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

Date of Decision:- 11.03.2020

+ ITA 186/2020

DCIT, CIRDE-25(1), NEW DELHI

..... Appellant

Through: Ms.Adeeba Mujahid, Advocate for
Mr.Ajit Sharma, Senior Standing
Counsel

versus

TATA POWER DELHI DISTRIBUTION LTD. Respondent

Through: Ms.Shashi M. Kapila, Mr.Pravesh
Sharma, Mr.R.R.Maurya and
Mr.Sushil Kumar, Advocates.

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

HON'BLE MR. JUSTICE SANJEEV NARULA

SANJEEV NARULA, J (Oral):

1. The present appeal under Section 260 A of the Income Tax Act, 1961 (hereinafter referred as "Act") assails the common order dated 14th June, 2019 passed by the learned Income Tax Appellate Tax ("ITAT"), relating to the assessment year (AY) 2009-2010, whereby the Tribunal has decided several appeals preferred by both the Appellant as well as the Respondent. The present appeal is in respect of ITA No. 5368/Del/2013, filed by the Revenue, that stands dismissed by virtue of the impugned order.

2. The factual matrix giving rise to the present appeal is that the Respondent-Tata Power Delhi Distribution Ltd. (hereinafter referred as

“assessee”), a joint venture between the Tata group and the Delhi Government and is in the business of distribution of electricity in north and north-west area of Delhi. An assessment order was passed under Section 143(3) of the Act whereby the total income of the Respondent was computed at Rs.139,21,95,000/- and additions were made *inter alia* on the ground of (a) derecognition of revenue: Rs.78,91,50,000 and (b) disallowance under Section 80 IA of Rs. 35,71,77,686/-. In the appeal preferred before the Commissioner of Income Tax (hereinafter referred to as “CIT(A)”), the Respondent succeeded and vide order dated 30th July, 2013 the above noted additions were deleted. Thereafter, the assessee and the appellant preferred appeals before the ITAT. The common issues pertaining to abovenoted additions were identified and decided. The issues were decided in favour of the Respondent-assessee vide impugned order dated 14th June, 2019. The Appellant/ Revenue has preferred the present appeal impugning the order passed by the Tribunal qua the aforementioned issues.

3. Ms. Adeeba Mujahid, learned standing counsel for the Revenue argues that the order passed by the Tribunal is not in accordance with law and the additions made on account of derecognition of revenue is justified. She argues that since the Respondent-company has not given any refund to the customers, the surplus fund which continues to be at the disposal of the Respondent has to be recognised as income. With respect to the disallowance relating to the deduction made under Section 80 IA of the Act, she argues that this incidental income arising out of the business of the respondent undertaking is not directly related to the business and is therefore not eligible for deduction under the aforementioned provision of the Act. She

further argues that since the assessee has included income arising on account of commission on arrears, replacement of burnt metres, inspection fee, reconnection fee, miscellaneous recovery from suppliers etc, which are incidental incomes and therefore, cannot be claimed as income derived from eligible business so as to be entitled to deduction under Section 80 IA of the Act. She also submits that this Court in ***Principal of Commissioner of Income Tax vs. M/s Tata Power Delhi Distribution Ltd., ITA No. 687/2019*** has issued notice on the appeal preferred by the appellant and prays that this appeal be also admitted.

4. We have given thoughtful consideration to the submissions advanced by the learned counsel for the Revenue. The questions of law that have been urged for our consideration as also the grounds of challenge made out in the memorandum of appeal are relating only to (i) additions made on account of derecognised revenue and (ii) for deleting the disallowance deduction made under Section 80 IA of the Act. No other ground has been urged and we have therefore proceeded to consider the merits of the submissions with respect to the aforementioned issues only. The first addition relating to recognition of the revenue is on account of efficiency gain. The learned Tribunal after considering the facts of the case have applied the ratio of the decision of the Supreme Court in ***Poona Electric Supply Company Limited vs. CIT (1965) 57 ITR 521***, wherein the Apex Court has deliberated upon the concept of commercial profits viz-a-viz clear profits. On the basis of this principle, the Court has held that the amount transferable 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 has to be deducted

from its total income. On the strength of this reasoning, the Tribunal has relied upon the decision of the Coordinate Bench in Assessment Year 2006-07 and held that since the Respondent-assessee has no right to appropriate the efficiency gain amount and that such amount is at the disposal of DERC, the amount has to be reduced from the profits and loss account. The observations of the Tribunal on this aspect are as under:

"15. We find that similar facts were considered by the co-ordinate bench in assessment year 2006-07 in ITA N.o. 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 matter 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 directjns 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 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 Company Ltd. vs. CIT (1965) 56 ITR 521 (SC), the Hon'ble Apex Court considered a similar situation where the licensee like the assessee was 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 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 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 their profit and loss account.”

5. We feel that in view of the factual situation discussed above, the approach adopted by the Tribunal in applying the ratio of the decision of the Supreme Court in **Poona Electric Supply Company Limited vs. CIT (supra)** is wholly justified and does not call for any interference. Accordingly the ground of challenge urged by the revenue on this aspect is rejected.

6. With respect to the deductions under Section 80 IA of the Act, the Tribunal has referred to the circular no. 37/2016 dated 2nd November, 2016 issued by the Central Board of Direct Taxes (hereinafter referred to as “CBDT”). On the basis of the said circular, the Tribunal has observed that the issue has become redundant and academic in nature. The relevant portion of the impugned order is extracted herein below:

“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.*

- Commissioner of Income-tax-IV, Nagpur vs; Sunil Vishwambharnath Tiwari, IT Appeal No. 2 of 2011, September 11, 2015, Bombay High Court.*

(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 do for deduction under section 80-IB of the Act. This view was taken by the court in the following cases:

"Principal CIT. Kanpur vs. Sonya 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 disallowance made under sections 32, 40 (a) (ia), 40A (3), 43B, etc of the Act and other specific disallowance, 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 801A 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 801A 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."

7. We do not find any perversity in the view taken by the Tribunal. The circular of CBDT has been issued in view of the decisions of various High

Courts that find mention therein. The issue is no longer res integra. The Board has accepted the settled position “*that the disallowances made under Section 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*”.

8. For the foregoing reasons, we find no question of law much less substantial question of law arises for our consideration.

9. Accordingly, the appeal is dismissed.

SANJEEV NARULA, J

MANMOHAN, J

MARCH 11, 2020

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