

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES: 'D', NEW DELHI

BEFORE SMT. BEENA A PILLAI, JUDICIAL MEMBER
AND SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No. 3800/Del/2015
AY: 2008-09

DCIT, Circle 5(1) Room No.390 C.R.building I.P.Estate New Delhi	vs.	BSES Yamuna Power Ltd. Shakti Kiran building Karkardoma Delhi 110 092 PAN: AABCC8569N
---	-----	---

(Appellant)

(Respondent)

Department by : Sh. JK Mishra, CIT, DR.
Assessee by : Sh. Rohit Jain, Adv.
Sh.Vibhu Gupta, CA

Date of Hearing : 29/01/2019
Date of Pronouncement: 08/02/2019

ORDER

PER BEENA A PILLAI, JUDICIAL MEMBER

Present appeal has been filed by revenue against order dated 21.03.2012 passed by Ld.CIT(A)-VIII, New Delhi for Assessment Year 2008-09 on following grounds of appeal:

"The Assessing Officer (AO) Dy.CIT, Circle 5(1), New Delhi is directed to file appeal in the above mentioned case before the ITAT, New Delhi on the following grounds of appeal.

- (i) *On the facts and in the circumstances of the case and in law, the Ld.CIT(A) has erred in deleting the disallowance of Consumer Security Deposit and Service Line deposits amounting to Rs.57,56,69,642/- ignoring the fact that the amount received from the customers for service line is revenue in nature as the same is part of the selling of electricity during normal business operation and does not qualify to be capital receipt.*
- (ii) *On the facts and in the circumstances of the case and in law, the Ld.CIT(A) has erred in deleting the addition amounting to Rs.95,83,279/- on account of legal claims ignoring that the amounts involved are penal in nature and hence are not allowable.*
- (iii) *The appellant craves leave for reserving the right to amend, modify, alter, add or forego any ground(s) of appeal at any time before or during the hearing of this appeal.*

2. Brief facts of case are as under:

The assessee filed return of income on 29.09.2008, declaring loss of Rs.84,73,35,870/- which was subsequently revised on 29/03/10 declaring revised loss of Rs.64,49,30,204/-. Notice under section 143(2) of In.T.Act, 1961 (the Act) was served upon assessee along with questionnaire. In response to statutory notices, representative of assessee appeared before Ld.AO and filed details as called for.

2.1. Ld.AO observed that assessee had received a sum of Rs.19,65,18,794/- as service line deposit which was treated by Ld.AO as non-refundable deposit.

2.2. Further Ld.AO observed that assessee claimed legal expenses of Rs.3,83,33,117/-. Ld. AO called for nature of payment. From details filed, it was observed that, a portion of expenses claimed, Ld. AO was of opinion that could not be allowed as it was in the

nature of penalty imposed upon assessee for failure to perform his duties as per law.

3. Aggrieved by order of Ld.AO, assessee preferred appeal before Ld.CIT(A) who deleted addition made by Ld.AO by following order passed by his predecessor for assessment year 2006-07 and 2007-08.

4. Aggrieved by order of Ld.CIT (A), revenue is in appeal before us now.

5. At the outset Ld.AR submitted that both grounds raised by revenue are covered by order of this Tribunal in assessee's own case for preceding assessment years. He filed order in paper book at page 1-52, it is also submitted that said order of this Tribunal has been approved by *Hon'ble Delhi High Court*, which is also part of paper book at page 53-58.

6. Ld.Sr DR though supported order of Ld.AO, could not controvert afore stated argument of Ld.AR.

7. We have perused submissions advanced by both sides in light of records placed before us.

8. Ground No. (i)

It is observed that assessee during year under consideration received a sum of Rs.19,65,18,794/- as service line deposits from customers for setting up service line which include cost of GI pipes, bricks sand etc. The said charges have been received by assessee as per provisions of Electricity Act, 2003, and regulations framed thereunder, by DERC from time to time. It is observed that said issue has been considered by this Tribunal, in assessee's own case

in consolidated order dated 05/10/15 for Assessment Years 2005-06 to 2008-09 as under:

" 17.2. We find that while dealing with the issue the Learned CIT(Appeals) has discussed the related provisions of the Electricity Act, 1910 defining "service line" as per which it is an electric supply line intended to supply energy to a single consumer or a group of consumer from the same point of the distributing main. So the service line is to be drawn from the distributing main. The lines drawn with the help of electric posts are electric supply lines and connection taken from the post to the building are service line. He has noted further that service line charges are levied to recover the cost of service line which includes the cost of GI pipes, bricks, sand, overheads or under ground cables etc. There is no dispute that the service line charges are charged from the consumer only at the time of providing new connections, to recover the expenditure incurred on such equipments and it is a one time charge levied on the consumers at the time of taking new connections and thereafter it is the responsibility of the BRPL for repair/replacement of the service line. It has been noted that the assessee was charging service line deposits as well as development charges from the consumers as per the rules and notification of Delhi Electricity Regulatory Commission (BERC). The capital expenditure incurred in respect of service line deposits on account of service line cables, cost of G.I. pipes, bricks etc. were capitalized under the head 'meter accessories' (on which depreciation was claimed at the rate of 80% but was reduced by the Assessing Officer to 25%). However, the capital expenditure incurred on development charges were duly included under the head "plant and machinery", which was subject to the normal depreciation @ 25%. It was accordingly submitted that the development charges are required to be D-capitalized from the plant and machinery @ 25% and service line deposits from plant and machinery (meter) @ 80% in accordance with the provisions of sec. 43(1) of the Act. Against the observation of the Assessing Officer that it is not a deposit but a receipt as it is non-refundable, the contention of the assessee remained that service line charges are being recovered from the customers as per the Electricity Act, 2003 and the regulation framed under the Act by the DERC from time to time. The charges are levied to recover the cost of service line which includes cost of G.I. pipes,

bricks, sand, overhead or underground service line cable, meter accessories etc. These charges are taken from the customers only at the time of providing the new connection to recover the expenditure incurred on the equipments and these expenditures are capitalized under the head "plant and machinery" (meter) and depreciation is claimed thereon.

17.3 With regard to the observations of the Assessing Officer, only 1/3 of the total amount on revenue account and not whole of it is treated as capital receipts, the contention of the assessee remained that DERC is a regulatory body, which regulates the charges of service line charges. Thus, service line deposits are received by the company as per the provisions of DERC and Electricity Act for the purpose of incurring the expenditure for laying the service line and other related expenses for providing new connection to the customers. It was explained that in the absence of a one to one linking of the service line deposit scheme with the capital expenditure incurred on the service line connection, the justification for treating 1/3rd of the total amount of receipts in a particular year as Revenue is that by doing so the assessee is offering for Revenue all service line receipts over three years. It was submitted that at the same time the assessee is claiming 99% of the cost incurred on capitalization service line connections under plant and machinery (meter) as depreciation over three years based upon the facts that energy meters are eligible for depreciation at the higher rate of 80%. This is in line with the matching concept as enunciated under AS-I requiring Revenue to be matched with cost. Based upon the matching concept and Revenue friendly concept, the offering of service line deposits (which are in the nature of capital receipts) over a period of three years is not prejudicial to the interest of Revenue, however, the service line receipts are of capital nature and is required to be reduced from the relevant cost of plant and machinery in accordance with sec. 43(1) of the Income-tax Act, 1961, explained the assessee.

17.4 With regard to the observation of the Assessing Officer that the assessee is engaged in selling electricity to the consumers from whom it charges fees in the name of energy charges and these energy charges are in the nature of Revenue receipts, the submission of the assessee remained that the nature of service line receipts are entirely different from the nature of the energy charges and the service line receipts deserve to be reduced from the cost of the

relevant plant and machinery in accordance with sec. 43(1) of the Income-tax Act, 1961. On the other hand, energy charges are recovered from consumers for the amount of electricity consumed by them at the prevailing tariff, which is of the Revenue nature. Accordingly, both these receipts, namely, energy charges and service line receipts have different characteristic and therefore, could not be measured with the same yard-stick. We find substance in the submission of the assessee as there is no dispute on the facts of the case. Discussing these submissions of the assessee and meeting out the observations of the Assessing Officer, we are of the view that the Learned CIT(Appeals) following the ratios laid down in the cited decisions has rightly come to the conclusion that the amounts received for installation of service lines are to be treated as capital receipts in the hands of the assessee. In result, the Learned CIT(Appeals) was justified in deleting the addition of Rs.73,75,590 made on account of service line deposits from customers. The same is upheld. The ground No.1 of the appeal preferred by the Revenue is accordingly rejected.

8.1. Further, it is observed that Hon'ble Delhi High Court approved order passed by this Tribunal vide order dated 14/09/16. Hon'ble Delhi High Court upheld findings of this Tribunal by observing as under:

" 8. With respect to the ITAT's ruling that the treatment of the service line deposit over the years being capital or revenue is concerned, we notice that the AO refused to recognise the amounts as capital receipts. The assessee offered 1/3rd of the amount to the profit and loss account and later explained that these were capital receipts and are not revenue in nature. This volte face of the assessee seems to have triggered the AO's decision that the receipts were not capital but revenue and therefore entirely liable to be taxed. The issue is covered against the revenue in **Hoshiarpur Electric Supply Co. vs. CIT {1961} 41 ITR 608 (SC)**.

9. As far as the change in the method of valuation is concerned, the ITAT permitted the assessee to adopt the moving average

methodology. The ITAT noted that the previous method adopted by the assessee was First In First Out (FIFO) in terms of AS2. However, they changed that method from 2005-2006 onwards. The ITAT concurred with the CIT (A)'s decision that the assessee had the autonomy to decide appropriate method as long as the authority did not find anything fundamentally wrong in it. In our opinion no question of law arises on this score as well."

8.2. Admittedly facts and circumstances of this issue are identical in year under consideration, with that of preceding assessment years and no distinguishing features has been brought out by the Ld.Sr DR in order to deviate from view upheld by *Hon'ble High Court*.

8.3. Respectfully following same, we are upholding view taken by Ld.CIT(A).

8.4. Accordingly this ground raised by revenue stands dismissed.

9. Ground No.(ii)

9.1. Ld.AR submitted that deduction of expenditure amounting to Rs.3,83,33,117/- was made under section 37 of the Act. He submitted that Ld.AO without giving any specific reference to an expenditure incurred under legal claims disallowed ad hoc 25% of expenses considering same to be penal in nature.

9.2. Ld.CIT(A) deleted addition by following order of his predecessor for assessment year 2006-07 and 2007-08. It has been submitted that facts and circumstances are same in year under consideration.

9.3. Ld.Sr DR though supported order of Ld.AO could not controvert aforestated arguments advanced by Ld.AR.

10. We have perused submissions advanced by both sides in light of records placed before us.

10.1. It is observed that, this Tribunal has decided issues in preceding assessment years in assessee's own case vide order dated 05/10/15 as under:

" 44.3. Further, even the assessing officer has failed to pin-point any specific expenditure which is penal in nature and has merely made an ad-hoc disallowance @ 25% of such expenditure, merely on the basis of assumption.

44.4. Even otherwise, payments made to customers and others in lieu of civil claims/ suits, arbitration, etc., are merely in the nature of compensation paid in the regular course of business, which was purely compensatory in nature and cannot, be disallowed under section 37 of the Act.

Reliance in this regard has been placed by the Learned AR on the following decisions:

- *Prakash Cotton Mills vs. CIT: 201 ITR 684 (SC)*
- *CIT vs. Indian Copper Corporation Ltd.: 161 ITR 327 (Pat)*
- *CIT vs. Grand Cashew Corporation: 182 ITR 216 (Ker)*
- *Jama Auto Industries vs. CIT: 299 ITR 92 (P&H)*
- *CIT vs. Hindustan Copper Ltd.: 55 Taxman 392 (Cal)*
- *CIT vs. Todi Tea Col. Ltd: 239 ITR 28 (Cal.)*
- *G.L. Rexroth Industries Ltd. vs. DCIT: 59 TTJ 757 (Ahd.)*
- *CIT vs. Deversons Industries Ltd.: 104 ITD 171 (Ahd.)*

45. On perusal of the orders of the authorities below on the issue, in view of the above submissions and the decisions cited, we find that the Learned CIT(Appeals) has deleted the addition made on account of disallowance of legal claim on the basis that the Assessing Officer has not highlighted a single instance that the charges were of penal nature. We find that the Assessing Officer has made the

disallowance on estimate basis at 25% of the expenditure claimed. No basis has been assigned for making such ad hoc disallowance. Noting these material aspects, we are of the view that the Learned CIT(Appeals) has rightly deleted the disallowance in absence of any instance that there was any penalty which would fall under the Explanation to Sec. 37 of the Income-tax Act, 1961. The First Appellate Order in this regard is thus upheld. Ground No.3 is accordingly rejected."

10.2. Before Hon'ble Delhi High Court revenue had not raised this issue and therefore attained finality.

10.3. Respectfully following view taken by this Tribunal, we are inclined to uphold order passed by Ld.CIT(A).

10.4. Accordingly this ground raised by revenue stands dismissed.

11. Ground no.(iii) is general in nature and therefore do not require any adjudication.

12. In the result appeal filed by revenue stands dismissed.

Order pronounced in the open court on 08th February, 2019.

Sd/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Sd/-
(BEENA A PILLAI)
JUDICIAL MEMBER

Dt. 08th February, 2019

- Gmv

Copy forwarded to: -

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

- TRUE COPY -

By Order,

ASSISTANT REGISTRAR
ITAT Delhi Benches

	Date
Draft dictated on	06.02.19
Draft placed before author	06.02.19 07.02.19
Draft proposed & placed before the second member	07.02.19
Draft discussed/approved by Second Member.	
Approved Draft comes to the Sr.PS/PS	
Kept for pronouncement on & Order uploaded on :	08.02.19
File sent to the Bench Clerk	
Date on which file goes to the AR	
Date on which file goes to the Head Clerk.	
Date of dispatch of Order.	