आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, JAIPUR

श्री विजय पाल राव, न्यायिक सदस्य एवं श्री भागचंद, लेखा सदस्य के समक्ष
BEFORE: SHRI VIJAY PAL RAO, JM & SHRI BHAGCHAND, AM

आयकर अपील सं./ITA No. 933 to 935, 937 & 890/JP/2017
निर्धारण वर्ष/Assessment Year : 2004-05, 2005-06,2009-10, 2011-12 & 2007-08

The ACIT, Circle-2, Ajmer.	बनाम Vs.	M/s Ajmer Vidyut vitaran Nigam Ltd., Vidyut Bhawan, Panchsheel Nagar, Ajmer.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AACCA8562E		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से/ Assessee by : Shri Subhash Porwal (C.A.)
राजस्व की ओर से/ Revenue by : Shri Varinder Mehta (CIT)

सुनवाई की तारीख/ Date of Hearing : 05/02/2018
उदघोषणा की तारीख/Date of Pronouncement: 07/02/2018

आदेश/ ORDER

PER BENCH:

These five appeals by the Revenue are directed against separate orders of ld. CIT (A), Ajmer all dated 21.09.2017 arising from the penalty order passed u/s 271(1)(c) of the I.T. Act for the assessment years 2004-05 to 2007-08, 2009-10 & 2011-12 respectively.

For the assessment year 2004-05 the Revenue has raised the following grounds:-

" In view of the facts and circumstances of the case, the Ld. CIT(A), Ajmer has erred in:-

1. Cancelling the penalty levied for disallowance of depreciation on non-existing assets of Rs. 12,15,25,004/- without appreciating the fact that the quantum addition made by the AO was confirmed by the Ld. CIT(A) as the assets were not physically allowable with the assessee;

2. Cancelling the penalty levied for disallowance of excess depreciation of Rs. 22,05,23,697/- without appreciating the fact that the quantum addition made by the AO was confirmed by the Ld. CIT(A) as well as ITAT confirming the fact that the subsidy or grant or reimbursement shall not be included in the actual cost of the asset;

3. Cancelling the penalty levied for disallowance of prior period expenses of Rs. 4,64,27,170/- without appreciating the fact that the quantum addition made by the AO was confirmed by the Ld. CIT(A) as the assessee has failed to prove that prior period expenses were actually paid in the relevant financial year;

4. The appellant craves to add, amend, alter, delete or modify the above ground of appeal before or at the time hearing."

2. Ground No. 1 is regarding cancellation of the penalty in respect of the disallowance of depreciation of non-existing assets.

3. We have heard ld. DR as well as AR and considered the relevant material on record. At the outset we note that the disallowance made by the AO has been deleted by this Tribunal in quantum appeal in ITA No. 362/JP/2016 vide order dated 28.08.2017 as held in para 12 to 16 as under:-

"12. In respect of ground no. 2, briefly the facts of the case are that the Assessing Officer during the course of assessment proceedings noticed that the assets worth Rs. 115.21 Crores could not be physically verified and following the earlier years, he disallowed depreciation on such assets amounting to Rs. 12,15,15,004/-.

13. Being aggrieved, the assessee carried the matter in appeal before the ld. CIT(A) who confirmed the said disallowance. The decision of Tribunal for A.Y. 2003-04 in ITA No. 867/JP/2007 dated 20.06.2008 was brought to the notice of ld. CIT(A). The ld. CIT(A) stated that the order of the Tribunal for A.Y. 2003-04 cannot be interpreted to conclude that depreciation, on the fixed assets worth Rs. 115.21 Crore which are not physically available, is allowed indefinitely, even if the assessee does not prepare the list of fixed assets after physical verification. The assessee should have completed the exercise of physical verification within reasonable time which has not been done. If the assessee cannot find where the assets of Rs 115.21 crore are located, then the question of putting them to use for business purposes doesn't arise. No depreciation u/s 32 can be allowed on non-existing assets and accordingly he confirmed the disallowance of depreciation on the non-existing assets of Rs. 115.21 Crore.

14. The ld. AR submitted that the matter for assessment year 2003-04, which has been referred to by the ld CIT(A), has infact been set aside by the Tribunal to the Assessing Officer in the first round and it has again reached the Tribunal in the second round which has since been decided by the Tribunal vide its consolidated order dated 14.07.2016 in ITA No. 284/JP/2009 and its others. It was further submitted that the matter in the second round of appellant proceedings has been decided in favour of the assessee by the Tribunal and the same may be followed in the instant year.

15. The relevant findings of the Coordinate Bench in its consolidated order dated 14.07.2016 in ITA No. 284/JP/2009 and others are contained at paras 9 to 9.5 which are reproduced as under:-

"9. We have heard the rival contentions of both the parties and perused the material available on the record. We have heard the matter on 16/6/2016. During the course of hearing, it was submitted on behalf of the assessee that the erstwhile Rajasthan State Electricity Board was not assessable to income tax and therefore, it was not filing the income tax return. However, thereafter on going through the record and the judgment passed by the Hon'ble High Court and Hon'ble Supreme Court, it transpires that the Rajasthan State Electricity Board is an taxable entity and therefore the matter was fixed for hearing on 29/6/2016 for the purposes of clarification. On 29/6/2016, the ld AR alongwith representatives of the assessee were present in the court. Ld AR submitted that the Board have filed the return of income for the assessment year 2001-02 and have also provided the chart for depreciation in respect of fixed assets of the assessee.

9.1 Even otherwise Section 80 of the Electricity Supply Act, 1948 provides as under:-

"80. Provision relating to Income Tax and Super Tax.-

(1) For the purposes of the Indian Income-tax Act, 1922 (XI of 1922), 4 the Board shall be deemed to be a company within the meaning of that Act and shall be liable to income tax and super tax accordingly on its income, profits and gains.

(2) The State Government shall not be entitled to any refund of any such taxes paid by the Board.

In view of the specific provisions under the Electricity Supply Act, 1948, a Board constituted under the said Act and the Board is liable to pay tax under the provisions of Income Tax Act, 1961 and therefore, the Board was required to file income tax return

and the judgment passed by the Hon'ble Rajasthan High Court in the case of Rajasthan State Electricity Board Vs. DCIT (1993) 200 ITR 434 clearly deals that the Rajasthan State Electricity Board is a government company assessable under the I.T. Act. Further in the matter of CIT Vs. Rajasthan State Electricity Board (2007) 160 taxman 19, the Hon'ble Jurisdictional High Court has dealt Rajasthan State Electricity Board as a government company and is also subject to the rigorous of the Income Tax Act. Therefore, we are of the view that the Rajasthan State Electricity Board was a government company and was subject to the Income Tax Act.

9.2 Since the Rajasthan State Electricity Board was a government undertaking and was an income tax entity, therefore, it was having block of assets and fixed assets. Admittedly by the gazette notification dated 18/1/2002, the Rajasthan State Electricity Board was divided into five undertakings and the total assets of the Rajasthan State Electricity Board were divided in various companies and the gross fixed assets of Rs. 1029 crores came to the share of the assessee. It is the contention of the ld AR that it is not possible for the assessee to physically verify the individual assets as sought by the ld Assessing Officer as the fixed assets transferred to the assessee were forming part of the block of assets prior to its transfer with the RACB. As per the balance sheet of the Rajasthan State Electricity Board, the allowable depreciation up to 19/7/2000 was mentioned as Rs.1,04,82,30,121/-.Since block of assets were transferred to the assessee, therefore, the insistence of the ld Assessing Officer for physical verification of the assets for the purposes of depreciation, in our view, was not warranted. In our view, once the assets are forming part and parcel of the block of assets, which were transferred to the assessee from Rajasthan State Electricity Board, the physical verification for the purposes of depreciation may not be required and therefore, the assessee is entitled to depreciation on the written down value of the assets a

per Income Tax Act 1961, subsequent to the transfer from the assets from Rajasthan State Electricity Board.

9.3 It is an admitted case that the assessee company was constituted under the Act of Rajasthan and under the statutory transfer scheme, therefore, in view of Section 43 of the Act, transfer of assets had been fall within the realm of transfer as envisaged under the Act. As per explanation-6 of Section 43(1), the actual basis of transferee company would have to be written down value of the transferor company meaning thereby the block of assets, which was transferred by the Rajasthan Electricity Board with the original cost of acquisition, shall be determined the written down value for the assessee company. The Hon'ble Delhi High Court in the case of Dalmia Ceramic Industries Ltd. Vs. CIT (2005) 277 ITR 219 has held that "what would be the actual cost of the transferee company on the date of transfer is indicated in Section 43(1), explanation-6, thus the actual cost of transferee company will be written down value of the holding company."

9.4 Since the original cost of acquisition of the transferor company, is determined, similarly, the written down value of the transferor company is also available with the Assessing Officer, therefore, the ld Assessing Officer was only required to allow the application depreciation on the written down value of the assets acquired by the assessee from the transferor company (RACB). The relevant portion of the judgment is reproduced hereinbelow:

"*8. The only issue before this court is whether the written down value of the holding company is to be taken as actual cost of the assessee or the amount paid by the assessee to the holding company? Chapter IV of the Act refers to computation of business income and section 43 is required to be examined for the purpose of deciding this matter. Section 43(1) of the Act which defines actual cost reads as under:*

" (1) ' actual cost' means the actual cost of the assets to the assessee, reduced by that portion of the cost thereof, if any, as has been met directly or indirectly by any other person or authority :

Provided that where the actual cost of an asset, being a motor-car which is acquired by the assessee after the 31st day of March, 1967 but before the 1st day of March, 1975, and is used otherwise than in a business of running it on hire for tourists, exceeds twenty-five thou sand rupees, the excess of the actual cost over such amount shall be ignored, and the actual cost thereof shall be taken to be twenty-five thousand rupees."

9. What is written down value is defined in clause (6) of section 43 which reads as under :

" ' written-down value' means—

(a) in the case of assets acquired in the previous year, the actual cost to the assessee ;

(b) in the case of assets acquired before the previous year, the actual cost to the assessee less all depreciation actually allowed to him under this Act, or under the Indian Income-tax Act, 1922 (11 of 1922), or any Act repealed by that Act, or under any executive orders issued when the Indian Income-tax Act, 1886 (2 of 1886), was in force."

10. It may be noted that sub-clause (a) of clause (6) would not apply in the instant case as that would apply for the assessment year 1975-76. Sub- clause (b) clearly indicates that the written down value means the actual cost to the assessee less all depreciation actually allowed to him under the Act. In the instant case Explanation 2 to clause (6) of section 43 is relevant and is reproduced hereunder :

" Explanation 2.—When any capital asset is transferred by a hold ing company to its subsidiary company or by a subsidiary company to its holding company, then, if the conditions of clause (iv), or, as the case may be, of clause (v) of section 47, are satisfied, the written down value of the transferred capital asset to the transferee-company shall be taken to be the same as it would have been if the transferor-com pany had continued to hold the capital asset for the purpose of its business."

11. *There is no dispute that the case falls under clause (iv) of section 47. Therefore, it is clear that the actual cost would be the written down value of the transferor-company. This aspect is required to be borne in mind while considering the question. We will now have to turn to Explanation 6 to section 43(1) which reads as under :*

" Explanation 6.—When any capital asset is transferred by a hold ing company to its subsidiary company, or by a subsidiary company to its holding company, then, if the conditions of clause (iv) or, as the case may be, of clause (v) of section 47 are satisfied, the actual cost of the transferred capital asset to the transferee-company shall be taken to be the same as it would have been if the transferor-company had continued to hold the capital asset for the purposes of its business."

12. *It is clear that what would be the actual cost to the transferee company on the date of transfer is indicated in section 43(1), Explanation 6. Thus, the actual cost to the transferee-company will be the WDV of the holding company (transferor-company).*

13. *The assessee based its submission relying on Maharana Mills P. Ltd. v. ITO [1959] 36 ITR 350 (SC) and Saharanpur Electric Supply Co. Ltd. v. CIT [1992] 194 ITR 294 (SC). The*

assessee has also relied on Ciba of India Ltd. v. CIT [1993] 202 ITR 1 (Bom) as also on CIT v. Hides and Leather Products P. Ltd. [1975] 101 ITR 61 (Guj). It is required to be noted that the Revenue as well as the assessee placed reliance on the decision of the apex court in the case of Saharanpur Electric Supply Co. Ltd. v. CIT [1992] 194 ITR 294. The apex court considered the decisions in Maharana Mills P. Ltd. v. ITO [1959] 36 ITR 350 (SC) and CIT v. Hides and Leather Products P. Ltd. [1975] 101 ITR 61 (Guj) amongst other cases. The apex court after examining the provisions in detail pointed out at page 315 as under :

" Explanation 6 offers no difficulty as the relationship of ' parent' and ' subsidiary' between the companies involved in the transfer, for the purposes of this clause, has to be determined as at the time of the transfer of the asset and will not be a wobbling or fluctuating one as suggested by counsel for the assessee. . ."

14. *Thus in view of Explanation 6 the written down value of the holding company is required to be taken into consideration.*

15. *Learned counsel for the assessee submitted that the difference between the WDV and the price received for the property has been taxed in the hands of the holding company in the relevant assessment years and there is no dispute on this issue. In view of this, it was submitted that the Revenue cannot have tax benefit at both the places, namely, in the hands of the parent company and at the hands of the assessee. It was thus submitted that there is no evasion of tax.*

16. *On behalf of the assessee it was contended that actual cost is not static and it is required to be determined year to year. No doubt there may be a situation which may require the Assessing Officer to examine the case and re-determine the*

actual cost. In fact the apex court has considered this aspect at page 306 and pointed out instances. The apex court at page 309 (see [1992] 194 ITR) as under:

"In principle, therefore, we are unable to accept the contention that the actual cost cannot be determined year after year on the factual or legal position applicable for the relevant previous year and that the actual cost once determined cannot be altered except in the three situations outlined by counsel where the original figure itself requires a modification."

9.5 In view thereof, this ground of the assessee's appeal is allowed."

16. We have heard the rival submissions and perused the material available on record. Undisputedly, there is no change in the facts and circumstances of the case. No contrary authority has been brought to our notice subsequent to the above referred decision of the Coordinate Bench. In light of the same, following the decision of the Coordinate Bench, the ground is allowed in favour of the assessee company."

Thus, when the disallowance made by the AO has been deleted by this Tribunal then, the penalty levied against such disallowance is not sustainable. Accordingly, we do not find any error or illegality in the order of the ld. CIT(A) in deleting the penalty levied u/s 271(1)(c) of the Act against on this account.

4. Ground No. 2 is regarding deletion of the penalty levied on account of disallowance of excess depreciation claimed without reducing the amount of subsidy/grant/reimbursement from the cost of the asset.

5. We have heard ld. DR as well as AR and considered the relevant material on record. Though the issue in quantum appeal has been decided against the assessee by this Tribunal however, the Tribunal has deleted the penalty levied on account of disallowance of excess depreciation for the assessment years 2002-03, 2003-04, 2006-07 vide order dated 09.08.2017 in ITA No. 306 to 308/JP/2017 as held in paras 11 to 21 as under:-

> *"11. As we have stated above, in the instant case, the facts of the case after taking into consideration the findings of the Coordinate Bench in the quantum proceedings are that there is disallowance of depreciation under the normal provisions of the Act and as a result, loss declared in the return of income under normal provisions of the Act has got reduced. Further, the provisions of MAT are held not applicable in the instant case. The facts of Nalwa Sons are therefore totally distinguishable and don't support the case of the assessee. In that case, though there were additions made under the normal provisions of the Act, income of the assessee was assessed and brought to tax under the provisions of MAT and basis that, the Hon'ble Delhi High Court has decided the matter. The relevant findings of the Hon'ble Delhi High Court are as follows:*
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> *"24. The income of the assessee was thus assessed under section 115JB and not under the normal provisions. It is in this context that we have to see and examine the application of Explanation 4.*
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> *25. Judgment in the case of Gold Coin Health Food (P.) Ltd. (supra), obviously, does not deal with such a situation. What is held by the Supreme Court in that case is that even if in the*

Income-tax return filed by the assessee losses are shown, penalty can still be imposed in a case where on setting off the concealed income against any loss incurred by the assessee under other head of income or brought forward from earlier years, the total income is reduced to a figure lower than the concealed income or even a minus figure. The court was of the opinion that 'the tax sought to be evaded' will mean the tax chargeable not as if it were the total income. Once, we apply this rationale to Explanation 4 given by the Supreme Court, in the present case, it will be difficult to sustain the penalty proceedings. Reason is simple. No doubt, there was concealment but that had its repercussions only when the assessment was done under the normal procedure. The assessment as per the normal procedure was, however, not acted upon. On the contrary, it is the deemed income assessed under section 115JB of the Act which has become the basis of assessment as it was higher of the two. Tax is thus, paid on the income assessed under section 115JB of the Act. Hence, when the computation was made under section 115JB of the Act, the aforesaid concealment had no role to play and was totally irrelevant. Therefore, the concealment did not lead to tax evasion at all."

Similarly, Circular No. 25/2015 dated 31.12.2015 doesn't come to support the position of the assessee.

12. Now coming to other contentions of the ld AR. On merits, the contention of the ld AR is that the assessee under good faith and as per Electricity (supply) Annual Account Rule, 1985 and accounting instructions, prepared its accounts and there was no hiding or concealment of facts. It is merely an opinion on the subject for sake of addition by the AO and the same cannot be termed as furnishing of inaccurate particulars of income or concealment of facts.

13. In this regard, the question that arises is that whether there are two opinions about the applicability of provisions of section 43(1) read with explanation 10 in the instant case or not. In the quantum proceedings, when the matter reached before the Co-ordinate Bench, the Co-ordinate Bench in its order noted that "During the course of argument, a pointed query was asked from the ld AR, to which it was fairly stated that the contribution / grant in the form of subsidy were received from the State Govt./other department towards the cost of capital asset and for replacement of the assets." Thereafter, the Coordinate Bench held that "A bare reading of the Explanation 10 of Section 43 of the Act, which clearly provides that where a portion of the cost of an asset acquired by the assessee has been met directly or indirectly by the Central Government or a State Government in the form of a subsidy or grant or reimbursement, then, so much of the subsidy or grant or reimbursement shall not be included in the actual cost of the asset to the assessee. Admittedly, the amount has been received by the assessee in the form of grant/reimbursement/subsidy from the state Government therefore, in our view, the order passed by the ld CIT(A) is required to be upheld and the value of the assets shall be taken by the ld Assessing Officer after adjusting the subsidy/grant/reimbursement from the State Govt. or the other government departments. Accordingly, this issue is decided against the assessee and in favour of the revenue. " In light of above, in the facts of the present case and in light of clear admission by the ld AR that the contribution / grant in the form of subsidy were received from the State Govt./other department towards the cost of capital asset and for replacement of the assets, there doesn't appear to be two opinions that emerges regarding applicability of section 43(1) read with explanation 10 in the instant case. The assessee has simply followed the Electricity (supply) Annual Account Rule, 1985 and accounting instructions. These accounting rules and instructions are not doubt binding on the assessee as far as preparing its financial

statements is concerned and infact, the Coordinate Bench in the quantum proceedings has agreed to this contention while upholding non-applicability of MAT provisions. However, being a taxable entity, the assessee is equally governed by the regular provisions of Income Tax Act and has to compute its income and offer the same to tax taking into consideration the relevant provisions of the Act. It cannot therefore be said that the assessee being governed by the Electricity rules and regulations will not follow the Income tax Act or the Electricity rules and regulations override the Income tax Act. In our view, in the instant case, the assessee company has simply failed to apply the provisions of the Act while determining the actual cost of the assets and computing the depreciation allowance thereon.

14. The next question that arises is where the assessee company has failed to give effect to and take into consideration the provisions of section 43(1) read with explanation 10, while determining the actual cost and claimed excess depreciation thereon, can it be said that the assessee company has furnished inaccurate particulars of income under Section 271(1)(c) which reads as under:

"271.(1) If the Assessing Officer or the Commissioner (Appeals) or the Principal Commissioner or Commissioner in the course of any proceedings under this Act, is satisfied that any person-
(c) has concealed the particulars of his income or furnished inaccurate particulars of such income."

15. It is well established that the provisions of section 271(1)(c) being in the nature of penal provisions require a strict interpretation and it must be shown that the instant case falls within four corners of the said provisions and conditions laid therein are specifically fulfilled. The case of the Revenue is that the present case is about furnishing inaccurate particulars of income. Therefore, it has to be examined whether there is

furnishing of inaccurate particulars of income by the assessee company in the instant case.

16. In this regard, the ld AR has drawn our reference to the decision of the ***Hon'ble Supreme Court in case of Reliance Petroproducts (322 ITR 158).*** *In that case, the facts of the case were that the assessee company filed its return of income claiming interest expenditure in respect of loan amount for purchasing shares by way of its business policies. The Assessing Officer disallowed said expenditure and simultaneously levied penalty under section 271(1)(c) on account of concealment of income/furnishing of inaccurate particulars of income. The Revenue contended before the Hon'ble Supreme Court that the claim of the expenditure was totally without any legal basis and was made with malafide intentions and it was a clear case of furnishing inaccurate particulars of income. It was further contended by the Revenue that since the assessee had claimed excessive deductions knowing that they are incorrect; it amounted to concealment of income. It was contended by the Revenue in that case that the falsehood in accounts can take either of the two forms; (i) an item of receipt may be suppressed fraudulently; (ii) an item of expenditure may be falsely (or in an exaggerated amount) claimed, and both types attempt to reduce the taxable income and, therefore, both types amount to concealment of particulars of one's income as well as furnishing of inaccurate particulars of income. The Hon'ble Supreme Court however negated the contentions of the Revenue and held as under:*

"since the assessee had furnished all the details of its expenditure as well as income in its Return, which details, in themselves, were not found to be inaccurate nor could be viewed as the concealment of income on its part. It was up to the authorities to accept its claim in the Return or not. Merely because the assessee had claimed the expenditure, which claim was not accepted or

was not acceptable to the revenue, that by itself would not, in our opinion, attract the penalty under section 271(1)(c)."

"The learned Counsel argued that "submitting an incorrect claim in law for the expenditure on interest would amount to giving inaccurate particulars of such income". We do not think that such can be the interpretation of the concerned words. The words are plain and simple. In order to expose the assessee to the penalty unless the case is strictly covered by the provision, the penalty provision cannot be invoked. By any stretch of imagination, making an incorrect claim in law cannot tantamount to furnishing inaccurate particulars."

17. In the instant case, the assessee company has duly filed its return of income along with audited balance sheet and profit/loss account. In schedule 2 – Reserve and Surpluses of its balance sheet, the assessee company has disclosed contribution, grants, subsidies towards cost of capital assets. The Assessing officer drawing reference to schedule 2 of the balance sheet as furnished, asked the assessee company to submit its explanation as to why increase in reserve and surplus as per the balance sheet should not be reduced from cost of the assets for purposes of calculation of depreciation in view of section 32(1)(iii) read with section 43(1) and explanation 10 thereto. Thereafter, after taking into consideration the submission and explanation of the assessee, though not agreeing with it, the AO want ahead and recalculated the depreciation claim as made by the assessee in its return of income. It is thus seen that all material facts and figures are duly disclosed in the return of income and the financial statements, and the Assessing officer, on perusal of the same, came to a conclusion that contribution, grants, subsidies towards cost of capital assets received by the assessee company during the year under consideration should be reduced from the total value of the assets for the purposes of determining the

depreciation allowance. All the facts relating to claim of depreciation are thus on record. There is no falsity that has been found in the financial statements or in the return of income. At the same time, it is equally relevant to refer to the observations of the auditor which has attracted the attention of the AO.

18. The auditors have stated in their audit report that:

"(1) Contributions. Grants & Subsidies Towards Cost of Capital Assets

The Grants/ contribution received from State Govt. / Other Govt. Departments towards the cost of fixes assets is shown separately under the heads Contributions, Grants, Subsidies towards cost of Capital Assets and is neither deducted from the gross value of the assets nor it is treated as a deferred income on the systematic and rational basis over the useful life of the asset. Thus both the fixed assets and grants are overstated by the amount of grants; this should have been taken as per the provisions of AS-12.

(2) In case replacement of assets. WDV of the asset discarded should be reduced from the total fixed assets and losses arising from the retirement or gains or losses arising from disposal of the fixed assets, which is carried at cost should be recognized in the Profit & Loss Account. However this is not being done. Also scrap is accounted for at nil value and net realizable value while as per the provisions of AS-10 clause-24 material items from active use and held for disposal should be stated at the lower of their net books value and net book value and shown separately in the financial statements. The same has not been done thus leading to the violation of AS-10.

(3) In the absence of Contribution, Grants, Subsidies towards the cost of capital assets being deducted from the gross value of asset as also in case of replacement of asset, WDV of the asset, WDV of the asset discarded is not reduced from the Gross value of the asset, depreciation is charged on the full gross value of the

asset. This is against the provisions of AS-6. Thus, depreciation is overstated and net loss, which is shown as subsidy receivable from Govt. is overstated by the amount the quantification of which is not possible in the absence of full details of discarded assets and the allocation of Contribution & towards the respective asset."

19. In response to the above observations of the auditor, the assessee company has submitted that:

"a. That the Company is a 100% owned undertaking of Rajasthan Government and is governed by the instructions approved by Government for Rajasthan State Electricity Board's The Electricity (Supply) Annual Accounts Rules, 1995 and Accounting Instructions. According to Rules page no. 252 & 253 the treatment of Contribution, Grants and Subsidies towards Cost of Capital Assets shall be credited in accordance with the policies laid down in the following paragraphs.

2.34 Amount receivable as Consumer's Contribution, subsidy are Grant towards Capital Assets shall be credited to appropriate account set out in Chart of Accounts only if the following conditions are satisfied :

(i) The amount is not subject to any conditions to be fulfilled by the Board. Or

The conditions attached to the amount have been fulfilled by the Board.

(ii) No Part of the amount is refundable nor is likely to become refundable by the board.

2.35 Consumer's contribution, Subsidies and Grants towards Cost of Capital Assets shall not be treated as a Reduction in the 'cost' but as a Capital Receipt to be credited to Capital Reserve Account.

2.36 Accounting for Cost of a Capital Asset shall be done in the normal course without considering any Contribution, Subsidy are Grants towards the Cost of the Asset, Depreciation shall be charged in the normal course on the 'full cost' of the Asset.

b. That the Reserves & Surpluses in which these Grants, Subsidies, Contribution are credited are in form of deposits from customers are in actual the liabilities and could not be reduced from the cost of assets for the purpose of calculation of depreciation since they are in the nature of ***"CAPITAL RECEIPT".***

c. *Further these Capital Receipts are not directly relatable to the assets acquired out of which the same deducted to reduce the block. Further already adhoc disallowance of fixed assets out of FRP transfers already made of 20% of assets without any breakup as above and further disallowance of depreciation on the same block of assets is a "DOUBLE DISALLOWANCE / DOUBLE ADDITION".*

d. That the Company has to follow the instruction of Accounting as approved and the accounts has been prepared on the basis and as per the bye laws the treatment of Consumers Contribution, Subsidies and Grants has been made in the books accordingly by creating the Reserves and the A.O. has erred to reduce the same from the cost and disallow portion depreciation. The Company cannot act beyond the Accounting Norms approved for them and is also Governed by Accounting for Electricity Companies and accordingly the treatment has been made in books and the A.O. has made disallowance without considering the Accounting applicable to Electricity Companies.

e. Alternatively the A.O. while making the deduction from Fixed Assets Block for Reserves & Surplus has not followed consistent method i.e. in A.Y. 2001-02 and 2002-03 has not deducted amounts for material cost variance under the head

Reserves & Surplus but in the later years for deduction of Reserves & Surplus from Fixed Assets the amount of Material Cost Variance has also been deducted which is not in relevance with the Fixed Assets Cost and is rather related to Material Cost and thus the Block of Assets has reduced for depreciation by this amount and the eligible depreciation has also reduced. Further the addition to Fixed Assets as per books has been taken by A.O. at other arbitrary figures which have also been corrected in chart. Thus as per the chart on the theory of A.O. the depreciation disallowable come to Rs. 11,63,37,224.00 for the year against taken by A.O. at Rs. 18,99,41,047/-.

f. Further any loss/ short fall in revenue is subject to ***SUB-VENTION CHARGES*** *as receivable from State Government subject to verification; However to close the Accounts, the Corporation takes "Difference is Revenue" as "Subvention"& nullified the loss. Thus if this Depreciation is disallowed; Subvention Charges shall also got reduced & ultimately the Income/ Loss would be Nil & thus in other terms subvention being a "Provisional Income" already takes care for such variation if any. "*

20. In our view, the observations of the auditor are in relation to non-compliance with the various accounting standards as prescribed by the ICAI which have to be followed while preparing the financial statements. At the same time, the assessee's explanation is that being a 100% owned undertaking of Rajasthan Government, it is governed by the instructions approved by Government for Rajasthan State Electricity Board's, The Electricity (Supply) Annual Accounts Rules, 1995 and Accounting Instructions which cannot be lost sight off. In our view, these are plausible explanation relating to variation in the accounting policies followed by the assessee company given the nature of business the assessee company is engaged in and related electricity regulations which it must comply with. These

are statutory requirements which the assessee company is required to follow while preparing its financial statements. However, the fact remains that there is complete disclosure of all material facts in the financial statements so far as issue relating to determination of actual cost of the assets are concerned. The material facts so disclosed in the financial statements have infact been considered by the AO while recalculating the depreciation claim of the assessee company.

21. In the entirety of facts and circumstances of the case and respectfully following the decision of the Hon'ble Supreme Court in case of Reliance Petroproducts (Supra), we hereby delete the levy of penalty under section 271(1)(c) in respect of disallowance of depreciation under section 32(1)(iii) read with section 43(1) and explanation 10 thereto in respect of all three years under consideration."

Thus, the issue being common and identical, therefore, following the earlier decision of this Tribunal in assessee's own case for the assessment years 2002-03, 2003-04 & 2006-07 we do not find any error or illegality in the order of the ld. CIT(A) in deleting the penalty levied against the disallowance of depreciation due to non reduction of subsidy/grant/reimbursement from the cost of asset.

6. Ground No. 3 is regarding deletion of the penalty levied in respect of the disallowance of prior period expenses.

7. We have heard ld. DR as well as AR and considered the relevant material on record. At the outset, we not that in the quantum appeal

the Tribunal vide order dated 28.08.2018 in ITA No. 362/JP/2016 has deleted the disallowance made by the AO in paras 6 to 11 as under:-

> *"6. During the course of hearing, the ld. AR submitted that Hon'ble Rajasthan High Court has recently decided this particular matter relating to prior period expenditure in assessee's own case for A.Y. 2003-04 in its favour by its judgement dated 19.05.2017.*
>
> *7. In this regard, firstly our reference was drawn to the decision of the Coordinate Bench in ITA No. 1019/JP/2007 dated 17.10.2008 for AY 2003-04 wherein the Coordinate Bench has held as under:-*
> *"The Ld. CIT(A) while deciding the issue has followed the decision of Jaipur Bench of the Tribunal on the issue in the case of DCIT v/s Chambal Fertilizers and Chemicals ltd, 34 TW 59 (Jpr.) holding that the deduction of an expenditure will be admissible only in the year in which it crystallized and accounted for on the basis of system of accounting regularly followed by the assessee. An identical issue in the case of assessee for the A.Y. 2002-03 has also been decided by Jaipur Bench of the Tribunal in favour of the assessee vide its order dated 31.10.2007 in ITA No. 272/JP/2006. Under these circumstances, we are of the view that the Ld. CIT(A) was justified in accepting the case of the assessee on the issue with this observation that the assessee company have been following a particular system of accounting where prior period income and expenditure are claimed only when the same gets crystallized. The company has followed the system under the peculiar circumstances of the case when the company came into existence after restructuring of the parent company i.e. RSEB. The first appellate order being reasoned one is thus upheld."*
>
> *8. Further, our reference was drawn to the decision of Hon'ble Rajasthan High Court in DB Appeal No. 333/2009 dated*

19.05.2017 for AY 2003-04 wherein the following question of law was raised for its consideration:-
"1. Whether on the facts and circumstances of the case the Tribunal was justified in conforming the deletion of prior period expense of Rs. 1,55,40,777/- made by the Assessing Officer which cannot allowed while following mercantile system of accounting."

The relevant findings of the Hon'ble High Court are contained in para 6 and 7 of its judgement which are reproduced as under:-

"6. Counsel for the respondent contended that the issue is covered by the decision of Delhi High Court in case of SMCC Construction India Ltd. vs. Assistant Commissioner of Income Tax reported in [2013] 38 taxmann.com 146 (Delhi) wherein in para 13 & 14 it has been held as under:-

> *"13. The prior period expenses are eligible for deduction during the current year provided the liability was determined and crystallized during the relevant year.*
>
> *14.The reason to believe recorded by the Assessing Officer "that the assessee has debited a sum of Rs. 1,20,765 in the P&L account on account of prior period expenses after netting income of Rs. 30,34,463/- and expenditure of Rs. 31,55,228/- has not been crystallized during the year 2001-02 relevant to the assessment year 2002-03 such prior period expenses should have been disallowed" is not based on any material that had come to the knowledge of the Assessing Officer. The Assessing Officer has placed reliance on the notes to the accounts that were available at the time of the scrutiny assessment. But the notes also states that the prior period expenses had crystallized/settled in the year. The reasons to believe recorded do not show as to on what basis the Assessing Officer has formed a reasonable belief that the said expenditure had not*

crystallized during the year relevant to the assessment year. It is apparent the Assessing Officer suspects that the income has escaped assessment. But mere suspicion is not enough. The reasons to believe must record reasons, the reading of which should demonstrate, that such a reasonable belief could be formed on some basis/foundation and was in fact formed by the Assessing Officer that income has escaped assessment. No such reasonable belief can be formed from the reasons to believe recorded."

7. Taking into consideration, the issue is required to be answered in favour of the assessee against the department."

9. The ld. DR is heard which has fairly conceded that the issue is covered in favour of the assessee by the decision of the Hon'ble Rajasthan High Court.

10. In light of above discussion, what emerges is that as per the accounting policy followed by the assessee, the prior period expenses as well as the prior period income have been accounted for in its financial statements on a regular basis in the year in which they are crystallized. The assessee has been consistent in following the said accounting policy. The Assessing officer has stated that following the past history of the assessee, the addition on account of prior period expenditure has been made in the year under consideration. This shows that the assessee has been consistent in its accounting policy regarding prior period expenditure and the Revenue is equally consistent in disallowing the same. The Hon'ble Rajasthan High Court in above referred decision for AY 2003-04 has decided the issue in favour of the assessee company. Further, the Coordinate Benches in assessee's own case for AY 2002-03, 2003-04 & 2006-07 has decided the issue in favour of the assessee. Though the principle of res judicata doesn't apply in the income tax proceedings but where

the same "fundamental aspect" permeates in different assessment years and the assessee is consistent in its accounting policy, as in the instant case, of accounting for the liabilities in the year in which it is crystallised, the Courts have held that the settled position should not be disturbed unless there are glaring changes in the facts and circumstances of the case or there are change in law which call for a fresh examination. Further, the Courts have held that where the rate of tax remained the same in the present assessment year as well as in the subsequent assessment year, the dispute raised by the Revenue is entirely academic or at best may have a minor tax effect. In the instant case, we have been informed that the assessee is subject to corporate tax rate of 35% and there is no change in the said tax rate in the subsequent assessment year.

11. In the entirety of facts and circumstances of the case and respectfully following the decision of the Hon'ble Rajasthan High Court in assessee's own case, the AO is directed to allow the claim of deduction of the prior period expenses amounting to Rs. 4,64,27,170/-. In the result, the ground of appeal taken by the assessee is allowed."

Since, the disallowance has been deleted and the deduction was allowed by the Tribunal as well as by the Hon'ble High Court in the earlier assessment year, therefore, the penalty levied against such disallowance is not sustainable. Accordingly, we do not find any error or illegality in the order of the ld. CIT(A) qua this issue.

8. For the assessment years 2005-06, 2007-08, 2009-10 & 2010-11 ground no. 1 is common as raised for the assessment year 2004-05 accordingly, in view of our finding on this issue for the assessment year

2004-05 this ground of Revenue's appeal stands disposed off being decided against the Revenue.

9. Ground No. 2 is common for the assessment year 2004-05, 2005-06, 2007-08 & 2009-10. In view of our finding on this issue for the assessment year 2004-05 this ground of the Revenue's appeal for the assessment years 2005-06, 2007-08 & 2009-10 stands disposed of being dismissed.

10. Ground No. 3 is common for all five assessment years. We have decided this issue for the assessment year 2004-05 by considering the fact that the Tribunal in the quantum appeal deleted the disallowance of claim of the assessee for all these assessment years. Accordingly, this ground of the Revenue's appeal for all the assessment years before us is decided against the Revenue.

In the result, the appeals filed by the Revenue are dismissed.

Order pronounced in the open court on 07/02/2018

Sd/-	Sd/-
(भागचंद)	(विजय पाल राव)
(Bhagchand)	(Vijay Pal Rao)
लेखा सदस्य / Accountant Member	न्यायिक सदस्य / Judicial Member

जयपुर / Jaipur
दिनांक / Dated:- 07/02/2018.

*Santosh.

आदेश की प्रतिलिपि अग्रेषित/Copy of the order forwarded to:

1. अपीलार्थी/The Appellant- ACIT, Circle-2, Ajmer.
2. प्रत्यर्थी/ The Respondent- M/s Ajmer Vidyut vitaran Nigam Ltd., Ajmer.
3. आयकर आयुक्त/ CIT
4. आयकर आयुक्त/ CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर/DR, ITAT, Jaipur.
6. गार्ड फाईल/ Guard File {ITA No. 933 to 935 ,937 & 890/JP/2017}

आदेशानुसार/ By order,

सहायक पंजीकार/Asst. Registrar