

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

RESERVED ON: 13.03.2014
PRONOUNCED ON: 16.04.2014

+ **ITA 507/2013**

NTPC LTD.

.....APPELLANT

Through : Mr. S.E. Dastur, Sr. Advocate with
Mr. R. Muralidhar and Mr. Ved Jain,
Advocates.

Versus

COMMISSIONER OF INCOME TAX-VRESPONDENT

Through : Mr. Rohit Madan, Mr. P. Roy
Choudhary, Mr. Anshumaan Sahni & Mr.
Akash Vajpai, Advocates.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE R.V. EASWAR

MR. JUSTICE S.RAVINDRA BHAT

1. This is an assessee's appeal against the decision of the Income Tax Appellate Tribunal (ITAT) dated 30.4.2012 in ITA 1438/Del/2009 for the assessment year 2005-06. The question of law which arises for consideration in this case is whether the Commissioner of Income Tax fell into error in invoking his power under Section 263 of the Income Tax Act, 1961 ("the Act") modifying the assessment order by withdrawing the additional

depreciation of Rs.187,55,77,000 and further directing the Assessing Officer (“AO”) to examine the allowance of Rs.938.80 crores on account of revision of sales afresh.

2. The assessee (hereafter called “NTPC”) filed its return of income under the Act on 24.10.2005 and declared a total income of Rs.1330,17,92,000/-. The return was processed under Section 143(1) on 27.2.2006 at the same figure. Later, the case was selected for scrutiny assessment and a notice under Section 143(2) of the Act was issued on 23.3.2006; the AO had served a detailed questionnaire upon NTPC under Section 142(1) of the Act. NTPC in response furnished the necessary details whenever called for by the AO. Upon analysis of various issues, the AO framed the assessment order under Section 143(3) on 27.11.2006. He determined the taxable income at Rs.3736,18,91,370/-.

3. The Commissioner, after going through the assessment order, felt that the AO allowed additional depreciation under Section 32(1)(iia) of the Act for the sum of Rs.187,55,71,000/30 due to additional assets at the Ramagundam and Talcher Super Power Plants, and that *prima facie*, this was not inadmissible. It was stated that there was lack of deliberation by the AO on the issue and, therefore, his order was erroneous as well as prejudicial to the revenue’s interest. The Commissioner also noted that NTPC had raised the total sale bills to its customers of Rs.23066.03 crores in terms of the earlier norms of Central Electricity Regulatory Commission (CERC) and that the final order of CERC was not made during the year; it was to be passed in the succeeding year.

NTPC company had provisionally revised the sales downward. As on 31.3.2005, it reduced the sales provisionally to Rs.22128 crores on an estimate basis, without issuing any corresponding credit notes to its customers. In the opinion of the Commissioner, the AO permitted NTPC to reduce sales by Rs.938.03 crores without examining the issue, which rendered his order erroneous and prejudicial to the revenue's interest.

4. The Commissioner issued a show-cause notice under Section 263 of the Act, on 19.10.2007 seeking explanation of the assessee why the assessment order should not be treated as erroneous and prejudicial to the revenue's interest. The relevant portions of the notice are as follows:

"(a) Additional Depreciation:

During the year under consideration assessee company claimed additional depreciation of Rs.187,55,71,000 on account of addition of assets at Ramagundam and Talcher Super Power Plants u/s. 32(1)(ia) of the Income-tax Act. This was the first year in which such claim was made: Section 32(ia) of the Income-tax Act reads as under: In the case of any new machinery or plant (other than ships and aircraft), which has been acquired and installed after the 31st day of March, 2005, by an assessee engaged in the business of manufacture or production of any article or thing, a further sum equal to twenty per cent of the actual cost of such machinery or plant shall be allowed as deduction under clause (ii). From plain reading of the Section 32(ia) of the Act, it is evident that benefit is available only to those undertakings which are engaged in the business of manufacture or production of any article or thing. Other businesses

are not eligible to claim the benefit. Generation of power cannot be equated with the production of article or thing. Article or thing in common parlance is known as something tangible, movable, etc. Generation of power is giving energy as output and therefore, activity is no way similar to the production of article or thing. In case of CIT vs. N.C. Budhiraja and Co. (1993), 204 ITR 412 (S.C), it was held that the expression 'manufacture' and 'produce' are normally associated with movables-articles and goods, big and small. Therefore, in light of the position of facts and law claim of additional depreciation has been erroneously allowed and to that extent order of the A.O. is erroneous is so far as it is prejudicial to the interest of revenue.

(b) Provisional Revision of Sales

In Schedule 28 of Annual Report of the company vide para 3(a) and (b) it is mentioned:

3(a) The Central Electricity Regulatory Commission (CERC) has notified by regulation in March 2004, the terms and conditions for determination of tariff applicable with effect from 1st April, 2004 for a period of five years. Pending final determination of tariff for the period 1st April 2004 onwards, CERC has directed by notification that on provisional basis, the annual fixed charges as applicable on 31st March, 2004 shall be billed at target availability and variable charges based on norms of operation notified in Regulation, 2004. The amount billed for the year on this basis is Rs.230,663 Million. Since the amount billed is subject to adjustment with effect from 1st April, 2004, pending final determination of the tariff by CERC, sales amounting to Rs.221,280 million for the year have been provisionally recognized on the basis of principles enunciated by the CERC in Regulation, 2004.

3(b)further, in case of stations for which final tariff orders have been issued by the CERC for the period up to 31.3.2004, sales amounting to Rs.2768 million has been accounted for during the year. In the previous year there was a reduction effected in sales to the extent of Rs.9034 million relating to earlier years".

In this matter assessee company has provisionally revised the sales downward as on 31.3.2005. Assessee company had raised the total sale bills of the customers of Rs.23066.3 crores as per earlier norms of CERC. Final order of CERC was not passed during the year and same was to be passed in some succeeding years. There was no occasion to reduce the sales provisionally to Rs.22128 crores on estimated basis and that too without issuing any corresponding credit note to the customers. The determination of liability as on 31.3.2005 is contingent upon the final order by the CERC. Therefore, the reduction in sale in this manner is against the law. Moreover, assessee company is again passing a final entry on receipt of CERC order as mentioned in para 3(b) of the Schedule 28. Assessee company cannot make any provision on estimated basis when final determination is a future event. In this manner, company has wrongly reduced sale by Rs.938.3 crores. Assessing Officer has failed to examine the issue. Therefore, in light of the position of facts and law provisionally entry reducing the sale has been erroneously allowed and to that extent order of the A.O. is erroneous in so far as it is prejudicial to the interest of revenue.

You are requested to show cause as to why the order passed u/s. 143(3) be not revised on the issue of wrong allowance of additional depreciation and provisional revision of sales of energy...."

5. The Commissioner, noting that NTPC generates power, and that Section 32(1)(iia) of the Act provided additional depreciation to undertakings engaged in manufacture or production of any

article or thing, was of opinion that generation of power cannot be equated with the production of article or thing because article or thing in common parlance is known as something tangible and moveable etc. The Commissioner was of the view that wherever a deduction is granted for power generation undertaking, a separate mechanism has been provided under the Act. He agreed that Section 32(1)(vi) (as stood prior to 01.04.1998), provided for additional depreciation but that it categorically specified both businesses i.e. generation of power and manufacture of production or an article or thing. He therefore held that additional depreciation was inadmissible to NTPC. He also held that the AO incorrectly allowed additional depreciation. He therefore set aside the AO's order and directed the latter to withdraw the additional depreciation of Rs.187,55,71,000. On the second issue, the Commissioner observed that the CERC was tasked by law to regulate the tariff of electricity generating companies owned or controlled by the Central Government. NTPC had issued total sales bills of Rs.23,066.30 crores to its customers in terms of CERC's existing norms. CERC's final norm fixation order was not made during the year. Yet NTPC revised the sales downwards to Rs.22,128 crores and did not take into account a sum of Rs.938.30 crores. The AO permitted this without any inquiry. On this score, the Commissioner set aside the assessment order and remitted this issue to the file of the Assessing Officer for fresh examination. NTPC approached the ITAT.

6. By the impugned order, ITAT ruled against NTPC, *inter alia*, observing that:

“16. On due consideration of all these facts and circumstances, we are of the view that learned Assessing Officer has not put any query to the assessee about the reduction of the sales provisionally. As far as the reference to page No.90 is concerned, the assessee has given an explanation with regard to different issues wherein it has pointed out about the provisional revision of the sales, but Assessing Officer has not called for the information on this issue nor examined it. Even if the details are available on the record, there is no application of the mind at the end of the Assessing Officer. Thus, his order is erroneous. As far as the second condition i.e. whether any prejudice has been caused to the revenue or not is concerned, we find that Learned Commissioner has recorded a finding that permitting the assessee to reduce the sales without examining the issue, whether the assessee can reduce it or not would result a loss to the revenue, prima facie, there is an escapement of income. Though Learned Commissioner has not examined the issue on merit but the discussion prima facie indicates his formation of opinion about the loss of revenue. He remitted it to the file of the Assessing Officer after satisfying himself that the record cry for an inquiry on this issue. Hon'ble Delhi High Court in the case of Ashok Logani (supra) has specifically observed in paragraph 14 of the judgment that if the matter was relegated to the Assessing Officer to conduct an inquiry then ITAT itself should not take up that inquiry in its hands and adjudicated the issue on merit and thereafter judge the order of the Learned Commissioner. In such circumstances, ITAT has a very limited scope and it should focus its discussion on the propriety of the

order of the Learned Commissioner. At the time of hearing, we have confronted the learned counsel for the assessee that if the Assessing Officer failed to conduct an inquiry then assessment order can be termed as erroneous which ultimately caused a prejudice to the revenue and deserves to be set aside, then learned counsel for the assessee submitted that if hundred items are there in computation of income and no inquiry was conducted by the Assessing Officer on certain items then can the assessment order be erroneous. In our opinion if an verification of the record, Learned Commissioner formed an opinion that an issue available in the computation of income required verification and investigation at the end of Assessing Officer before its acceptance or rejection and such inquiry was not conducted than and an error has crept in the assessment order. If such an error caused a prejudice to the revenue than assessment order on such issue could be set aside. Therefore, in view of the above discussion, we are of the view that on reduction of sales Learned CIT has rightly taken cognizance u/s. 263 and has rightly remitted this issue to the Assessing Officer for fresh adjudication.”

7. Relying upon the decision reported as *Malabar Industrial Co. Ltd. v. CIT*, 243 ITR 83, Mr. Dastur, the learned senior counsel for NTPC, argued that the term “*prejudicial to the interests of the Revenue*” in Section 263 is not defined under the Act; in the sense that it is understood ordinarily it has wide implications and is not confined to loss of tax. It is stated that the Supreme Court ruled that every loss of revenue as a consequence of the order of the Assessing Officer (AO) cannot be treated as prejudicial to the Revenue’s interest. Thus, when an Income Tax Officer adopts one of the courses permissible in law which results in loss of revenue

or where two views are possible with which the Commissioner is not in agreement, the matter cannot be treated as one amounting to an error or prejudicial to the Revenue's interest. Learned counsel also submitted that the Division Bench ruling in *Commissioner of Income Tax. v. Leisure Wear Exports Limited*, 341 ITR 166 is decisive in that the revisional power under Section 263 cannot be invoked to merely correct an error by the ITO which is prejudicial to the Revenue's interest. Only those orders which are based on an incorrect assumption of facts or based on wrong application of law or which betray non-application of mind can be termed erroneous. It was also argued that the order of the CIT to the extent that it directed the AO to investigate the matter without describing how such investigation is to be carried-out would itself be erroneous. In other words, the CIT has to go into the merits to decide how the AO's order is prejudicial or erroneous. If he does not do so, his order itself would be outside jurisdiction and, therefore, contrary to law.

8. It was submitted that paragraphs 3(a) and 3(b) of the 21st Schedule to the Annual report of 20.04.2005, placed on record, at the time of the original assessment reveal that pending finalization of tariff for the period 01.04.2004 onwards, CERC directed that on provisional basis, the annual fixed charges applicable as on 31.03.2004 had to be applied for billing at target availability and variable charges were to be charged on operation notified in the Regulations of 2004. The sum of ₹2683.01 crores was billed for the year and was subject to adjustment with effect from 01.04.2004 till

a final determination was made by the CERC. Consequently, the sum of ₹257.179 crore was provisionally recognized based on the principles enunciated by the CERC in the 2004 Regulations. In case of circumstances for which final tariff orders were made by CERC for the period 2004, sales upto ₹ 603 crores were accounted for this year. It was submitted that note 3(b) clearly stated that in the previous year, there was a reduction in the sales to the extent of ₹ 903.4 crores relating to earlier years.

9. Stressing that these aspects were taken into account by the AO after a detailed enquiry, scrutiny and proper application of mind, the learned senior counsel submitted that in the original paragraph 13 of the assessment order, the AO dealt with the issue of pre-commissioning scales, and referred to Schedule 28 to the note of account which included notes 3(a) and 3(b).

10. It is submitted that the NTPC is not free to charge any tariff for electricity generated but is subject to strict regulation by through the CERC's regulations. Thus, note A of the Annual Report brought out that in the year ending 31.03.2005 (A.Y. 2005-06), the CERC had not finally determined the tariff chargeable. Instead, what happened was that NTPC was allowed to bill on the provisionally fixed charges applicable as on 31.03.2004. As this amount was not final and subject to change, the CERC notification clarified that if the billed amount was in excess of final tariff, such excess had to be returned by the company to the consumer. Arguing further, it is urged that the record reveals that the tariff norms fixed by the NTPC for power plants from 2004-09 were

lower than the tariff norms for 2000-04. The NTPC had accounted sales for electricity for ₹ 2212.8 crores based upon the previous experience in tariff fixation orders of CERC. This was even though the billed amount was ₹ 2306.6 crores. This estimate was *bona fide* and made on a realistic assessment of sales estimation that could be realized in terms of accepted tariff notifications. Thus, it is urged that there was nothing erroneous or prejudicial to Revenue's interest in such estimate.

11. Learned counsel also emphasized that NTPC's stand was vindicated because the final tariff orders issued in Financial Years 2006-07 and 2007-08 fixed the tariff at a lower rate than what was previously billed by it. Consequently, NTPC was obliged to return the excess collected to the consumers in the form of credit notes. However, it was argued that wherever final tariff rates determined by the CERC are higher than the sales recorded by NTPC even though lower than the amounts billed to its consumers, such excess has been invariably offered to tax. It was thus stated that during A.Y. 2007-08, an additional amount of tax of ₹ 46.40 crores on account of such tariff finalized for previous years was offered to tax. It was submitted, therefore, that there was no escapement of income or prejudice to the Revenue and there was no error calling for exercise of revisional jurisdiction.

12. Relying upon the decisions reported as *Saurashtra Cement and Chemicals v. CIT*, 1995 (213) ITR 523 and *Bharat Earth Movers v. CIT*, 245 ITR 428 (SC), it was submitted that so long as the estimate is based upon reasonable certainty though actual

quantification may not be possible, such exercise should not be rejected. Likewise, it was submitted – based upon the decision in *CIT v. Shoorji Vallabhdas and Co.*, 1962 (46) ITR 144 that what is to be seen is whether the substance of the matter is really income and that if income does not result, there cannot be a tax even though a big entry is made about a hypothetical income which does not materialize. It was submitted, therefore, that the downward revision based upon an estimate and past experience, could not be said to have caused prejudice especially when pursuant to the final tariff the NTPC's stand was in fact vindicated.

13. On the other hand, learned counsel for the Revenue urged that the ITAT's order does not call for interference. Learned counsel states that the AO's order revealed that in fact no information was called for in question and that there was no meaningful examination. Stressing that there were no details available on the record in the assessment proceedings, learned counsel submitted that the AO's order was in fact erroneous and led to loss of revenue. It was, therefore, urged that there was in fact no occasion to reduce the sales provisionally of ₹ 2212.2 crores on estimated basis even though the total amount billed upon the NTPC's customers was ₹ 203.66 crores. The determination of liability as on 31.03.2005 was contingent upon final order of the CERC. The estimation, therefore, could not have been made in respect of final determination of the matter in future. Thus, NPTC had wrongly reduced the sale of ₹938.3 crores. Learned counsel relied upon the ruling of this Court reported as *CIT v. Regency*

Park Property Management Company Pvt. Ltd., ITA 1991/2010 decided on 05.01.2012 and submitted that failure to conduct necessary enquiry and investigation would render the Assessing Officer's orders erroneous as he is required to act as an investigator. Such an order would also be prejudicial to Revenue's interest. It was also submitted that this decision is an authority on the question that the CIT can require the AO – in the proper exercise of his authority under Section 263 – to carry-out further enquiry and investigation with a view to making an appropriate order.

Analysis and findings

14. Before proceeding to deal with the rival merits of the contentions of the parties, it would be necessary extract some of the relevant CERC Regulations. On 26.03.2001, CERC Regulations of 2001 were brought into force with effect from 01.04.2001 for three years. Para 2.7 of these Regulations of 2001 reads as follows:

“2.7 Payment of Capacity (Fixed) Charges

The Capacity Charges shall be computed on the following basis and its recovery shall be related to Availability.

(a) Interest on loan capital

Interest on loan capital shall be computed on the outstanding loans, duly taking into account the schedule of repayment, as per the financial package approved by the

Authority or an appropriate independent agency, as the case may be.

(b) Depreciation:

(i) The value base for the purpose of depreciation shall be the historical cost of the asset.

*Depreciation shall be calculated annually as per straight line method at the rate of depreciation as prescribed in the Schedule attached to this notification as **Appendix-II**.*

Provided that the total depreciation during the life of the project shall not exceed 90% of the approved original cost. The approved original cost shall include additional capitalization on account of foreign exchange rate variation also.

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(c) Return on Equity:

Return on equity shall be computed on the paid up and subscribed capital and shall be 16 percent of such capital.

Explanation:-

Premium raised by the Generating Company while issuing share capital and investment or internal resources created out of free reserve of the existing utility, if any, for the funding of the project, shall also be reckoned as paid up capital for the purpose of computing the return on equity, provided such premium amount and internal resources are actually utilized for meeting the

capital expenditure of the generating station and forms part of the approved financial package as set out in the techno-economic clearance accorded by the Authority or approved by an appropriate independent agency, as the case may be.

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15. On 30.04.2004, a notification was issued which stated that the terms and conditions for tariff determination with effect from 01.04.2004 were notified on 29.03.2004 to determination of tariff based upon revised terms was likely to take some time. The notification (of 30.04.2004), therefore, went on to direct as follows:

“7/25(7)/2004-Legal

Dated the 30th April, 2004

NOTIFICATION

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2. *It is, therefore, directed that with effect from 1.4.2004, the billing of charges shall be done on the following basis, for a period of 6 months, that is, up to 30.9.2004.*

Thermal Power Generating Stations

The annual fixed charges as applicable on 31.3.2004 shall be billed at the target availability and variable charges based on norms of operation notified on 29.3.2004.

Hydro Power Generating Stations

Full recovery of annual fixed (capacity) charges as applicable on 31.3.2004 shall be billed and recovered based on capacity index notified on 29.3.2004. Similarly, primary/secondary energy

rates shall be computed based on the terms and conditions notified on 29.3.2004.

Transmission System

Annual transmission charges shall be billed as applicable on 31.3.2004 and recovered based on Target Availability notified on 29.3.2004.

3. The development surcharge as applicable up to 31.3.2004 shall not be billed.

4. The billing of charges as directed above shall be on provisional basis and shall be further subject to adjustment after final determination of tariff by the Commission in accordance with the revised terms and conditions notified on 29.3.2004, for which the petitions shall be filed by the utilities latest by 30.6.2004.”

16. Likewise, on 11.06.2004, a clarification was issued that since there were certain doubts with regard to payment of charges other than those specified in the notification of 30.04.2004, all respective terms of tariff of 29.04.2004 were applicable but that billing of charges of main component specified on 30.04.2004 would be regulated in terms of that notification only on provisional basis till determination of tariff in individual cases, was published. On 01.10.2004, the CERC notified as follows:

*“CENTRAL ELECTRICITY REGULATORY
COMMISSION NEW DELHI*

L-7/25(7)/2004-Legal Dated the 1st October, 2004

NOTIFICATION

It is hereby directed that the billing of charges in terms of the Commission's notification No.L-7/25(7)/2004-Legal dated 30.4.2004, read with the

notification of even number dated 11.6.2004, shall be continued on provisional basis for a period up to 31.3.2005 or till disposal of the applications made by the utilities for approval of tariff, whichever is earlier, and shall be subject to adjustment after final determination of tariff by the Commission based on such applications.

2. It is further directed that the applications shall be made by the utilities by 31.10.2004 failing which the Commission may consider to reduce the provisional tariff presently allowed for generating stations or the transmission assets, as the case may be, in respect of which the applications are not made by that date.

(A.K. SACHAN)

SECRETARY”

17. The 26.03.2004 Regulations – notified on 29.03.2004 – which were referred to in the above two notification and which contained the terms that were operationalized after the tariff rates were fixed and finalized, by paragraph 21(iii) prescribed as follows:

“(iii) Return on Equity

Return on equity shall be computed on the equity base determined in accordance with regulation 20@14% per annum.

Provided that equity invested in foreign currency shall be allowed a return up to the prescribed limit in the same currency and the payment on this account shall be made in Indian Rupees based on the exchange rate prevailing on the due date of billing.

Explanation

The premium raised by the generating company while issuing share capital and investment of internal resources created out of free reserve of the generating company, if any, for the funding of the project, shall also be reckoned as paid up capital for the purpose of computing return on equity, provided such premium amount and internal resources are actually utilized for meeting the capital expenditure of the generating station and forms part of the approved financial package.”

18. There is no dispute that Notes 3 (a) and 3(b) of the XXI Schedule to the Annual Report in this case disclosed all the facts, especially that initially the sales figures were ₹ 2683.01 crores; how there was a reduction in this on the basis of downward revision, due to the CERC Regulations, resulting in the final figure – shown in the return being ₹ 903.4 crores less. Therefore, NTPC could not be accused of withholding information or material information, or providing incomplete facts. The question therefore is whether the absence of a specific discussion on this aspect in the assessment order resulted in an error of law by the AO, and whether that resulted in prejudice to the revenue.

19. The narrative and discussion of facts in the previous part of this judgment has showed that there was some tentativeness in the CERC Regulations about the tariff rates and conditions that were to be applied for the period 01-04-2004 onwards. The previous Tariff Regulations – framed in 2001 – were to end on 31.03.2004; yet by the latter date, even though the conditions for tariff applicability had been more or less finalized, the final tariff order, notifying the rates and some final principles, had not been brought into force. In

these circumstances, the CERC directed that the existing conditions were to be applied till 30.9.2004. The notification of 01.04.2004 thereafter directed corporations like NTPC in the following terms:

“... It is hereby directed that the billing of charges in terms of the Commission’s notification No.L-7/25(7)/2004-Legal dated 30.4.2004, read with the notification of even number dated 11.6.2004, shall be continued on provisional basis for a period up to 31.3.2005 or till disposal of the applications made by the utilities for approval of tariff, whichever is earlier, and shall be subject to adjustment after final determination of tariff by the Commission based on such applications.”

20. NTPC thus had no choice in the matter but to carry on billing in terms of the previous notification *on a provisional basis* up to 31.03.2005 or till the approval of tariffs; such billing figures were to be subject to adjustment after final tariff determination. Thus, inherently there was a degree of uncertainty and incompleteness in the process. This was reflected in the return when the adjustment of the billing became necessary on account of the application of the CERC notification. NTPC’s argument that the tariff for power plants from 2004-09 was lower than the tariff norms for 2000-04 has not been disputed by the Revenue. Even a bare look at the later Tariff Regulations shows that the rate of return was revised downwards. NTPC submits that it accounted sales for electricity for ₹2212.8 crores based upon the previous experience in tariff fixation orders of CERC. This was even though the billed amount was ₹ 2306.6 crores. This estimate was *bona fide* and made on a realistic assessment of sales estimation that could be

realized in terms of accepted tariff notifications. There was nothing erroneous or prejudicial to Revenue's interest in such estimate.

21. This Court finds that power generation companies owned or controlled by the Central Government are a sub-species of business entities for which a separate provision has been enacted by the Act. There is no dispute that the income of utilities, especially ones subject to stringent public control, are tightly regulated in terms of what are the accounting methods to be adopted, how depreciation is to be claimed, allowances rate of return on capital, etc. All these aspects are subject to CERC Regulations. At the relevant time, i.e. the transition between the old (2001) CERC Regulations, and the later ones (2004-2009), had not been fully worked out by the CERC as to what had to be recovered by NTPC and other entities. It therefore directed that the previous regime be followed. Apparently for a portion of previous accounting periods, provisional figures were being indicated as income estimates, and depending on how the final figures were worked out at times, higher figures would be offered as amounts received in excess of the sum estimated and reported during other periods. An example cited is one for 2006-2007 when an excess figure of over Rs. 46 crore was reported and brought to tax. Furthermore, the revision downward – in the present instance – was based on past experience, whenever revision of tariff had taken place. If downward revision were not undertaken, there would have been a

likelihood of the higher figure not being realized *after tariff finalization*.

21. There is authority, in the form of Supreme Court judgments in *Shree Sajjan Mills Ltd v. CIT*, (1985) 156 ITR 585, *Bharat Earth Movers Ltd v. CIT*, (2000) 245 ITR 428 and [*Metal Box Company of India Ltd v. Their Workmen*](#), (1969) 73 ITR 53, that a provision made on a reasonable basis, it would be in the nature of an ascertained liability and that in a mercantile system of accounting, provision for liability ascertained during the course of the relevant accounting period, which is payable at a future is permissible.

22. The expression “error of law” resulting in prejudice to the interests of the revenue are not to be given wide connotation, as is sought to be urged by the Revenue here. Where two views are possible, the Commissioner should not exercise his power under Section 263; *Leisure Wear* (supra) aptly summarizes this power as not enabling a revisional interdict on the mere existence of another view which conflicts with what was adopted by the Income Tax Officer; so long as the latter’s opinion is a plausible one, exercise of power would be unwarranted. The fulfillment of both preconditions, i.e. error of law, and prejudice to revenue is essential, else the revenue would have wide ranging powers to oversee and re-open almost every assessment order. In the present case, the court is satisfied that the AO’s order was made after appropriate inquiry; the absence of discussion regarding downward

revision of sales figures in this case did not make it any less vulnerable to correction under Section 263. The view taken by him is one which is endorsed by law, as the CERC Regulations left the NTPC with little choice to make such revision awaiting a final determination in regard to the whole period after the expiry of the assessment in that instance.

23. This Court is of the opinion that the question of law framed in this appeal has to be answered in favour of the assessee. The Commissioner acted erroneously in exercising revisional power under Section 263. The orders of the Commissioner and the ITAT are hereby set aside. The order of the AO dated 27.11.2006 is restored. However the merits of that order, on aspects other than what has been discussed here and pending in appeal, are not being touched upon. The appeal is allowed in the above terms.

**S. RAVINDRA BHAT
(JUDGE)**

**R.V. EASWAR
(JUDGE)**

APRIL 16, 2014