

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 03.09.2020

CORAM

THE HONOURABLE MR. JUSTICE T.S.SIVAGNANAM
AND
THE HONOURABLE MRS. JUSTICE V.BHAVANI SUBBAROYAN

T.C.A.NOS.60 OF 2018 AND
C.M.P.NO.668 OF 2018
AND T.C.A.NO.61 OF 2018

PPN Power Generating Company Private Ltd.,
Jhaver Plaza III Floor,
1A, Nungambakkam High Road,
Chennai - 600 034 ...Appellant in both the appeals
Vs.

Commissioner of Income Tax (Appeals) - III
No.121, Mahatma Gandhi Road,
Nungambakkam,
Chennai - 600 034 ...Respondent in T.C.A.No.60 of 2018

Assistant Commissioner of Income Tax,
Central Circle - 3(1)
46, Nungambakkam High Road,
Chennai - 600 034 ...Respondent in T.C.A.No.61 of 2018

Tax Case Appeals filed under Section 260-A of the Income Tax Act, 1961, are directed against the Orders passed by the Income Tax Appellate Tribunal "B" Bench in I.T.A Nos.2721/MDS/2016 and 3067/MDS/2016 dated 22.08.2017 for the assessment year 2009-10.

TCA 60 of 2018

Appeal filed against the order of the Income Tax Appellate Tribunal 'B' Bench, Chennai dated 22/08/2017 in I.T.A No.2721/MDS/2016 Assessment year 2009-2010 against the Commissioner of Income Tax (Appeals)-3 in ITA No.9/2013-14/CIT (A)-3-dated 30/06/2016 PAN NO.AABCP8131D Assessment year 2009-10 against Deputy Commissioner of Income Tax, Company Circle (2), PAN NO.AABCP8131D Assessment Year 2009-2010.

TCA 61 of 2018

Appeal filed against the order of the Income Tax Appellate Tribunal 'B' Bench, Chennai dated 22/08/2017 in I.T.A No.3067/MDS/2016 Assessment year 2009-2010 against the

Commissioner of Income Tax (Appeals)-3 in ITA No.9/2013-14/CIT (A)-3-dated 30/06/2016 PAN NO.AABCP8131D Assessment year 2009-10 against Deputy Commissioner of Income Tax, Company Circle (2), PAN NO.AABCP8131D Assessment Year 2009-2010.

For Appellant : Mr.G.Baskar
For Respondents : Mr.T.Ravikumar
Sr.Standing Counsel

C O M M O N J U D G M E N T

[Common Judgment of the Court was delivered by T.S.SIVAGNANAM,J.]

These appeals have been filed by the assessee under Section 260A of the Income Tax Act, 1961 ['the Act', for brevity] challenging the order dated 22.08.2017 passed by the ITAT 'B' Bench, Chennai [Tribunal] in I.T.A Nos.2721/MDS/2016 and 3067/MDS/2016 for the assessment year 2009-2010.

2. The assessee has filed two appeals challenging the common order passed by the Tribunal dated 22.08.2017 on account of the fact that the assessee's appeal challenging the order passed by the Commissioner of Income Tax Appeals- III, Chennai [CITA] was dismissed and the appeal filed by the Revenue was allowed. However, the issue pertains only to the assessment year 2009-2010.

3. The Assessee is a private limited company, engaged in the generation of power, which is sold to the Tamilnadu Generation and Distribution Corporation [TANGEDCO] under a power purchase agreement entered into between the parties. For the assessment year under consideration, AY - 2009-2010, the assessee declared a total income of Rs.4,15,55,069/- under the normal provisions of the Act. After claiming deduction under Section 80IA of the Act to the tune of Rs.1,06,50,60,712/-, the assessee declared a book profit of Rs.1,11,44,71,000/- under Section 115 JB of the Act. Subsequently, a revised return of income was filed on 23.09.2010 adding back Rs.70 Crores being the provision for cash discount allowable to TANGEDCO, declaring the very same income, Rs.4,15,55,070/- under the normal provisions of the Act and claiming enhanced deduction under Section 80 IA of the Act to the tune of Rs.1,76,50,60,712/-. The assessee admitted a book profit of Rs.1,81,44,71,000/- under Section 115JB of the Act. The return of income was processed under Section 143(1) of the Act and subsequently, the case was selected for scrutiny and a notice under Section 143(2) of the Act was issued on 24.08.2010. A reference to the Transfer Pricing Officer was made on 26.10.2009 under Section 92(C)(A) of the Act for determining the arm's length price in respect of the assessee's transaction on its associated enterprises.

4. The Transfer Pricing Officer [TPO] by an order dated 31.12.2012 stated that no adjustments was necessary to value the international transaction entered into by the assessee. The assessment was completed under Section 143(3) r/w Section 144(1) of the Act on 26.03.2013 computing the total income at Rs.10,09,39,254/- under normal provisions of the act and by adding Rs.41,76,92,807/- under the caption 'Delayed Revenue Recognition' as business income for the said assessment year and allowed deduction under Section 80IA of the Act. Further, the assessing officer treated the interest income of Rs.5,93,84,195/- as income from other sources thereby denying the deduction under Section 80 IA of the Act. The assessing officer computed the book profit under Section 115 JB of the Act at Rs.2,23,21,63,807/- under the caption 'Delayed Revenue Recognition'. Aggrieved by such order, the assessee filed an appeal before the CIT[A], who by an order dated 30.06.2016 partly allowed the appeal and rejected the grounds except the ground challenging the deletion of addition towards reimbursement to specified taxes and a direction was issued to the assessing officer to follow the decision of the Tribunal in the assessee's own case for AY-2004-2005 dated 02.03.2009.

5. Aggrieved by the same, the assessee preferred an appeal to the Tribunal. The department also filed an appeal challenging the deletion of addition towards reimbursement of specified taxes. Both the appeals were heard together and by an impugned common order dated 22.08.2017, assessee's appeal was dismissed and the revenue appeal was allowed. This is how the assessee is before us by way of these appeals.

6. The only question to be considered by us in these appeals is whether the assessing officer was right in coming to the conclusion that the accounts of the assessee were not prepared in accordance with the Companies Act, 1956 ['1956 Act', for brevity] and whether the additions made were proper?. The other issue would be whether the CIT[A] and the Tribunal were right in affirming the finding of the assessing officer?.

7. We have carefully perused the order passed by the assessing officer and found it to be a speaking order. The assessing officer has recorded a factual finding that the assessee was not recognising income in accordance with Schedule VI of 1956 Act and this was highlighted by the statutory auditors of the assessee in the main audit report in Paragraph No.3, after explaining with regard to the revenue recognition and noting the factual position, the assessing officer has held that non-recognition of revenue to the extent of Rs.25.07 crores and provisions for cash discount to the tune of Rs.17.16 crores clearly shows that the assessee did not follow matching concept relating to the recognition of revenue and expenses and accounting standards prescribed by the ICAI.

8. Further, while dealing with the stand taken by the assessee there were uncertainties in receiving funds from TANGEDCO, the assessing officer held that the stand is incorrect because the power purchase agreement is backed by the state guarantee and there was never uncertainty about the determination of revenue. Finally, the assessing officer held that had the assessee followed the accounting standards properly and had it recognised the income property and had also prepared its financial statements as Part II and Part III of Schedule VI of the 1956 Act, it could have paid taxes correctly and claimed these payments as part of its bills to TANGEDCO.

9. The assessee in its appeal before the CIT[A] contended that the statutory auditors have not made any qualification in the audit report and the noting made in the audit report was misunderstood by the assessing officer to be a qualification by the statutory auditor. Further, the assessee relying on the decision of the Hon'ble Supreme Court in Appolo Tyres Vs. I.T.O., reported in [2002] TIOL - 185 - SC-IT questioned the power of the assessing officer with regard to the computation on book profits in so far as the accounts which are otherwise accepted under the Company Law.

10. The assessee further stated that they have prepared their accounts in accordance with schedule VI of the 1956 Act and the same were also consistent in the concept of 'Prudence' enshrined in AS 1 notified by the CBDT. These contentions were tested for its correctness by the CIT[A], who concurred with the assessing officer and on appreciation of facts, held that the books of accounts are not prepared as per 1956 Act. The decision in the case of Appolo Tyres was considered by the CIT [A] and recorded a finding as to how the same cannot be applied to the assessee's case.

11. Before the Tribunal, assessee contended that they have prepared the accounts in accordance with 1956 Act. This contention was tested by the Tribunal and the Tribunal, as a matter of fact, found that the accounts are not in accordance with the 1956 Act. After going through the above orders, we find that the entire matter appears to be factual and no question of law much less substantial question of law arises for consideration on this aspect.

12. At this juncture, it would be relevant to take note of few Judgments, which were referred to by Mr.T.Ravikumar, learned Senior Standing Counsel for the Revenue. In [Dynamic Orthopedics P.Ltd., Vs. C.I.T.], reported in (2010) 321 ITR 0300 the Hon'ble Supreme Court held that Section 115 J does not make any distinction between the public and private limited companies, it legislatively incorporates only the provisions of

Part II and III of Schedule VI to the 1956 Act by a deeming fiction and therefore, Section 115 J [1A] is to be read in the strict sense and if the company is a MAT Company, it has to prepare profit and loss account for the purpose of Section 115 J in accordance with Part II and Part III of Schedule VI of the 1956 Act, otherwise the very purpose of enacting Section 115 J would stand defeated particularly, as the said section does not make any distinction between public and private companies. Therefore, it was held that the Judgment in Malayala Manorama Co., Ltd., Vs. CIT reported in (2008) 300 ITR 251(SC) needs reconsideration by a larger bench.

13. On behalf of the Revenue it was argued that there was excess provision made by the assessee, which is also an important factor to be taken note of, in this regard, reliance was placed on the decision of the Division Bench of this Court in Commissioner of Income Tax Vs. Forbes Campbell Finance Limited reported in [2013] 352 ITR 0602. The learned Senior Counsel also referred to the decision of Hon'ble Supreme Court in Commissioner of Income Tax V. British Paints India Limited reported in [1991] 188 ITR 0044, wherein the Court pointed out the importance of system of accounting and held as follows :

'21. Any system of accounting which excludes, for the valuation of the stock-in-trade, all costs other than the cost of raw materials for the goods-in-process and finished products, is likely to result in a distorted picture of the true state of the business for the purpose of computing the chargeable income. Such a system may produce a comparatively lower valuation of the opening stock and the closing stock, thus showing a comparatively low difference between the two. In a period of rising turnover and rising prices, the system adopted by the assessee, as found by the Tribunal, is apt to diminish the assessment of the taxable profit of a year. The profit of one year is likely to be shifted to another year which is an incorrect method of computing profits and gains for the purpose of assessment. Each year being a self-contained unit, and the taxes of a particular year being payable with reference to the income of that year, as computed in terms of the Act, the method adopted by the assessee has been found to be such that income cannot properly be deduced therefrom. It is, therefore, not only the right but the duty of the Assessing Officer to act in exercise of his statutory power, as he has done in the instant case, for determining what, in his opinion, is the correct taxable income'.

14. The above decisions are having referred to emphasis the importance of following the accounting standards as prescribed under the 1956 Act, as already held by us, we find no question of law or substantial question of law arising on the said issue.

15. We now proceed to consider the alternate submissions made by Mr.G.Baskar, learned counsel appearing for the assessee. It is submitted that the Tribunal after taking into consideration of the note submitted by the assessee held that the assessee has received all the disputed sums including the specific taxes, on which, the revenue is on cross appeal from AY-2010-2011 to AY-2014-2015 in various proportions but in full. It is further submitted that the Tribunal while affirming the view taken by the assessing officer that the assessee did not follow accounting standard properly held that the impugned additions made have not been challenged by the assessee with relevant material and accordingly rejected the plea raised by the assessee. Further, the Tribunal pointed out that the income which is to be assessed in the particular year cannot be assessed in any other year.

16. It is the submission of Mr.G.Baskar, learned counsel for the appellant that the Tribunal having recorded the above finding, ought to have issued a direction to the assessing officer to take appropriate steps for assessment years 2010-2011 to 2014-2015 during which period, the assessee had received the disputed sums including the specified taxes and was assessed to tax on the said receipts. Therefore, it is submitted that consequential direction should have been issued to the assessing officer. In this regard, the learned counsel has drawn the attention of this Court to Paragraph No.6.7 of the impugned order, wherein such a point was canvassed before the Tribunal. Therefore, it is submitted that the order passed by the Tribunal suffers from error and appropriate direction may be issued to the assessing officer.

17. Mr.T.Ravikumar, learned senior standing counsel for the respondents submitted that the assessee should be considered as a person never to be aggrieved on such a finding as no such ground was raised and for the first time, in these appeals filed under Section 260A of the Act it is raised and the same should not be permitted to be raised as it was never a question of law framed for consideration.

18. After elaborately hearing the learned counsels on either sides, this Court finds that the assessee has raised a specific ground before the Tribunal stating that the additions were made under the normal provisions of the Act as well as under Section 115 JB, which the assessee prayed for deletion and submitted that since it has received and admitted, the impugned receipts for the subsequent year, the additions made under the normal provisions of the Act, as well as under Section 115 JB of the Act, may be deleted and the rate of tax remains the same in all these years under Section 115 JB of the Act. In fact, the ground raised by the assessee was to delete the impugned additions on the ground that the receipts have been subjected to the tax in the subsequent year whatever the assessee had received from TANGEDCO. The Tribunal did not agree with the assessee and sustained the addition, if such is the factual position, the natural consequences that is to flow is to issue a direction to the assessing officer to take appropriate action in so far as the assessments from the year 2010-2011 to 2014-2015, during which the assessee has been taxed on the said receipts. If such a consequential direction is not issued, then, the assessee would be subjected to double taxation which is unauthorised in Law. Thus, we find that this issue can clearly be brought within the scope of Sub-Section (4) of 260 A and the Court would be justified in issuing appropriate direction to the assessing officer to reopen the assessments from the year 2010-2011 to 2014 - 2015 on this issue alone and examine whether the assessee has paid taxes on these receipts, which addition have been sustained in the impugned assessment year 2009-2010 and after affording an opportunity to the assessee redo the assessment only on this aspect.

19. In the result, the appeals are dismissed as no substantial question of law arises for consideration. In the light of the reasons assigned by us in the preceding paragraphs, there shall be a direction to the Assessing Officer to reopen the assessment years 2010-2011 to 2014 - 2015, ascertain as to whether the assessee has paid taxes on the impugned receipts and afford an opportunity of hearing to the assessee, re-do the assessment on this aspect alone. Consequently, connected miscellaneous petition is closed. No costs.

Sd/-
Assistant Registrar

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Sub Assistant Registrar

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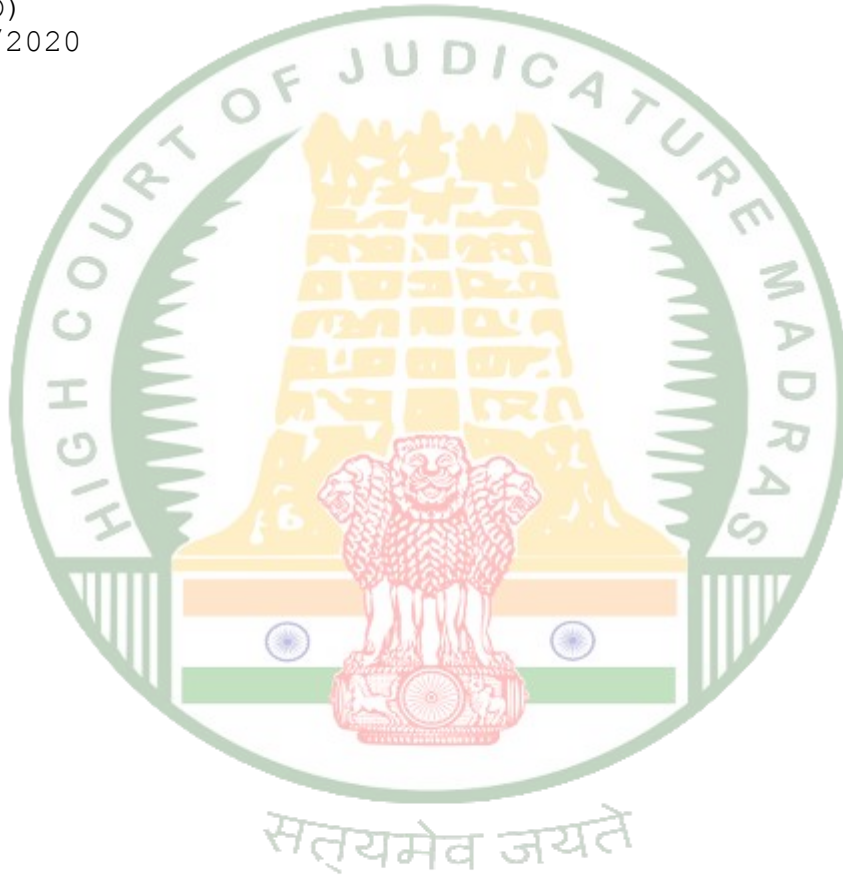
The Income Tax Appellate Tribunal "B" Bench

+lcc to M/s.G.Baskar, Advocate, S.R.No.28867

+lcc to M/s.T.Ravikumar, Advocate, S.R.No.28877

T.C.A.Nos.60 of 2018 and
C.M.P.No.668 of 2018
and T.C.A.No.61 of 2018

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