

IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'D' BENCH,
NEW DELHI

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND
SHRI KULDIP SINGH, JUDICIAL MEMBER

ITA No. 4733/DEL/2015
[Assessment Year: 2012-13]

NTPC SAIL Power Supply Co. P. Ltd Vs.
4th Floor, NBCC Tower
15, Bhikaji Cama Place
New Delhi

The D.C.I.T
Circle - 18(2)
New Delhi

PAN : AABCN 5467 A

[Appellant]

[Respondent]

Date of Hearing : 29.11.2018
Date of Pronouncement : 29.11.2018

Assessee by : Shri M.R. Rastogi, Adv
Revenue by : Shri J.K. Mishra, CIT-DR

ORDER

PER N.K. BILLAIYA, AM:-

This appeal by the assessee is preferred against the order of the Commissioner of Income Tax [Appeals] - 6, Delhi dated 05.06.2015 pertaining to assessment year 2012-13.

2. The substantive grievances of the assessee read as under:

“1. The learned CIT(A) has erred in confirming the disallowance of Rs. 15.30 lacs by AO, deeming Bank guarantee commission incurred as Commission u/s 194H of the Act and disallowing it u/s 40[a][ia] of the Act for non-deduction of TDS by ignoring the appellate decisions and misinterpreting CBDT Circulars on the matter.

2. That ‘Bank guarantee commission’ is not ‘Commission’ as per the meaning of the term “Commission or Brokerage” as per Explanation (i) to Section Sect 194 H

3. The learned CIT(A) has erred in confirming the disallowance of Rsl09.88 lacs on Corporate Social Responsibility(CSR for Short) by AO, the CSR expenses incurred under the directions of BPE Govt, of India requiring Companies to spend a prescribed percentage of its profits on CSR -and now also made mandatory under the Companies Act.”

3. At the very outset, the ld. AR pointed out that the issues contended in this appeal are squarely covered in favour of the assessee and against the Revenue by the order of the Tribunal in assessee’s own case for A.Y 2011-12.

4. The ld. DR fairly conceded to the same.

5. We have given thoughtful consideration to the orders of the authorities below. We find force in the contention of the ld. AR. These issues were considered by the co-ordinate bench in ITA No. 5687/DEL/2014 for A.Y 2011-12 vide order dated 27.04.2018. The relevant finding of the co-ordinate bench is as under:

"We have heard the rival submissions and perused the material available on record. We take up the assessee's appeal in ITA No. 5687/Del/2014 first. We find that the assessee's ground regarding disallowance u/s 40(a) (ia) with respect to the bank guarantee commission is squarely covered in the assessee by order of ITAT Mumbai in the case of Kotak Securities Ltd. vs. DCIT (supra) wherein JTAT Mumbai Bench has followed the order of ITAT Delhi Bench in the case of SRL Ranbaxy Ltd. vs. ACIT in ITA No. 434/Del/2011 and has held that there is no principal and agent relationship between the bank issuing the bank guarantee and the assessee and, further, that when the bank issues the bank guarantee on behalf of the assessee, all it does is to accept the commitment to make the payment of a specified amount to, on demand, to beneficiary and it is in consideration of this commitment that the bank charges a fee termed as bank guarantee commission. It was further held that although it is termed as guarantee commission, it is not in the nature of commission- as is understood in the common business parlance and in context of section 194F of

the Act. Respectfully following the order of the Coordinate Benches, we hold that since principal-agent relationship is a *sine qua non* for invoking provisions of section 194H, the Ld. Commissioner of Income Tax (A) was not justified in upholding the disallowance u/s 4Q(a)(ia) in respect of bank guarantee commission. Accordingly, we allow ground nos. 1.1 and 1.2 of the assessee's appeal and order the deletion of this disallowance.

2. Coming to ground no. 2 of the assessee's appeal which challenges the expenses incurred towards corporate social responsibility, we find that the Raipur Bench of ITAT in the case of AC1T vs. Jindal Power Ltd. In ITA No. 99/Del/2012 has allowed CSR expenses in assessment year 2008-09. The Raipur Bench has further held that Explanation (2) to section 37 of the Act, inserted by Finance Act, 2012 has been brought into the Statute w.e.f. 1.4.2013 and this amendment is prospective in nature and accordingly prior to 1.4.2013, CSR expenses are revenue in nature and allowable. We have gone through the details of CSR expenditure incurred by the assessee during the year under consideration i.e. assessment year 2011-12 and we find that the expenses have been incurred in respect of tree plantation/environment protection, construction of Zoology Lab in Rourkela, construction of Special Wings for cerebral palsy children in Rourkela, medical camps in Sirsa village in Bhilai, development of Dongia Pond in a village near Bhilai, construction of Bus stop shed in the city of Rourkela,

creating awareness against drug abuse in Bhilai, construction of road in Durgapur etc. besides other expenses incurred under the head. It is not in dispute that these expenses have been incurred and the only reason they were disallowed by the Assessing Officer and so confirmed by the Ld. Commissioner of Income Tax (A) was that this expenditure was not expended wholly or exclusively for the purpose of business of the assessee. Although, it is undisputed that the assessee had incurred this expenditure on the basis of guidelines issued by Bureau of Public Enterprises, Govt, of India, the department was of the view that since the expenditure was not mandatory in nature, the same could not be allowed. However, we are unable to concur with the findings of the lower authorities on this issue and we hold that the disallowance under Explanation (2) to section 37(1) will not come into play and there is no such disabling provision even if the expenses in discharge of corporate social responsibility are incurred on voluntary basis. Explanation (2) to section 37(1) comes into play only w.e.f. 1.4.2015 and accordingly, expenses incurred towards corporate social responsibility incurred prior to this date will necessarily be allowable as revenue expenditure. Accordingly, we set aside the order of the Id. CIT(A) on this issue and direct the Assessing Officer to allow the expenses incurred towards corporate social responsibility."

6. Respectfully following the findings of the co-ordinate bench [supra], we direct the Assessing Officer to delete the impugned additions.

7. In the result, the appeal of the assessee is allowed.

The order is pronounced in the open court on 29.11.2018.

Sd/-

**[KULDIP SINGH]
JUDICIAL MEMBER**

Sd/-

**[N.K. BILLAIYA]
ACCOUNTANT MEMBER**

Dated: 29th November, 2018

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the C-DC/DO	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the C-DC/DO	
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