IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCHES "A" : HYDERABAD
(THROUGH VIDEO CONFERENCE)

BEFORE SHRI S.S.GODARA, JUDICIAL MEMBER
AND
SHRI LAXMI PRASAD SAHU, ACCOUNTANT MEMBER

I.T.A. No. 1336/HYD/2018
Assessment Year: 2008-09

Clarion Power Corporation Ltd., HYDERABAD [PAN: AABCC5697M]	Vs	Asst. Commissioner of Income Tax, Circle-1(2), HYDERABAD
(Appellant)		(Respondent)

For Assessee : Shri P.Murali Mohana Rao, AR
For Revenue : Shri Sunil Kumar Pandey, DR

Date of Hearing : 24-03-2021
Date of Pronouncement : 06-05-2021

O R D E R

PER S.S.GODARA, J.M. :

This assessee's appeal for AY.2008-09 arises from the CIT(A)-1, Hyderabad's order dated 08-01-2018 passed in case No.0406/CIT(A)-1,Hyd/2013-14/2017-18, in proceedings u/s.143 r.w.s.147 of the Income Tax Act, 1961 [in short, 'the Act'].

Heard both the parties. Case file perused.

2. It transpires at the outset that this assessee's instant appeal suffers from 39 days delay stated to be attributable to the reason(s) beyond its control as per condonation petition/affidavit dt.19-06-2018. No rebuttal has come from

the departmental side. The impugned delay is condoned therefore.

3. The assessee's pleadings in the instant appeal raises *inter alia* raises three folded substantive grievances i.e., validity of Section 147/148 proceedings followed by challenge the correctness of both the lower authorities' action mainly carbon credits sales addition of Rs.5,87,82,516/- and Section 43B disallowance of provisions of gratuity and leave encashment payments of Rs.5,16,594/-; respectively made in the course of assessment and upheld in the CIT(A)'s order.

4. Learned authorised representative reiterated the assessee's stand that both the lower authorities have erred in law and on fact in taking recourse to the impugned re-opening thereby making that the twin additions/disallowances in above terms. We proceed in this factual backdrop and come to the former issue of carbon credits sales addition to the tune of Rs.5,87,82,516/-. It emerges at the outset that this tribunal's first round order dealing with the Revenue's appeal in Section 143(3) proceedings ITA No.1482/Hyd/2013 has already decided the issue in Revenue's favour holding that such receipt is capital in nature as under:

"2. In Ground No.2, the department has challenged the. decision of learned CIT(A) in deleting the addition made by AO by holding that the amount received on sale of carbon credits is capital in nature, hence, not taxable.

3. Briefly, the facts relating to the aforesaid issue are, assessee a company is engaged in generation of power. For the AY under consideration assessee filed its return of income declaring 'NIL' income. During the course of assessment proceeding, AO while examining assessee's claim of deduction u/s 80IA, noticed that assessee has received an amount of Rs.5,07,45,000 from sale of

CERs (carbon credits) which have been included in the gross sales and credited to P&L A/c and the assessee has also claimed deduction u/s. 80IA on the same. When AO proposed to disallow the deduction claimed u/s. 80IA on sale of carbon credits on the ground that sale of carbon credits cannot be considered to be income derived from eligible business of assessee, though, assessee objected to the proposed disallowance', AO ultimately. disallowed the claim of deduction u/s. 80IA of Rs. 5,07,45,000 by excluding it from business income in the assessment order passed by him. Assessee challenged the decision of AO in appeal preferred before the CIT(A). The learned CIT(A) following the decision of the ITAT. Hyderabad Bench in case of M/s My Home Power Ltd. Vs. DCIT, 151 TTJ 616 deleted the addition by holding that the amount of Rs.5,07,45,000 on sale of carbon credits is in the nature of capital receipt, hence, is not taxable.

4. We have heard both the parties and perused the orders of revenue authorities as well as other material on record. At the outset, both learned DR and learned AR agreed before us that the issue in dispute is squarely covered by the decision of the ITAT, Hyderabad Bench in case of M/s My Home Power Ltd. Vs. DCIT (supra), which has been confirmed by the Hon'ble Jurisdictional High Court in case of same assessee while dismissing department's appeal as reported in 365 ITR 82 / 46 Taxman.com 314. Considering such submission of both the counsels and after going through the judgment of the Hon'ble Jurisdictional High Court as aforesaid, we do not find any infirmity in the order of learned CIT(A) as the issue Is squarely covered in favour of assessee by virtue of the aforesaid judgment of the Jurisdictional High Court. Accordingly, we uphold the order of the learned CIT(A) on this issue and the ground raised by the department is dismissed".

5. Coupled with this, we find that the legislature has inserted Section 115BBG in the Act vide Finance Act, 2017 w.e.f.01-04-2018 treating the said carbon credits as taxable income. We make it clear that we are in AY.2008-09 only. This is not in Revenue's case that the said statutory provision carries any retrospective effect. We thus hold that both the lower authorities have erred in law and on facts in treating the assessee's carbon credits' receipts as taxable income. The impugned addition of Rs.5,87,82,516/- is directed to be deleted therefore.

6. Next comes equally important question as whether the impugned re-opening is liable to be sustained in the facts of the instant case or not. We repeat as per our discussion in the preceding paragraphs that the Assessing Officer's sole re-opening reason recorded to this effect dt.30-03-2013 goes contrary to the tribunal's landmark decision dt.02-11-2012 in My Home Power Ltd., Vs. DCIT (2012) [27 taxmann.com 27] Hyderabad tribunal's deciding the issue in assessee's favour as upheld in hon'ble jurisdictional high court in CIT Vs. My Home Power Ltd., (2014) [365 ITR 82] AP. The assessee's case in the light of hon'ble apex court's landmark decision in GKN Driveshafts (India) Ltd., Vs. ITO, [(2003) 259 ITR 101 (SC)], that all the facts invalidate the impugned re-opening as well since their lordships have made it clear that there are twin stages of posing challenge to correctness thereof i.e., by filing objections before the Assessing Officer at the threshold stage as well as during the course of scrutiny assessment's appeals. This tribunal's co-ordinate bench's decision in Joginder Singh Vs. ITO, ITA No.222/ASR/2014, dt.11-06-2015 holds the instant issue as under:

"…16. The reason is this. The reasons for reopening the assessment, as is the scheme of law visualized and set out by Hon'ble Supreme Court in the GKN Driveshaft's case (supra), are to be confronted to the assessee and the assessee has an opportunity to rebut these reasons. This is a stage prior to the Assessing Officer proceeding with the reassessment proceedings and after he has issued notice for reopening the assessment. In a situation in which the assessee can convince the Assessing Officer that these reasons are not good enough to make the additions, the reassessment proceedings are to be dropped anyway.

17. There is no bar on the nature of material that the assessee may seek to rely upon, even at the first stage, to demonstrate that the reasons for reopening are unsustainable in law and even this

adjudication by the Assessing Officer is subject matter of legal scrutiny by the appellate authorities in the course of the same appellate proceedings as against the reassessment order. The scheme of law, as laid down by the Hon'ble Supreme Court in GKN Driveshaft's case, thus provides for dual adjudication by the Assessing Officer on the correctness of the reasons recorded for reopening the assessment- one at the stage of dealing with the objections of the assessee prior to proceeding with the reassessment proceedings, and the other at the point of time when, during the reassessment proceedings, the Assessing Officer has to take a call on additions to be made in respect of these reasons. That is where there is a paradigm shift in the scheme of things post GKN Drivershaft decision. In a situation in which, during the reassessment proceedings, the Assessing Officer finds these reasons to be so incorrect that he concludes that no income has escaped the assessment and the additions on that count are unwarranted, the same should have been the position at the stage of adjudicating on the correctness of the reasons recorded in the pre-reassessment proceedings. In the latter proceedings also, the assessee has the liberty to bring the material, other than that available to the Assessing Officer on his records, that no income has escaped assessment. The conclusions in these two sets of somewhat parallel exercises cannot, therefore, be ordinarily different. In other words, when the Assessing Officer is satisfied that no additions can be made on the basis of the reasons of reopening, as recorded by him, he has to drop the reassessment proceeding at this initial stage itself. When the examination of correctness of the reasons recorded come up for adjudication before the appellate authorities, the approach, therefore, cannot be any different either.

18. In the case before Hon'ble jurisdictional High Court, as evident from the extracts from the CIT(A)'s order reproduced therein, the reassessment was quashed on the ground that the Assessing Officer "could not make additions in respect of the income which had not escaped assessment for which no notice had been given to the assessee under Section 148 read with Section 147 of the Act". Their Lordships appreciated that to that extent the legal proposition was incorrect in the light of insertion of Explanation 3 to Section 147, and the earlier judicial precedents, which were relied upon by the assessee, did not hold good law, as Their Lordships made clear in no uncertain words. The correctness of the reasons of reopening was not an issue before Their Lordships. The correctness of the reasons for reopening was not, directly or indirectly, in challenge.

19. As is evident from the discussions earlier in this order, here is a case in which the very reasons on account of which the CIT(A) has deleted the quantum additions were also good enough to hold that the initiation of reassessment proceedings is bad in law and yet the

CIT(A) was fighting shy of the logical conclusions thereto and natural corollaries to these findings. It is also important to bear in mind the fact that the relief so granted by the CIT(A), on the basis of which the additions in respect of the reasons recorded for reopening the assessment were deleted and which were, in our considered view, good enough to quash the reassessment itself, is not even challenged in further appeal. These findings of the CIT(A) have thus reached finality and are not even in dispute before us. If such be the facts, there can be no justification for taking these findings to its logical conclusions and, based on these uncontroverted findings, quash the reassessment itself. What held good for deleting the additions on the basis of the reasons recorded the assessment, on the fact of this case and in our humble understanding, was good enough to hold the reasons for reopening the assessment to be incorrect as well. We are unable to see any legally sustainable reasons to come to different conclusions. In our considered view, therefore, the CIT(A) ought to have quashed the reassessment as well.

20. In view of these discussions, and bearing in mind entirety of the case, we hold that the CIT(A) ought to have, on the peculiar facts and circumstances of the case, quashed the reassessment proceedings as well. We, therefore, quash the reassessment proceedings. As reassessment itself is quashed as above, nothing else survives for adjudication".

6.1. We follow the foregoing reason *mutatis mutandis* and hold that the impugned reasoning is also not sustainable as per law. The same stands quashed therefore.

The assessee's third substantive ground raising the issue of correctness of 43B disallowance is rendered infructuous in above terms.

7. This assessee's appeal is allowed.

Order pronounced in the open court on 6th May, 2021

Sd/-	Sd/-
(LAXMI PRASAD SAHU)	**(S.S.GODARA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Hyderabad, Dated: 06-05-2021

TNMM

Copy to :

1.Clarion Power Corporation Ltd., C/o. P. Murali & Co., Chartered Accountants, 6-3-655/2/3, 1st Floor, Somajiguda, Hyderabad.

2.The Asst.Commissioner of Income Tax, Circle-1(2), Hyderabad.

3.CIT(Appeals)-1, Hyderabad.

4.Pr.CIT-1, Hyderabad.

5.D.R. ITAT, Hyderabad.

6.Guard File.