

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH: 'E' NEW DELHI**

**BEFORE SHRI N.K. SAINI, ACCOUNTANT MEMBER  
&  
SHRI K.N. CHARRY, JUDICIAL MEMBER**

**ITA No.-4867/Del/2014  
(Assessment Year: 2005-06)**

DCIT Circle 13(1) New Delhi.	vs	NTPC Ltd. NTPC Bhawan, Core-7, Scope Complex, Lodhi Road, New Delhi. AAACN0255D
<b>Assessee by</b>		<b>Ms. Rano Jain, Adv.</b>
<b>Revenue by</b>		<b>Ms. Shefali Swaroop, CIT DR Sh. S.P.Gupta, Sr. DR</b>

<b>Date of Hearing</b>	<b>13.09.2017</b>
<b>Date of Pronouncement</b>	<b>19.09.2017</b>

**ORDER**  
**PER SHRI K.N. CHARY, JUDICIAL MEMBER**

Revenue preferred this appeal challenging the order dated 25.06.2014 in appeal no. 166/2009-10 passed by the Ld. Commissioner of Income Tax (Appeals)-XVIII, New Delhi (hereinafter for short called as the "Ld. CIT (A)").

2. Briefly stated facts are that the assessee is a public sector undertaking under the administrative control of the Ministry of Power, Govt. of India and derives its income mainly by generation

of power and rendering of consultancy services. For the AY 2005-06 the assessee filed their return of income on 24.10.2005 declaring an income of Rs. 13,30,17,92,000/- and the assessment was completed u/s 143(3) of the Act by order dated 27.11.2006 assessing the taxable income at Rs. 3736.19 crores. Assessee preferred an appeal before the Ld. CIT (A), New Delhi. While the matter stood thus, Ld. CIT, Delhi-V initiated proceedings u/s 263 of the Act by way of notice dated 19.10.2007 and after hearing the assessee he passed an order dated 20.02.2009 holding that the assessment order passed in this matter was erroneous and prejudicial to the interest of the Revenue in so far as the allowance of claim of additional depreciation u/s 32(1)(iia) of the Act and on account of sales of 928.30 crores pending finalization of tariff by CERC. Pursuant to the said order AO proceeded and while rejecting the submissions made by the assessee made addition of Rs. 187.56crores on account of additional depreciation claimed by the assessee and 928.30 crores on account of revision of sales.

3. Assessee carried the matter in appeal against the order dated 24.03.2009 passed u/s 143(3)/263 of the Act and the Ld.

Commissioner of Income Tax allowed the appeal, and, therefore, the Revenue is in appeal before us.

4. It is the argument of the Ld. DR that the benefit of additional depreciation is not available to the undertakings engaged in generation of power and the revision of sales at the end of the year is not in accordance with the mercantile law or Income Tax Act, as such, the order of the Ld. CIT (A) suffers serious error in holding otherwise and deleting the two additions made by the AO. Per contra, it is the submission of the Ld. AR that the assessee claimed additional depreciation of Rs. 187.56 crores in respect of new plant and machinery u/s 32(1)(iia) of the Income Tax Act and as a matter of fact a coordinate bench of this Tribunal in ITA No. 1438/Del/2009, after a review of the entire case law on this aspect held that the admissibility of the additional depreciation cannot be denied to the assessee merely on the ground that electricity is not an article or thing. So also in respect of the revision of sales following the CERC guidelines, Ld. Counsel placed reliance on the decision of the Hon'ble Jurisdictional High Court in assessee's own

case in ITA No. 507/Del/2013, wherein this issue was held in favour of the assessee.

5. We have carefully gone through the record in the light of the submissions made by the parties. In so far as grounds no. 1 to 3 are concerned, records shows that as against the bills raised on State Electricity Boards and Others for a sum of Rs. 23066.30 crores, the assessee had accounted sales of electricity for Rs. 22138.0 crores and difference of Rs. 928.30 crores is explained as not the real income in as much as on finalization of tariff by CERC during the FY 2006-07, out of Rs. 928.30 crores, the assessee had to refund Rs. 737.80 crores and the balance of Rs. 190.50 crores was offered for tax during the AY 2007-08 and 2008-09. Basing on this the submission of the Ld.AR is that the huge reduction of Rs. 737.76 crores that had taken place suggests that there was wrong assessment of income. Further, the Hon'ble Jurisdictional High Court in ITA No. 507/Del/2013 vide paragraph nos. 20 to 23 held as follows:

*".....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 ITA 507/2013 Page 19 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 ITA 507/2013 Page 20 likelihood of the higher figure not being realized after tariff finalization.*

22. *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.*

23. *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 ITA 507/2013 Page 21 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.*

24. *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."*

6. Ld. CIT (A) in the impugned order referred to these observations of the Hon'ble High Court and while following the same he reached the conclusion that the ground of appeal of the assessee deserves to be allowed. In view of the fact that the Ld. CIT (A) in his order followed the binding precedent in assessee's own case, its not possible to entertain any argument to the contrary by the Revenue, as such, we dismiss grounds no. 1 to 3 of Revenue's appeal.

7. Now coming to grounds no. 4 & 5, Ld. CIT (A) in his order followed the observations of a coordinate bench of this Tribunal in assessee's own case in ITA No. 1438/Del/2009, and while referring to paragraphs no. 22 to 23 he held that additional depreciation cannot be denied to the assessee. ITA No. 1438/Del/2009 is assessee's own case, preferred by the assessee, whereas this appeal is preferred by the revenue for the very same assessment year. Hence, while respectfully following the same, we dismissed ground nos. 4 & 5 also.

8. In the result, the appeal of the Revenue is dismissed.

Order pronounced in the open court on 19.09.2017

Sd/-  
**(N.K. SAINI)**  
**ACCOUNTANT MEMBER**

Dated: 19.09.2017

\*Kavita Arora

Sd/-  
**(K.N. CHARY)**  
**JUDICIAL MEMBER**

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

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ASSISTANT REGISTRAR  
ITAT NEW DELHI

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