IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

ITA-295-2018 (O&M)

Date of Decision: 29.11.2018

Principal Commissioner of Income Tax, Hisar

....Appellant.

Versus

M/s Dakshin Haryana Bijli Vitran Nigam Ltd., Hisar

...Respondent.

CORAM:- HON'BLE MR. JUSTICE AJAY KUMAR MITTAL.
HON'BLE MRS. JUSTICE MANJARI NEHRU KAUL.

PRESENT: Mr. Yogesh Putney, Sr. Standing Counsel for the appellant.

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AJAY KUMAR MITTAL, J.

1. This appeal has been filed by the revenue under Section 260A of the Income Tax Act, 1961 (in short "the Act") against the order dated 16.1.2018 (Annexure A-3) passed by the Income Tax Appellate Tribunal, Delhi Bench 'B', New Delhi (hereinafter referred to as "the Tribunal") in ITA No. 5743/DEL/2014, for the assessment year 2005-06, claiming the following substantial questions of law:-

a) Whether on the facts and in the circumstances of the case, the Ld. ITAT was right in dismissing the Revenue's appeal, upholding the order of the Commissioner of Income Tax (Appeals) whereby he has deleted the addition of ₹ 1,95,95,85,359/- made by the Assessing Officer on account of non-inclusion of "surcharge levied on electricity bills,

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yet not realized during the year" in its total income even though the Respondent Assessee has regularly been following the mercantile system of accounting?

b) Whether on the facts and in the circumstances of the case, the Ld. ITAT was right in deleting the above addition, ignoring the fact that the consumers have not challenged such levy of surcharge and thus right to receive the surcharge has matured?

c) Whether on the facts and in the circumstances of the case, the Ld. ITAT was right in deleting the above addition holding that the Hon'ble High Court has decided the issue in favour of the Respondent Assessee in the Assessee's own case, ignoring the fact that the issue has still not attained the finality, as the Revenue is in appeal on the issue before the Hon'ble Supreme Court in the Assessee's own case for the AY 2006-07, which is still pending?

2. Put shortly, the facts necessary for adjudication of the instant appeal as narrated therein may be noticed. The assessee is purchasing the electricity from M/s Haryana Power Generation Corporation Ltd. and distributing the same to the consumers at the rate fixed by the Haryana Electricity Regulatory Commission (in short "the Commission"). The assessee filed its return of income on 31.10.2005 by declaring a loss of

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₹ 163,32,42,391/- for the assessment year 2005-06. The said return was processed under Section 143(1) of the Act on 11.10.2006. The assessee also filed a revised return of income on 18.10.2006 by declaring a loss of ₹ 222,90,10,540/- and the said return was processed under Section 143(1) of the Act on 28.12.2006. Thereafter, the assessee filed revised return of income on 22.3.2007 by declaring a loss of ₹ 124,33,57,290/- which was also processed under Section 143(1) of the Act on 30.3.2007. The Assessing Officer vide order dated 19.11.2007 framed the assessment under Section 143(3) of the Act at a returned loss of ₹ 124,33,57,290/- and allowed to carry forward the unabsorbed business loss and depreciation. Subsequently, the proceedings under Section 147 of the Act were initiated and a notice dated 9.3.2012 under Section 148 of the Act was issued to the assessee. The Assessing Officer vide order dated 4.2.2013 (Annexure A-1) passed under Section 143(3) read with Section 147 of the Act made the addition of ₹ 195,95,85,839/- on account of 'surcharge levied but not realized' as the assessee was following the mercantile system of accounting. It was noticed by the Assessing Officer that the assessee was charging the surcharge on delay payment of bill. The surcharge was charged and billed as part of single bill along with electricity dues. However, the assessee was not accounting the surcharge as a part of income on the ground that its recovery was not definite. Feeling aggrieved by the order, Annexure A-1, the assessee filed an appeal before the Commissioner of Income Tax (Appeals) [for brevity "the CIT(A)"]. The CIT(A) vide order dated 11.8.2014 (Annexure A-2) allowed the appeal and deleted the addition made on account of 'surcharge levied but not realized' by following its earlier orders dated 6.11.2009, 3.1.2011, 11.8.2011 and 4.10.2011 for the

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assessment years 2006-07 to 2009-10 and that of the Tribunal's orders dated 30.11.2011, 27.6.2012 and 10.2.2012 for the assessment years 2006-07 to 2008-09. Against the order, Annexure A-2, the revenue filed an appeal whereas the assessee filed cross-objections before the Tribunal. The Tribunal vide order dated 16.1.2018 (Annexure A-3) affirmed the order, Annexure A-2, of the CIT(A) and dismissed the appeal as well as the cross objections by relying upon the decision of this Court in **ITA-209-2014 (The Commissioner of Income Tax, Hisat v. Dakshin Haryana Bijli Vitran Nigam Ltd., Hisar)** decided on 1.10.2014. Against the order dated 1.10.2014, SLP-9961-2015 filed by the revenue is also pending before the Supreme Court. Hence, the present appeal by the revenue.

3. We have heard learned counsel for the appellant and perused the paper-book with his assistance.

4. The question that arises in this appeal is 'whether surcharge for delayed payment' contemplated in the bills raised by the assessee and its accounts, would invite payment of tax dehors recovery/payment/receipt of surcharge?

5. The Assessing Officer while making the addition of ₹ 195,95,85,839/- on account of 'surcharge levied but not realized' had observed that as soon as the surcharge was levied on delayed payment, the assessee acquires a right to receive money from the customers even though the amount may not have been received and that if the assessee acquires a right to receive the said amount, the income can be said to accrue to it. Since the assessee had regularly been following the mercantile system of accounting, the income accrued but not realized amounting to ₹ 195,95,85,839/- was disallowed and added to the income of the assessee.

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6. On appeal by the assessee, the CIT(A) vide order dated 11.8.2014 (Annexure A-2) allowed the appeal and deleted the addition of ₹ 195,95,85,839/- on account of 'surcharge levied but not realized' by observing as under:-

> "This system is being followed from the assessment year 2004-05 as the statutory auditors of the Nigam pointed out in their audit report on the accounts for the year ending 31st March, 2003 that the recognition of income by charging surcharge on delayed payments is in contravention of the Basic accounting assumption of prudence as contained in Accounting Standard-1 on Disclosure of Accounting Policies and without any certainty as to its recognition issued by the Institute of Chartered Accountants of India. Considering the auditors objection, the Audit Committee of the Boards of directors of the Nigam decided in its 2nd Meeting held on 21st February, 2003 to account for delayed payment income of surcharge on receipt basis henceforth. Accordingly, the income from surcharge of delayed payment is being accounted for on the basis of collection."

7. Thereafter, the revenue filed an appeal whereas the assessee filed cross objections before the Tribunal. The Tribunal vide order dated 16.1.2018 (Annexure A-3) affirmed the findings of the CIT(A) and dismissed the appeal filed by the revenue as well as cross-objections filed by the assessee. The relevant findings recorded thereof read thus:-

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"7. We have heard both the parties and perused the records especially the impugned order as well as the Tribunal's orders and the submission filed by the Ld. DR and the case laws cited therein. We find considerable cogency in the submissions of the Ld. Counsel of the assessee that the Tribunal in assessee's own case has decided the similar and identical issue in favour of the Assessee and against the Revenue vide orders dated 30.11.2011, 27.6.2012 and 10.2.2012 for the assessment years 2006-07, 2007-08 and 2008-09 respectively in assessee's own case. We further find that the assessee has also succeeded in appeal on the similar and identical issue for the assessment year 2006-07, 2007-08, 2008-09 and 2009-10 vide earlier CIT(A)'s order dated 6.11.2009, 03.1.2011, 11.8.2011 and 4.10.2013 respectively. We further note that the books of accounts of the assessee are regularly audited by the CAG and Tax auditors and the same has been duly accepted them. We further find that the case laws cited by the Ld. DR in the written submissions are on different set of facts and circumstances, hence, the same are not applicable in the present case. However, the assessee's case is fully covered by the Coordinate Bench decisions of the Tribunal in assessee's own case of assessment years 2006-07 to 2008-09. In view of the above, we are of the considered view that Ld. CIT(A) has rightly deleted the addition in dispute by respectfully following the decision of the previous CIT(A) as well as the ITAT decisions in assessee's own case of assessment years 2006-07 to 2008-09, hence, the impugned order does not need any interference on our part, therefore, we uphold the action of the Ld. CIT(A) on the issue in dispute and reject the ground raised by the Revenue.

8. As regards, Assessee's Cross Objection is concerned, since we have already dismissed the

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Revenue's Appeal as aforesaid on merit and also the grounds raised by the Assessee in Cross Objection were not raised before the Ld. CIT(A), during the appellate proceedings, hence, the same have become infructuous, hence, we reject the same."

8. This Court in a similar matter bearing **ITA-209-2014 (The Commissioner of Income Tax, Hisar v. Dakshin Haryana Bijli Vitran Nigam Ltd. Hisar)** decided on 1.10.2014 while dismissing the appeal of the revenue had recorded that as and when the assessee receives payment of surcharge, it would be obliged to pay tax on such amount.

9. In view of the above, no illegality or perversity could be pointed out by the learned counsel for the appellant in the aforesaid findings recorded by the CIT(A) and the Tribunal which may warrant interference by this Court. However, it is recorded that as and when the assessee receives payment of surcharge, it would be obliged to pay tax on such amount.

10. Accordingly, no substantial question of law arises and there is no merit in the appeal, consequently it is dismissed.

(AJAY KUMAR MITTAL)
JUDGE

November 29, 2018
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(MANJARI NEHRU KAUL)
JUDGE

Whether Speaking/Reasoned **Yes**

Whether Reportable **Yes**

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