153A .

Where the computation provision could not be applied in a particular case, it is indicative of the fact that the charging section also would not apply.

The Electricity Board or bodies similar to it, which are totally owned by the Government, either State or Central, have no shareholders. Profit, if at all, made would be for the benefit of entire body politic of the State. Therefore the enquiry as to the mischief sought to be remedied by the amendment becomes irrelevant. Therefore, the fiction fixed under section 1153B cannot be pressed into service against the Electricity ' Board while making the assessment of the tax payable under the Income-tax Act."

8. Finding parity of facts with the facts of the judgment of the Hon'ble Kerala High Court [supra], respectfully following the finding of the Hon'ble High Court, we hold that the provisions of section 115JB of the Act are not applicable to the appellant company. The Assessing Officer is directed accordingly. The additional ground raised by the assessee is allowed.

9. First addition contested by the appellant company relates to the addition on account of de-recognition of revenue on account of efficiency gain.

10. At the very outset, the ld. counsel for the assessee stated that on identical set of facts, the issue has been considered by the co-ordinate bench in assessment year 2006-07 by the Tribunal in ITA No. 4848/DEL/2010 and 5026/DEL/2010. It is the say of the ld. counsel for the assessee that facts have been elaborately discussed by the co-ordinate bench in assessment year 2006-07.

11. The ld. DR strongly supported the findings of the Assessing Officer but could not bring any distinguishing decision in favour of the revenue.

12. A perusal of the record shows that Delhi Electricity Regulatory Commission [DERC] constituted under the Delhi Reforms Act, 2000 determines the Retail Supply Tariff chargeable by the company to the consumers and bulk supply tariff payable by the company to Delhi Transco Ltd. for power purchase. As per the terms of the said notification, the tariffs are statutorily required to be fixed in a manner that the assessee recovers its prudently incurred cost and also earns an assured return of 16% p.a. on equity plus free reserves.

13. Prescribed procedure before the DERC is that the assessee has first to submit detailed estimate of its cost to the DERC, which is likely to incur before the start of the relevant financial year. DERC examines the same after invoking the comments of all stakeholders including the members of the public, who are the consumers. The DERC approves the estimate of costs and the corresponding tariff for the year. Such an estimate is subsequently reviewed by the DERC on the basis of actual costs incurred by the assessee and is subjected to "Prudence check".

14. If the revenue for the year exceeds the 'trued up cost' then the excess amount has to be carried forward as liability to be adjusted through corresponding tariff reduction in future, in order to

compensate the consumers through reduction in tariff; whereas if the trued up costs exceeds the revenue for any year, the difference is recognized as an assets of the company under the head "sundry debtors" and is recoverable from the consumers in future through the tariff mechanism.

15. We find that similar facts were considered by the co-ordinate bench in assessment year 2006-07 in ITA No. 4848/DEL/2010 and 5026/DEL/2010. The relevant findings of the co-ordinate bench read as under:

> "17. It is, therefore, clear from the arguments advanced before us that the question involved in this matter is whether the disputed Rs.91.13 crores could be brought to tax by treating it as the application of the income after its accrual. This aspect requires a reading of the provisions of the Delhi Electricity Reforms Act, 2000 with the notifications issued and the orders passed by the DERC. As could be seen from the Delhi Electricity Reforms Act, 2000, it received the assent of the President of India on 6.3.2001 and promulgated by way of Notification dated 8.3.2001. Section 2(c) of the Act defines the commission to mean the Delhi Electricity Regulatory Commission. The Act constitutes the Commission. It empowers the Government to issue directions to the Commission in the matters of policy involving public interest from time of time regulating the

discharge of the commission functions. In turn, by virtue of Section 28 of the Act, the holder of the license (i.e. assessee) is under obligation to observe the methodologies and procedure specified by the Commission from time to time in calculating the expected revenue from charges which it is permitted to recover pursuant to the terms of its license and in designing tariffs to collect those revenues. The Commission is also empowered to prescribe the terms and conditions for determination of the licensee's revenues and tariffs by regulations duly published in the official Gazette and in such other manner as the Commission considers appropriate. In this respect, it is provided that the Commission shall be guided by the following parameters, namely:-

the financial principles and their application provided in the Sixth Schedule to the Act, 1948 read with sections 57 and 57-A of the said Act;

the factors which would encourage efficiency, economic use of the resources, good performance, optimum investments and other matters which the Commission considers appropriate keeping in view the salient objects and purposes of the provisions of this Act; and the interest of the consumers.

18. In exercise of the powers conferred by Section 12 and other applicable provisions of the Act, the GNCTD issued Notification No.F.11(119(8)/2001- Power in the month of November 2001. In this Notification vide paragraph 8, the Government considered

the necessity of effective re-organization of the DVB and the sale of 51% equity shares in the distribution companies. The assessee is one of the entities, who participated in the bid, became successful for the lowest annual target loss was awarded 51% of equity. Vide para 12, this Notification prescribes that in the years between 2002-03 and 2006-07 in the event of actual AT&C loss of a distribution licensee for any particular year is better i.e. lower than the level proposed in the bid, the distribution licensee shall be allowed to retain 50% of the additional revenue resulting from such better performance and the balance 50% of additional revenue from such better performance shall be counted for the purpose of tariff fixation. Para 13 of such Notification provides that all expenses that shall be permitted by the Commission, tariffs shall be determined in such a way that the distribution licensees earn, at least, 16% return on the issued and paid up capital and free reserves (excluding consumer contribution and revaluation reserves but including share premium and retained profits outstanding at the end of any particular year) provided that such share capital and free reserves have been invested into fixed or any other assets etc.

19. Para 16 of this Notification sums up the mandate in this Notification in the following terms:

(a) The AT&C loss programme is to be as per the bid submitted by the purchaser (selected bidder) as per para 11 above.

(b) Distribution licensees shall be entitled to retain 50% of the additional revenues from any AT&C loss reduction over and above then level proposed in the bid by the Purchaser (selected bidder) and this shall not be counted as revenue for the purpose of tariff fixation for the succeeding years. The balance 50% of the excess efficiency gain shall be counted as revenue for the purpose of tariff fixation.

(c) Distribution licensees earn, at least, 16% return on the issued and paid up capital and free reserves

(d) The amount agreed to be made available by the Government to TRANSCO will be as a loan for the particular year.

20. In deference to this Notification, the DERC in its order passed in July 2005 at paragraph 4.2 observed that for the Asstt. Year 2004-05, the assessee had achieved AT&C loss level lower than the minimum bid level specified by the GNCTD, accordingly the provisions of the policy directions and the GNCTD's clarification have been applied to determine the extent of additional revenue to be retained by the DISCOM and that it will be passed down to the consumers while determining the annual revenue requirement of the utilities. It is further observed that in case of the assessee as the over achievement in AT&C loss reduction is more than the minimum level target the entire additional revenue as a result of AT and C loss reduction up to minimum level with respect to bid level, and 50% of the additional revenue beyond minimum level has been

considered as additional revenue for the purpose of ARR determination and balance 50% of the savings beyond minimum level has been approved to be retained by the assessee.

21. Basing on this, we are convinced that the assessee is under statutory obligation to meet the targets of reduction of A&TC losses and when the AT&C loss level reached by the assessee in that particular year is better i.e. lower than the level prescribed in the bid, the assessee shall be entitled to 50% of the additional revenue resulting from such purpose. This 50% becomes the regular taxable income of the assessee and insofar as this income is concerned, for this Asstt. Year 2006-07 also, there is no dispute. The balance 50% of this additional revenue, which is mandatory to be counted for the purpose of tariff fixation, which is called as the 'efficiency gain' will be taken into consideration by the DERC while permitting the tariff of the future years to be determined so as to see that the assessee would earn at least 16% return on the issued and paid up capital and free reserves. The Notification issued in November 2001, referred to above, is clear in its mandate that this 50% efficiency gain shall be reckoned as revenue for the purpose of tariff fixation and the assessee is under obligation to follow the mechanism of fixation of tariff by the DERC.

22. In Puna Electricity Supply Co. Ltd. Vs CIT (1965) 56 ITR 521 (SC), the Hon'ble Apex Court considered a similar situation where the licensee like the assessee was under the obligation to

set apart some amount and transfer it to the consumer benefit reserve account which represents a rebate to the customers of the excess amount collected from them. Hon'ble Apex Court held that there are two types of profits in such cases i.e. Commercial profits and clear profits governed by two different enactments. Commercial profits are arrived at on commercial principle whereas the other is regulated by the statute. The clear profits could be determined only after excluding the amount statutorily transferred to represent the rebate to the customers of the excess amount collected from them. Finally the Hon'ble Apex Court held that the amount transferrable for the benefit of the consumers do not form part of the assessee's real profit; and for the purpose of calculating the taxable income, such amount have to be deducted from its total income.

23. Record speaks that this decision was brought to the notice of the learned CIT(A) but he distinguished the same stating that in such case the assessee was crediting the excess amount in a separate account called "Consumer Benefit Reserve Account" and they were part of the excess amount paid to it and reserve to be returned to the consumers; whereas in the case of the assessee, the assessee is not required to return the excess amount to the consumers and on the contrary, the assessee is the beneficial owner of the amount which it could use the way it likes. On this premise, learned CIT(A) held that the decision in

the case of Puna Electricity Supply Co. Ltd (supra) has no application to the facts of the present case.

24. On a careful consideration of the factual matrix involved in both the cases and the reasoning of the Hon'ble Apex Court in reaching the conclusion, we are of the considered opinion that the approach of the learned CIT(A) is incorrect. In the preceding paragraphs, we have noted that the assessee is under a statutory obligation to set apart 50% of the excess amount generated due to the overreaching of the targets, for the purpose of the consideration of the DERC to fix the future tariffs either to give relief to the consumers or otherwise. A reading of the statute, notification and the orders of the DERC clearly indicates that the assessee is not free to use this efficiency gain amount the way it likes. Whether or not a separate account is opened, when this amount is separately shown under this head in the books, it makes little difference in so far as the application of the ratio of Puna Electricity Supply Co. Ltd. (supra) is concerned. Crux of the matter is that the assessee in both the cases has no right to appropriate the 'efficiency gain' amount and such amount is at the disposal of the DERC though not physically but in respect of utilization thereof. We, therefore, are convinced that the ratio of Puna Electricity Supply Co. Ltd (supra) is squarely applicable to the case of the assessee before us and on that score, we allow the contention of the assessee that they have rightly reduced the efficiency gain amount in their profit and loss account."

16. Respectfully following the findings of the co-ordinate bench, this grievance of the assessee is allowed.

17. At this stage, it would be pertinent to understand the claim of deduction under Chapter VIA which has been allowed by the first appellate authority and the Revenue is in appeal before us.

18. There is no dispute that the assessee had claimed deduction u/s 80IA of the Act at Rs. 98.38 crores, which is evident from the statement showing computation of total income exhibited at page 3 of the paper book. It is also not in dispute that the Assessing Officer did not raise any query nor there was any quarrel in respect of the claim of deduction u/s 80IA of the Act. However, the quarrel is only in respect of the disallowances made by the Assessing Officer while framing the assessment order u/s 143(3) of the Act.

19. Section 80IA(4)(iv)(c) of the Act provides that an undertaking which undertakes substantial renovation and modernisation of the existing network of transmission or distribution lines at any time during the period beginning the first day of April 2004 and ending on 31st day of March 201 is eligible for deduction u/s 80IA of the Act. The

explanation to the said provision provides that substantial renovation and modernisation means an increase in the plant and machinery in the net work by at least 50% of book value as on 01.04.2004.

20. A perusal of the record, read with the audit report and report in Form No. 10CCB, shows that plant and machinery in the network of transmission or distribution lines have increased by more than 50% of the book value of the plant and machinery as on 01.04.2004. On these undisputed facts, we find that the return of income was filed well within due date alongwith audit report including audit report in Form No. 10CCB and were available before the Assessing Officer during the assessment proceedings.

21. As mentioned elsewhere, the Assessing Officer has not disputed the claim of deduction u/s 80IA of the Act mentioned in the computation of income nor he has objected during the course of assessment proceedings. On these facts, the first appellate authority allowed the claim of deduction u/s 80IA of the Act irrespective of the fact that certain disallowances/additions were made by the Assessing Officer while completing the assessment order.

22. In our considered opinion, the issue is now well settled by the Circular No. 37/2016 dated 02.11.2016 issued by the Central Board of Direct Taxes, which reads as under:

> "Chapter VI-A of the Income-tax Act, 1961 ("the Act"), provides for deductions in respect of certain incomes. In computing the profits and gains of a business activity, the Assessing Officer may make certain disallowances, such as disallowances pertaining to sections 32, 40(a)(ia), 40A(3), 43B etc., of the Act. At times disallowance out of specific expenditure claimed may also be made. The effect of such disallowances is an increase in the profits. Doubts have been raised as to whether such higher profits would also result in claim for a higher profit-linked deduction under Chapter VI-A.
>
> 2. The issue of the claim of higher deduction on the enhanced profits has been a contentious one. However, the courts have generally held that if the expenditure disallowed is related to the business activity against which the Chapter VI-A deduction has been claimed, the deduction needs to be allowed on the enhanced profits. Some illustrative cases upholding this view are as follows:
>
> (i) if an expenditure incurred by assessee for the purpose of developing a housing project was not allowable on account of non-deduction of TDS under law, such disallowance would ultimately increase assessee's profits from business of developing housing project. The ultimate profits of assessee after adjusting disallowance under section 40(a)(ia) of the Act would qualify for

deduction under section 80-IB of the Act. This view was taken by the courts in the following cases:

- Income-tax Officer - Ward 5(1) vs. Keval Construction, Tax Appeal No. 443 of 2012, December 10, 2012, Gujarat High Court.[1]
- Commissioner of Income-tax-IV, Nagpur vs, Sunil Vishwambharnath Tiwari, IT Appeal No. 2 of 2011, September 11, 2015, Bombay High Court.[2]'

(ii) deduction under section 40A(3) of the Act. is not allowed, the same would be added to the profits of the undertaking on which the assessee would .d o for deduction under section 80-IB of the Act. This view was taken by the court in the following cases:
"Principal CIT. Kanpur vs. S onya Merchants Ltd.. I.T. Appeal No. 248 of 2015, May 03, 2016 Allahabad High Court

The above views have attained finality as these judgments of the High Courts of Bombay, Gujarat and Allahabad have been accepted by the Department.

3. In view of the above, the Board has accepted the settled position that the disallowances made under sections 32, 40(a)(ia), 40A(3), 43B, etc. of the Act and other specific disallowances, related to the business activity against which the Chapter VI-A

deduction has been claimed, result in enhancement of the profits of the eligible business, and that deduction under Chapter VI-A is admissible on the profits so enhanced by the disallowance.

4 Accordingly, henceforth, appeals may not be filed on this ground by officers of the Department and appeals already filed in Courts/ Tribunals may be withdrawn/ not pressed upon. The above may be brought to the notice of all concerned."

23. In view of the above Circular, disallowances made by the Assessing Officer are related to the business activity against which deduction u/s 80IA of the Act has been claimed which resulted in enhancement of the profits of the eligible business and hence deduction under Chapter VIA is admissible on the profit so enhanced by the disallowances.

24. In light of the above CBDT Circular, all the issues become academic in nature and therefore, need no separate adjudication, though it would be pertinent to mention here that all the disputed issues remain open for both the parties in case the deduction u/s 80IA is denied by the Hon'ble Superior Court. In the light of the above discussion and finding, all the appeals of the assessee are allowed whereas those of the revenue are dismissed.

25. In the result, all the appeals of the assessee in **ITA No 2784/DEL/2013**, **ITA No. 2785/DEL/2013** and **ITA No. 5368/DEL/2013** are allowed whereas those of the revenue in **ITA No. 2784/DEL/2013, ITA No. 2785/DEL/2013** and**ITA No. 5368/DEL/2013** are dismissed.

The order is pronounced in the open court on 14.06.2019.

Sd/-	**Sd/-**
[SUCHITRA KAMBLE**]**	**[N.K. BILLAIYA]**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 14th June, 2019

VL/

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