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

BEFORE SHRI G.D. AGARWAL, PRESIDENT
&
SHRI K.NARASIMHA CHARY, JUDICIAL MEMBER

ITA No.4848/Del/2010
Assessment Year: 2006-07

North Delhi Power Ltd., Grid Sub Station Building, Hudson Lines, Kingsway Camp, New Delhi PAN: AABCN6808R	vs	ACIT, Range – 13, Delhi

AND

ITA No.5026/Del/2010
ITA No.31/Del/2014
Assessment Year: 2006-07

DCIT, Range – 13, Delhi	vs	North Delhi Power Ltd., Grid Sub Station Building, Hudson Lines, Kingsway Camp, New Delhi PAN: AABCN6808R
Appellant		Respondent

Assessee by	**Shri S.D. Kapila,Advocate** **Shri R.R. Maurya, Advocate** **Shri Pravesh Sharma, Advocate**
Revenue by	**Ms Shefali Swaroop, CIT DR**

Date of Hearing	**8.10.2018**
Date of Pronouncement	**29.10.2018**

ORDER

PER BENCH

ITA No.4848 of 2010 and ITA No.5026 of 2010 are filed by the assessee and revenue respectively challenging the order dated 26.8.2010 in Appeal No. 120/CIT(A)/XVII/Del/09-10 passed by the learned Commissioner of Income-tax (Appeals)-XVII, New Delhi (in short "CIT(A)} in relation to the Assessment Year 2006-07 in respect of quantum additions whereas ITA No.31 of 2014 is filed by the revenue challenging the order dated 11.10.2013 in Appeal No.29/2012-13 passed by the learned CIT(A)- XVI, New Delhi deleting the penalty of Rs.18,93,03,840/- levied by the learned AO.

2. Since facts involved in all the appeals giving rise to different contentions by the parties are the same, we deem it just and convenient to dispose of these three appeals by way of this common order.

3. North Delhi Power Ltd. (assessee) was set up in terms of the Policy Directions issued by the Government of National Capital Territory of Delhi (GNCTD) under the provisions of the Delhi Electricity Reforms Act, 2000. The assessee is engaged in the business of distribution and supply of electricity in the north and north-west area of NCT Delhi and w.e.f. 1.7.2002 undertook the business of distribution of electricity from the erstwhile Delhi Vidyut Board (DVB) for the distribution and supply of electricity in north Delhi and north-west Delhi. As per the Policy Directions in Notification dated 22.11.2001 and also the Notification of May 2002 issued by the Government of Delhi, the business of the DVB was transferred. The Delhi Electricity Regulatory

Commission (DERC) constituted under the Delhi Reforms Act, 2000 determines the Retail Supply Tariff (RST) chargeable by the company to the consumers and bulk supply tariff (BST) payable by the company to Delhi Transco Ltd. for power purchase. As per the terms of the said notification, the tariffs are statutorily required to be fixed in a manner that the assessee recovers its prudently incurred cost and also earns an assured return of 16% p.a. on equity plus free reserves.

4. Prescribed procedure before the DERC is that the assessee has first to submit detailed estimate of its cost to the DERC, which is likely to incur before the start of the relevant financial year, DERC examines the same after invoking the comments of all stakeholders including the members of the public, who are the consumers. The DERC approves the estimate of costs and the corresponding tariff for the year after taking into account 'Assured income' in accordance with the said formula and the tariff adjustment mechanism as laid down in the said notification. Such an estimate is subsequently reviewed by the DERC on the basis of actual costs incurred by the assessee and is subjected to "Prudence check". Thereafter, the final cost was trued up.

5. If the revenue for the year exceeds the 'trued up cost' then the excess amount has to be carried forward as liability to be adjusted through corresponding tariff reduction in future in order to compensate the consumers through reduction in tariff; whereas if the trued up costs exceeds the revenue for any year, the difference is recognized as an assets of the company under the head "sundry debtors" and is recoverable from the consumers in future through the tariff mechanism in future. Generally the

accounts of any financial year are finalized within three months from the end of the year but the truing up process continues for more than a year and sometimes even more, hence, adjustment entries continue to be made in the accounts as per the subsequent orders of the DERC in later years. This phenomenon is reflected in the Notes to the accounts of the year.

6. For the Asstt. Year 2006-07, the assessee filed the return of income on 8.12.2006 returning an income of Rs.29,76,44,446/- under the normal provisions of the Act as against the book profits of Rs.1,62,35,14,954/-. However, assessment u/s 143(3) of the Act was completed at Rs.1,21,30,35,243/- under normal provisions of the Act as against the returned book profit of Rs.1,62,35,14,954/- by adding the following amounts

(i)	De-recognition of revenue	Rs.91.13 crores
(ii)	Disallowance u/s 14A	Rs.29.17 lacs
(iii)	Depreciation on UPS	Rs.11,73,797/-

to the income returned under the normal provisions of the Act and a sum of Rs.29.17 lacs to the book profits.

7. Simultaneously, learned AO initiated proceedings u/s 271(1)(c) of the Act and concluded levying penalty of Rs.18,93,03,840/- by order dated 30.3.2012.

8. When the assessee challenged the additions under the three heads in the quantum income and addition u/s 14A in the book profits before the learned CIT(A), the assessee also advanced an alternate plea that as a matter of fact they have disclosed a sum of Rs.52.11 crore in the earlier year as additional amount receivable and paid tax on it. So also it was the plea of the

assessee that in the Asstt. Year 2006-07, they have disclosed a sum of Rs.34.89 crores as additional receivables to be adjusted in the subsequent years. Assessee, therefore, prayed that without prejudice their claim that Rs.91.13 crores shall not be considered as income for the Asstt. Year 2006-07, if for any reason the first appellate authority reaches a conclusion that the sum of Rs.91.13 crores is treated as income for that year, then the income declared in the earlier year to the tune of Rs.52.11 crores and for this year to the tune of Rs.34.89 crores shall be considered for adjustment.

9. Learned CIT(A) by way of impugned order sustained the additions made by the learned AO on all the three heads. Learned CIT(A), however, considered the sum of Rs.34.89 crores offered by the assessee for tax in this year to be adjusted in future years as additional receivables and directed that such an amount cannot be considered as income for this year and gave relief to the assessee to the extent of Rs.34.89 crores but the learned CIT(A) refused to consider Rs.52.11 crores relatable to the earlier years on the ground that under the income-tax Act, income is to be computed for each of the year separately and merely because an excess income was declared in one year, benefit of the same cannot be taken in the subsequent years. Learned CIT(A) also deleted the penalty levied by the learned AO.

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10. In this appeal Grounds No 1 and 10 are general in nature, whereas Ground No 2 relates to the addition of Rs. 91.13 Cr. Ground No 3 relates to the addition by invoking Section 14A of the Act. Ground No.4 is in respect of

claim for depreciation on UPS at 60%. Grounds Nos. 5 to 7 relate to the additions for the purpose of computing income under section 115JB of the Act, Ground No. 8 relates to levy of interest under section 234B and 234D of the Act and Ground No. 9 is in respect of initiation of penalty proceedings under section 271(1)(c) of the Act.

11. Brief facts relevant to ground No. 2 are that the Ld. assessing officer noticed during the assessment proceedings that the assessee had reduced the amount of Rs. 91.13 crores on account of increasing tariff receipt to be utilized in future tariff determination. It was claimed by the assessee that during the financial year 2006 the company had over achieved its AT&C loss reduction target and has generated additional revenues of Rs. 17,216 Lacs out of which the assessee is entitled to retain an estimated amount of Rs. 5,539 Lacs as its share of our achievement. Further adjustments are made for the 5% DISCOM'S discount allowed to domestic consumers during the year and also for the advertising tariff truing up of Rs. 2,565 Lacs. Assessee submitted that the balance amount of Rs. 9,113 lakhs has been provided as a liability net of assets brought forward in the balance sheet as on 31/03/2006, being the amount payable to consumers by way of utilization of this amount for tariff determination in future years. The assessee, therefore, claims to have reduced this amount from the sales amount in the profit and loss account.

13. When confronted, assessee submitted that the assessee company was of the view that as per the revenue model determined by the DERC, 50% of the excess receipts (for and above determined profits) was not to be retained by the assessee company and on that score it is not their income. Ld.

Assessing Officer, however, did not agree with the contention of the assessee and held that the tariff determination is a separate exercise from the tax liability, and the provisions of the Income Tax Act shall override the norms laid down by the tariff determination by DERC. Holding that the moneys received by the assessee not only accrued to it but also received by it in actual terms as such the subsequent application thereof will not affect the taxability of such amounts. On this premise Ld. assessing officer brought the sum of Rs. 91.13 crores to tax.

14. Learned Commissioner of Income Tax (Appeals) held that when the assessee seeks to de-recognize revenue to the extent of Rs. 91.13 crores on the ground of the revenue model determined by the DERC, it does so without taking of the corresponding cast which will be normally attributable on a pro rata basis to earn the revenue to the extent of 172 crores being in excess of targeted revenue.

15. On this aspect, the sum and substance of the argument of the learned AR is that though the assessee had shown a sum of Rs.1,76,391.54 lacs as received from the sale of energy, such entire sum cannot be taken as income of the assessee because out of such amount due to operation of the statute under the Delhi Electricity Reforms Act, 2000 and notifications of the Government issued thereunder, a sum of Rs.91.13 crores cannot be taken as income of the assessee because the real income of the assessee has to be determined only after excluding the amounts statutorily transferrable to the consumers which has to be disbursed back to them as an amount collected excessively from them. Second proposition is that the assessee is carrying on

business under the tripartite agreement with the Government, DVB Joint Action Committee, Delhi Electricity Reforms Act, 2000, notifications issued by the Government and the orders of the Delhi Electricity Regulatory Commission and any expenditure that was incurred wholly and exclusively for the purpose of compliance with such directions for conduct of business is allowable deduction under the Act and inasmuch as the assessee follows the mercantile system of accounting, the amount that has to be utilized for future tariff determination has to be deducted to reach the commercial profit of the company in the year when the statutory liability arises and not when the amount is actually paid. According to the learned AR, a reading of the Delhi Electricity Reforms Act, 2000, the notifications issued thereunder and the order of the DERC clearly establishes that the assessee had incurred the liability to utilize Rs.91.13 crores in future tariff determination, as such, such an amount is beyond the reach of the assessee for utilization for their purposes and, therefore, such an amount cannot be taken as income of the assessee.

16. Per contra, it is the argument of the learned DR that as has rightly been observed by the authorities below in this case, the assessee received the amount on sale of energy and subsequent spending of any portion of such amount for future determination of the tariff is only an application of the income of the assessee and, therefore, cannot de-recognize for tax purposes. She further argued that as rightly observed by the authorities below when the assessee seeks to de-recognize revenue to the extent of Rs.91.1 crores on the ground of the revenue model determined by the DERC, it cannot do so

without taking all the corresponding cost which may normally be attributed on a pro rata basis on earning of revenue to the extent of Rs.172 crores, being the excess of targeted revenue. Learned DR also assailed the finding of the learned CIT(A) as to giving relief to the assessee in respect of Rs.34.89 crores. Learned DR submitted that the assessee voluntarily offered such an amount and cannot be deleted without proper verification simply believing the words of the assessee. She also submitted that this aspect was not raised by the learned AO and learned CIT(A) did not verify the truth or otherwise of this averment. She, therefore, prayed to dismiss the appeal of the assessee and also to restore the order of the learned AO in so far as the taxing of Rs.34.89 crores is concerned.

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 matters 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;
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> 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.
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> (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.
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> (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 directions 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 of 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 Co. Ltd. Vs CIT (1965) 56 ITR 521 (SC), the Hon'ble Apex Court considered a similar situation where the licensee like the assessee was under the 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 of 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 of 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 in their profit and loss account.

25. Ground No. 3 relates to disallowance of Rs. 29,17,000/-under section 14A by applying the Rule 8D of the Income Tax Rules, 1962 ("the Rules") in respect of the dividend income of Rs. 21,01,025/- on investments. Assessee pleaded that no expenditure is incurred to earn this exempt income. Ld. assessing officer observed that the cash flow statement of the assessee company indicated out-flow on account of interest paid but the income earned from the investment as dividend is claimed as exempt. By holding that Rule 8D of the Rules is procedural in nature and have retrospective effect, Ld. assessing officer made the addition.

26. Ld. CIT(A) held that it is difficult to accept that without incurring any expense the assessee could have had the exempt income and on that premise and placing reliance on the decision of the special bench of Mumbai ITAT reported in 2008-TIOL-509-ITAT-MUM-SB Ld. CIT(A) held that the disallowance made by the Ld. assessing officer under Rule 8D is correct.

27. Ld. DR heavily relied upon the orders of the authorities below whereas Ld. AR placed reliance on several decisions of the Hon'ble jurisdictional High Court and argued that for the assessment year 2006-07 Rule 8D had no application. He further stated that for non-record of satisfaction by the learned Assessing Officer, invoking the provisions under section 14A is bad under law.

28. We have gone through the record. Vide paragraph No. 4.6, Ld. assessing officer recorded reasons for not accepting the statement of the assessee that no expenditure was incurred to earn the exempt income. Ld. assessing officer also examined the cash flow statement furnished by the assessee. The reasons recorded by the assessing officer are in sufficient compliance with the requirement of 14 A (2) of the act.

29. Now coming to the argument that Rule 8D is only prospective in its operation and has no application to the assessment year 2006-07, the Hon'ble Apex Court in CIT vs. Essar Teleholdings Ltd (2018) 401 ITR 455 (SC) held that Rule 8D is prospective and applies only from the assessment year 2008-09. Inasmuch as Rule 8D has no application to the assessment year 2006-07, the disallowance under section 14A has to be computed on some reasonable basis as has been held in several decisions of the jurisdictional High Court including the one in Maxopp Investments Ltd vs. CIT (2012) 347 ITR 272 (Del). We, therefore, set aside the impugned order and restore the matter to the file of the learned assessing officer for computing the fresh amount of disallowance under section 14A on a reasonable basis, after affording a reasonable opportunity of being heard to the assessee.

30. Ground No.4 relates to the disallowance of depreciation on UPS claimed at 60% and treating it to be the part of plant and machinery other than the computers and restricting the representation at 15%. Both the authorities below held that UPS is not a computer and merely because it is attached to computer, it cannot be considered as computer.

31. However this issue is no longer res Integra and while following the decision of the Hon'ble jurisdictional High Court in CIT vs. Orient Ceramics and Inds. Ltd. (ITA No. 65 & 66 of 2011) and Commissioner of Income Tax vs. BSES Yamuna Powers Ltd. (in ITA No. 1267 decided on 31.08.2010), a coordinate Bench of this Tribunal in Bayer Bioscience P. Ltd., Vs. DCIT ITA No. 2685 and 5388/Del./2009) observed that,-

10. Coming to the last issue involved in Revenue's appeal, the brief facts are that the assessee claimed depreciation on UPS at the rate of 60% considering the same as computer peripherals. The AO observed that the UPS is not integral to computers and is capable of being used independently, cannot be allowed to fetch depreciation as computer peripherals and therefore, applying the depreciation @ 25% as applicable to plant and machinery, the total claim of depreciation of Rs.3,39,701/- on UPS was reduced by Rs.1,41,542/-. As such, total depreciation was allowed at Rs.2,97,13,838/- as against Rs.2,99,11,997/- claimed by assessee. The ld. CIT(A) deleted the addition.

11. Having considered the submissions of both the parties, we find that in view of several judicial pronouncements relied upon by the assessee, the ld. CIT(A) has rightly allowed the claim of the assessee in this regard. Hon'ble Delhi High Court in the case of CIT vs. Orient Ceramics and Inds. Ltd. (ITA No. 65 & 66 of 2011) has held as under :

> *"13. The third issue pertaining to depreciation on UPS arises only in the Assessment Year 2005-06. The assessee had claimed depreciation on UPS @ 60% whereas the AO had allowed it @ 25% and on this basis, disallowance of 1,470 was made. The issue now stands covered by the judgment of this Court in the case of Commissioner of Income Tax vs. BSES Yamuna Powers Ltd. (in ITA No. 1267 decided on 31.08.2010) wherein it was held that the depreciation @ 60% on such items shall be allowed.*

12. Similar view has been taken in several other decisions, relied upon by the assessee.

32. In view of this settled legal position and while respectfully following the above decisions we are of the considered opinion that UPS is also an integral part of computer periphery system on which depreciation at 60% is allowable. We accordingly allow this ground.

33. Grounds No. 5 to 7 are in respect of the enhancement of profit under section 115 JB. Argument of the Ld. AR is that the assessee is a company engaged in the business of distribution of electricity and in view of the decision reported in Kerala State Electricity Board vs. DCIT (2010) 329 ITR 0091, the provisions under section 115 JB have no application to the assessee. There is no dispute as to the nature of business conducted by the assessee. Ld. DR relied upon the orders of the authorities below.

34. In Kerala State Electricity Board vs. DCIT (2010) 329 ITR 0091, Hon'ble High Court of Kerala observed that, -

> ***18.*** *Coming to the legislative history of s. 115JB and its fore-runners—ss. 115J and 115JA—we have already noticed that they provided for the determination of the total income of the companies by a fictitious process. However, at the earliest point of time when such a fictitious process is invented, i.e. when s. 115J was introduced, the section expressly excluded from its operation bodies like the appellant. Coming to s. 115JA, though such express exclusion is absent, the CBDT issued a Circular No. 762, dt. 18th Feb., 1998 [(1998) 145 CTR (St) 5]—(which is binding on the Department, see K.P. Varghese vs. ITO (1981) 24 CTR (SC) 358 : (1981) 131 ITR 597 (SC)* and Ranadey Micronutrients vs. CCE 1996 (97) ELT 19 (SC) excluding the bodies like the appellant from the operation of the said section. Though under the normal rules of interpretation of statutes the omission of a clause which existed in the statute at some point of time by a subsequent amendment would indicate that the legislature intended not to give the benefit of such clause any more to those who were getting the benefit of such exclusion clause, in our opinion, it is not an absolute rule. The other attendant*

circumstances, the context, the history and the mischief sought to be remedied by the amendment are all required to be examined before reaching at definite conclusion.

19. *The Circular No. 762 not only is binding on the respondents, but also explains the purpose in introducing s. 115JA. The relevant portion reads as follows :*

> *"46.1 In recent times, the number of zero-tax companies and companies paying marginal tax has grown. Studies have shown that in spite of the fact that companies have earned substantial book profits and have paid handsome dividends, no tax has been paid by them to the exchequer.*
>
> *46.2 The Finance Act has inserted a new s. 115JA of the IT Act, so as to levy a minimum tax on companies who are having book profits and paying dividends but are not paying any taxes. The scheme envisages the payment of a minimum tax by deeming 30 per cent of the book profits computed under the Companies Act, as taxable income, in a case where the total income as computed under the provisions of the IT Act, is less than 30 per cent of the book profit. Where the total income as computed under the normal provisions of the IT Act, is more than 30 per cent of the book profit, tax shall be charged on the same.*
>
> *46.3 The effective minimum alternate tax, at the existing rates of taxation works out to 12 per cent of the book profits.*
>
> *46.4 Income arising from free trade zone (FTZ), export-oriented undertakings (EOUs), charitable activities, investment by a venture capital company and other exempted incomes (s. 10) are excluded from the purview of the alternate tax.*
>
> *46.5 Since the alternate tax is applicable only where the normal total income computed is less than 30 per cent of the book profits, so long as the enterprises (other than FTZ units and EOUs) earning income from export profits do not have their component of export income higher than 70 per cent of the book profits, the provisions of s. 115JA will not be attracted. In other words, the MAT will apply only to such cases where export profits forming part of book profits of an assessee exceed 7 per cent of the total profits.*

46.6 Companies engaged in the business of generation and distribution of power and those enterprises engaged in developing, maintaining and operating infrastructure facilities under sub-s. (4A) of s. 80-IA are exempted from the levy of MAT, so that the incentive given to infrastructure development is not affected."

It can be seen from the above that the legislature took note of the fact that a number of companies paying marginal tax and also zero-tax has grown. Such companies earned substantial book profits and paid handsome dividends to the shareholders without paying any tax to the exchequer. Such a result was achieved by such companies by taking advantage of the then existing legal position which permitted the adoption of dual accounting policies and practices, one for the purpose of computation of income-tax and another for the purpose of determining the book profits for the purpose of payment of dividends. Therefore, the amendment was made to plug the loophole in the law. However, the CBDT understood that companies engaged in the business of generation and distribution of electricity and enterprises engaged in developing, maintaining and operating infrastructure facilities, as a matter of policy, are not brought within the purview of the amendment (s. 115JA) for the reason that such a policy would promote the infrastructural development of the country. Such an understanding of the CBDT is binding on the Department.

20. *If that is the background in which s. 115JA is introduced into the IT Act, s. 115JB, which is substantially similar to s. 115JA, in our opinion, cannot have a different purpose and need not be interpreted in a manner different from the understanding of the CBDT of s. 115JA.*

35. Above decision is applicable to the facts of the case in hand on all fours. No circumstances are brought to our notice not to follow the ratio laid down in the above decision. We, therefore, while respectfully following the same hold that section 115 JB has no application to the facts of the case in hand and accordingly the additions made to enhance the book profits under section 115 JB are directed to be deleted.

36. Ground No. 8 is in respect of interest chargeable under section 234 B/D of the Act and as rightly observed by the Ld. CIT(A) interest is statutory and consequential in nature. It does not invite any adjudication.

37. Ld. CIT(A) held that since penalty is not levied, the ground is premature. It is so before us also. We, therefore, reject this ground.

ITA No.5026/Del/2010

38. This appeal of the revenue is directed against the grant of relief to the tune of Rs. 34.89 crores by the Ld. CIT(A) in the impugned order by holding that such a sum cannot be considered as income for the current year. It is submitted that the Ld. CIT(A) ignored the fact that the assessee had never raised this issue before the learned assessing officer and there is no evidence to show that the income of Rs. 34.89 crore can be set off against Rs. 91.13 crores which is the increase in tariff receipt to be utilized in any future tariff determination which has been determined by the Delhi electricity regulatory commission.

39 In the preceding paragraphs we held that in view of the revenue model determined by the DERC , 50% of the excess receipt, which is over and above the determined profits, does not belong to the assessee company since it has to be accounted for while determining the tariff for the next year and not available to the assessee to spend in the way in which they desire. Such an amount, therefore, cannot be reckoned as the income of the assessee and on this premise the entire addition of Rs. 91.13 crores is directed to be deleted. In

view of such a finding, the grounds of appeal in this matter do not survive and are liable to be dismissed. We accordingly dismiss the same.

ITA No.31/Del/2014

40. Assessee's quantum appeal in ITA No. 4848/Del/2010 is allowed deleting all the additions made by the learned Assessing Officer. The penalty, therefore, does not survive. We accordingly direct the learned Assessing Officer to delete the penalty.

41. In the result, appeal of the assessee in ITA No. 4848/Del/2010 is allowed in part and for statistical purpose. Both the appeals of the revenue are dismissed.

Order pronounced in the Open Court on 29th October, 2018.

Sd/-	sd/-
(G.D. AGARWAL)	**(K. NARASIMHA CHARY)**
PRESIDENT	**JUDICIAL MEMBER**

Dated: 29th October, 2018
VJ

Copy forwarded to:

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

ASSISTANT REGISTRAR
ITAT NEW DELHI

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