**IN THE INCOME TAX APPELLATE TRIBUNAL**
**Hyderabad ' B ' Bench, Hyderabad**

**Before Smt. P. Madhavi Devi, Judicial Member**
*AND*
**Shri S.Rifaur Rahman, Accountant Member**

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| ITA Nos.2092, 2093 and 2094/ Hyd/2018 | | |
| Assessment Years: 2011-12, 2012-13 & 2015-16 | | |
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| A.P. Gas Power Corporation Ltd, Hyderabad PAN:AABCA9105C | Vs. | Dy. Commissioner of Income Tax, Circle 1(1) Hyderabad |
| (Appellant) | | (Respondent) |

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| Assessee by: | Sri V. Sivakumar |
| Revenue by: | Sri Y.V.S.T. Sai, CIT-DR |
| | |
| Date of hearing: | 22/08/2019 |
| Date of pronouncement: | 19/11/2019 |

**ORDER**

**Per Smt. P. Madhavi Devi, J.M.**

All the three are assessee's appeals for the A.Ys 2011-12, 2012-13 & 2015-16 respectively against the order of the CIT (A)-1, Hyderabad, dated 20.09.2018.

2. Brief facts of the case are that the assessee company, engaged in the business of generating power using natural gas as fuel, filed its return of income for the relevant A.Ys both under the normal provisions of the Act and under section 115JB of the Act. During the assessment proceedings u/s 143(3) for the A.Ys 2011-12 and 2012-13, the assessments were initially completed u/s

143(3). Later it was noticed that the assessee company has paid $4.30 per MMBTU for Ravva Satellite gas to GAIL and further made a provision for Rs.15,17,68,889/- over and above $4.30 per MMBUT to the credit of GAIL $1.43 per MMBTU. In view of the excess claim, the case, the case was reopened for both the A.Ys by issuance of a notice u/s 148 dated 30.03.2017.

3. During the re-assessment proceedings, the AO observed that the assessee had entered into a short term agreement with GAIL in December, 2008 for supply of natural gas from Ravva Satellite gas field owned by Cairn Energy Ltd which is a joint venture of the GAIL @ $5.73 per MMBTU but GAIL has been raising invoices only at $4.30 per MMBTU and that the assessee has made a provision for the balance price of $1.43 per MMBTU since the price payable as agreed upon was $ 5.73 per MMBTU. It was submitted that GAIL can claim such differential amount at any time and APGPCL is bound to pay such amount as per the terms of contract entered into by it with GAIL. The AO, in order to verify the rate at which GAIL had raised the invoices, addressed a letter to GAIL. In response to the same, GAIL vide letter dated 24.08.2017 stated that it has never fixed the price of $5.73 per MMBTU, but it has only charged $4.30 per MMBTU to APGPCL and that the same was admitted as its income for the relevant financial year 2011-12.

4. Therefore, a show-cause notice was issued to the assessee as to why the excess of amount which is provided in the books to the credit of GAIL should not be disallowed u/s 37 of the I.T. Act. In response to the same, the assessee has submitted that

the purchase price was admitted in the books as per contractual obligations was made and a provision for the excess of the amount collected over the payment made by the assessee and after the correct price was crystallised in Feb. 2017 as per the letter issued by GAIL, taxes on the excess amount collected by the assessee was paid in the A.Y 2017-18 and requested to drop the proceedings u/s 148 of the I.T. Act. However, the AO did not agree with the assessee's contentions and disallowed the provision made and brought the provision to tax in the years of collection. Further, for the A.Y 2015-16, the assessment was completed u/s 143(3) disallowing the provision claimed u/s 37 of the I.T. Act. Aggrieved, the assessee preferred appeals for the A.Ys 2011-12 & 2012-13 before the CIT (A), who confirmed the orders of the AO and the assessee is in second appeal before us by raising the following grounds of appeal for the A.Ys 2011-12 & 2012-13 which are the same except for the quantum of disallowance.

> *"1. The Order of the Commissioner of Income Tax (Appeals)-1, Hyderabad dated 20-09-2018 is erroneous, contrary to law and facts of the case.*
>
> *2. a) The Commissioner of Income Tax (Appeals) is not justified in sustaining the addition of Rs. 15,17,68,889/- made by the Assessing Officer, representing provision made by the Appellant in its books on account of Natural Gas supplied by Gas Authority of India Limited (GAIL) from Rawa Satellite field stating that such amount is only a provision made in the Accounts towards differential price for supply of natural gas.*
>
> *b) Commissioner of Income Tax (Appeals) ought to have seen that the said provision was made as per -understanding the Appellant had with GAIL. It is further relevant to note that the Appellant is following mercantile system of accounting according to which all contractual liabilities are to be taken into account as and when they arise as otherwise such expenditure may not be allowed as deduction in the year in which it is paid stating it to be prior period expenditure.*

*Therefore Commissioner of Income Tax (Appeals) is not justified in confirming the addition of Rs. 15,17,68,889/- being the differential price Appellant had incurred for gas supplied by GAIL from Ravva Satellite field.*

*3. For all of the above and such other grounds as may be urged at the time of hearing it is most respectfully prayed that this Hon'ble Tribunal may be pleased to allow the appeal and suitable directions be given to Assessing Officer to delete disallowance of Rs. 15,17,68,889/- in the interest of justice".*

For the A.Y 2015-16 also, the grounds are as follows:

*"1. The Order of the Commissioner of Income Tax (Appeals)-1, Hyderabad dated 20-09-2018 is erroneous, contrary to law and facts of the case.*

*2. a) The Commissioner of Income Tax (Appeals) is not justified in sustaining the addition of Rs.3,25,22,021/- made by the Assessing Officer, representing provision made by the Appellant in its books on account of Natural Gas supplied by Gas Authority of India Limited (GAIL) from Ravva Satellite field stating that such amount is only a provision made in the Accounts towards differential price for supply of natural gas.*

*b) Commissioner of Income Tax (Appeals) ought to have seen that the said provision was made as per understanding the Appellant had with GAIL. It is further relevant to note that the Appellant is following mercantile system of accounting according to which all contractual liabilities are to be taken into account as and when they arise as otherwise such expenditure may not be allowed as deduction in the year in which it is paid stating it to be prior period expenditure.*

*Therefore, Commissioner of Income Tax (Appeals) is not justified in confirming the addition of Rs. 3,25,22,021/- being the differential price Appellant had incurred for gas supplied by GAIL from Rawa Satellite field.*

*3. Commissioner of Income Tax (Appeals) is not justified in confirming the disallowance of Employees share of PF of Rs.2,58,244/- u/s.36(1)(va) on the ground that such payments were made beyond the due dates under the PF Act. Commissioner of Income Tax (Appeals) in this regard ought to have seen that Hon'ble Apex Court held in the case of Alom Extrusions Ltd (Supra) that even payments made on account of PF and ESI before due date for filing of return are allowable as deduction. Hence the Commissioner of Income Tax (Appeals) should not have confirmed the disallowance of Rs.2,58,244/--.*

*4. For all of the above and such other grounds as may be urged at the time of hearing it is most respectfully prayed that this Hon'ble Tribunal may be pleased to allow the appeal and suitable directions be given to Assessing Officer to delete disallowances made in the Assessment Order in the interest of justice".*

5. The learned Counsel for the assessee submitted that the assessee company by APSEB along with a group of companies which are into manufacturing of cement, cast iron, free alloy etc., which consume substantial power, to meet their needs of power by setting up their own plant to generate power. The power thus generated was distributed to the shareholders in the proportion of their shareholding. The shareholders were free to transfer or disburse their shares and in their place, new shareholders could join the company and were to get the power in the place of original shareholders, as shareholding is the criterion for getting power from the company.

6. It is submitted that for generating the power, to meet the requirement of raw material, the assessee had entered into an agreement with GAIL for supply of natural gas and since GAIL was not in a position to supply the required quantity of fuel, it sought fuel from Cairn Energy Ltd from its Ravva Satellite Gas Field. Initially, the agreement between the assessee company and GAIL was entered into on 21.11.1990 and the same was being extended from time to time. The learned Counsel for the assessee has taken us through the relevant copies of the correspondence between the assessee and "GAIL" through which the agreement has been extended from time to time and submitted that in the year 2008, in the letter dated 29.10.2008 GAIL informed the

assessee that the price of gas to be supplied from Ravva field will be revised w.e.f. 1.12.2008 and indicated the price for such gas at $5.73/MMBTU with a validity of such price for three years from 1.12.2008. He also drew our attention to the letter dated 28.11.2008, wherein it is mentioned that as and when the agreement of Ravva Satellite Gas price as stipulated with Ravva JV was finalized, the same would be applicable to the Ravva Satellite Gas supplied to the assessee's plant w.e.f. 1.4.2008 and that the assessee agreed to pay the seller, the price as agreed to by and between GAIL and Ravva JV. Subsequent letters were also referred to, to show that the revision of gas price was inconclusive and it continued to be so upto Feb.2017, when it was finally decided that the gas price would be charged at $430 MMBTU only till Nov.2014, and thereafter, the price would be charged at $5.73 per MMBTU. The learned Counsel for the assessee submitted that as a prudent business practice, the assessee was collecting the charges from its customers at $5.73 per MMBTU from 1.4.2008, though GAIL has been raising invoices on the assessee at $4.30 per MMBTU only. He submitted that since the assessee was under an obligation to pay GAIL at the finally agreed price with effect from 1.4.2008, it had to collect the price from its shareholders at the price to be revised and the excess so collected was transferred to the provision A/c and the provision was claimed as an expenditure in the Income Tax return. He submitted that subsequently, when the price got finalised and it was decided that upto Nov.2014, the price would be charged only at $4.30 per MMBTU, the assessee has offered the provision to tax in the financial year 2016-17 i.e. the year of crystallization relevant to the A.Y 2017-18. Therefore, according to him, the liability to pay

the revised price had accrued to the assessee during the relevant A.Ys when the supplier GAIL had intimated the likely revision of the price and accordingly the assessee had collected the price from the customers but only date of the payment thereof was uncertain and therefore, the provision has to be allowed as per the mercantile system of accounting followed by the assessee. In support of his contention that such a provision is allowable as a deduction u/s 37(1) of the Act, the learned Counsel for the assessee has placed reliance on the following case law:

i) *Hon'ble Supreme Court in the case of Calcutta Co. Ltd vs.CIT (1959) 37 ITR 1 (SC)*
*ii)* *Hon'ble Supreme Court in the case of Bharat Earth Movers v. CIT (200) 112 Taxman 61 (Supreme Court)*
*iii)* *ITAT Kolkata Bench in the case of IBP Co. Ltd vs. ACIT (2003) 129 Taxmann.com 26 (Kol)*
*iv)* *Hon'ble Delhi High Court in the case of CIT vs. Insilco Ltd (2009) 179 Taxmann 55 (Del.)*
*v)* *Hon'ble Bombay High Court in the case of CIT vs. Monica India (2016) 70 taxmann.com 47 (Bom.)*
*vi)* *ITAT Hyderabad Bench in the case of Smt.Aruna Jyoti Vedire vs. Add CIT in ITA No.91/Hyd/2017 dated 3.5.2017.*

7. Further, the learned Counsel for the assessee has also filed a paper book consisting of the correspondence between the assessee and GAIL and that pages 46 to 52 are additional evidence which may be admitted and considered for adjudication of the issue.

8. The learned DR, on the other hand, supported the orders of the authorities below and submitted that the gas price is not decided by the parties but it is decided by the Ministry of Petroleum & Natural Gas and therefore, the assessee's contention that the assessee was under a liability to pay GAIL @ $5.73 per MMBTU during the relevant A.Ys is not acceptable. He further

submitted that even otherwise, the liability to pay the higher price had not arisen or was not crystallised during the relevant A.Ys as the negotiations between the parties were going on and the GAIL in its letters had clearly stated that the negotiations were inconclusive. Therefore, according to him, the liability had not arisen to the assessee but it is a contingent liability which may or may not arise even in future and therefore, such a provision is not allowable as an expenditure u/s 37 of the I.T. Act during the relevant A.Ys. In support of his contention as above, he placed reliance upon the following case laws:

*i)* *Hon'ble Supreme Court in the case of Rotork Controls India (P) Ltd reported in 180 Taxmann 422 (SC) dated 12.5.2009.*

*ii)* *Hon'ble Madras High Court in the case of FFE Minerals India P Ltd reported in 98 Taxmann.com 170 (Mad.) dated 13.8.2018.*

*iii)* *Hon'ble Karnataka High Court in the case of Micro Land Ltd reported in 18 Taxmann.com 80 (Kar.) dated 21.9.2010.*

*iv)* *ITAT Pune Bench in the case of Thermax Babcock & Wilcox Ltd (2001) 79 ITD 63 (Pune)(TM).*

9. Having regard to the rival contentions and the material on record, we find that the assessee had entered into an agreement with GAIL for supply of natural gas and GAIL was sourcing the fuel/raw material from Cairn Energy Ltd which on the other hand, was sourcing the natural gas from its Ravva Satellite Gas Field. As per the letter dated 29.10.2008 (which is placed at page 6 of the paper book), there is an intimation to the assessee from GAIL that Ravva JV sought revision of the gas price and has indicated a price of $5.73 per MMBTU with a validity of such price for three years from 1.12.2008 and that the possible

increase in the rate of Ravva Satellite gas price is from 1.12.2008. In the letter dated 28.11.2008, it also intimated to the assessee that the price of Ravva Satellite Gas price has been agreed at US $ 4.30 per MMBTU for the period 1.10.2006 to 30.11.2008 and that vide letter dated 29.10.2008, it has been informed to the assessee that in accordance with the provisions of upstreaming contract, Ravva JV has entered into, the Ravva Gas Field has indicated a price of US $ 5.73 per MMBTU with a validity of such price from 1.12.2008. It is also mentioned that the negotiations with Ravva JV on the price revision are inconclusive and that the seller continues to supply gas from Ravva Satellite Gas Field to the assessee's plant as per the letter dated 8.2.2007 with clear understanding that, as and when, the agreement on Ravva Satellite Gas price is reached with Ravva JV, the same would be applicable for the Ravva Satellite Gas supplied to the assessee's plant w.e.f. 1.12.2008. It is also mentioned that the buyer i.e. the assessee has agreed to pay the price for the gas as agreed to between GAIL and Ravva JV. The assessee being the purchaser, had agreed to the price proposed to be charged by the GAIL and Ravva JV. From the subsequent communications between the assessee and GAIL, it is seen that the discussions with Ravva JV for the revision of price w.e.f. 1.12.2008 for the gas supplied from Ravva Gas Field is inconclusive. Therefore, it can be reasonably concluded that the assessee had a possible liability to pay GAIL $ 5.73 per MMBTU w.e.f. 1.12.2008, even if the discussions on the price revision culminated at a later date. Therefore, the assessee's collecting the charges from its shareholders/consumers @ 5.73 per MMBTU is a prudent practice, as admittedly, there were no restrictions on the shareholders from selling/transferring their

shares and the new shareholders would not be liable to pay the charges for the consumption of power by the earlier shareholders and the assessee would not be able to recover the revised charges from the earlier shareholders who had consumed the power. Therefore, the assessee collecting the price at the possible revised price from the customers cannot be faulted. We find that the assessee has made a provision of the excess of the amount received and has claimed it as an expenditure during the year of receipt itself, though it has not made the payment. The allowability of this claim is the question before us. The learned Counsel for the assessee has relied upon various case laws for the allowability of such a claim. Let us therefore, see the applicability of the said case laws to the facts of the case before us.

10. In the case of Calcutta Co. Ltd (Supra), the assessee therein was dealing in landed property and carried on land developing activity and in the course of the said business, it maintained its account on mercantile system. In the relevant accounting period, it had sold certain plots and had received the entire sale price, but it had to also carry out developments within six months from the date of sale. Accordingly, it estimated a sum as expenditure for developments to be carried out in respect of the plots sold out during the relevant year and debited the said sum in its books of account as accrued liability. The Department did not allow the said estimated expenditure, and the matter travelled upto the Hon'ble Supreme Court and the Hon'ble Supreme Court held that the assessee had already undertaken a liability under the terms of its sale deeds of lands in question and therefore, it was an accrued liability and had to discharge such a liability and

therefore, it was entitled to debit the same in its books of account in the accounting year against the receipts which represented sale proceeds of said lands. We find that this decision is applicable to the assessee. The assessee therein had received the income and has estimated the expenditure towards a liability which had accrued to it as per the terms of the sale deed. In the case before us also, the assessee had sold the power generated by it by utilizing the fuel sourced from Ravva Satellite Gas Field and as the price was likely to be revised, the liability of the assessee to pay the revised price with effect from the date of supply had accrued , though it had to be discharged at a later date. Thus, this decision is clearly applicable to the assessee.

11. In the case of Bharat Earth Movers (Supra), the assessee therein had made a provision for meeting the liability towards leave encashment to be paid to its employees proportionate to the entitlement earned by the employees of the company, subject to a ceiling on accumulation as applicable on relevant date. On the question whether the assessee would be entitled to a deduction of such provision out of gross receipts for the accounting year during which the provision was made for liability in as much as the liability was a contingent liability, the Hon'ble Supreme Court has held that the assessee was entitled to do so. It was held that the liability was an ascertainable liability as the assessee had employees and the actual emoluments to be paid to them was ascertainable and therefore, the provision which had to be made for future liability, was allowable as expenditure.

12. In the case of IBP Co. Ltd (Supra) also, the assessee therein had made a provision for payment on finalization of revision of pay scale and other benefits to its Officers. The ITAT held that it was decided by the Govt. of India to increase salary w.e.f. a certain date in accordance with certain norms and therefore, liability for such increase had definitely arisen and could not be said to be a contingent liability.

13. In the case of Insilco Ltd (Supra), the Hon'ble Delhi High Court was considering the case of an assessee which had evolved a scheme whereby employees who rendered long period of service to the assessee company were made entitled to monetary awards at various stages of their employment equivalent to a defined period of time and based on actuarial calculation, the assessee made a provision for "long service award" payable to its employees and claimed deduction of the same. The Hon'ble Delhi High Court held that since the provision for long service award was estimated based on actuarial calculation, the deduction claimed by the assessee has to be allowed.

14. In the case of Monica India (Supra), the assessee therein had purchased imported goods from two parties and as per the purchase agreement, customs duty payable by sellers for import, would be included in the sale consideration. Accordingly, the assessee had claimed deduction of customs duty as part of cost of goods purchased. Revenue authorities denied deduction of customs duty on the ground that liability to pay customs duty was contingent liability as seller/importers had challenged the

same in the Supreme Court and obtained stay against the admission of customs duty. The Hon'ble Bombay High Court held that since the assessee had liability to pay the sellers the cost of customs duty on goods purchased, it was to be borne by the assessee purchaser, only and thus the assessee would be entitled to deduct the said amount as consideration paid for goods in the relevant A.Y, irrespective of fact that sellers/importers had disputed such a liability.

15. Let us now consider the applicability of case laws relied upon by the learned DR. In the case laws relied upon by the learned DR, we find that the Hon'ble Supreme Court in the case of Rotork Controls India (P) Ltd, has held that a provision for the warranty period is allowable where its historical trend indicates that in past large number of sophisticated goods were being manufactured and defects existed in some of the items manufactured and sold. It was held that the provision made for warranty in respect of army of such sophisticated goods would be entitled to a deduction from gross receipts u/s 37(1) of the Act.

16. In the case of FFE Minerals India (P) Ltd, the assessee therein was engaged in the business of turnkey projects, in which, the time was essence of contract. One of the conditions enumerated in the contract was delivery of equipment in time, which if not done within stipulated time, would lead to liquidated damages. The case of the assessee therein was that during the relevant A.Y there was a delay in delivery of machinery and thus, liability to pay liquidated damages arose and accordingly it made

a provision for the same and claimed deduction u/s 37(1) of the Act. Revenue rejected the assessee's claim on the ground that the liability to pay damages did not crystallize in the relevant A.Y. The Hon'ble High Court held that in the A.Y in question, only negotiations and discussions took place and the finally liquidated damages were computed much later and therefore, the assessment order did not require any interference.

17. In the case of Microland Ltd (Supra), the assessee therein had claimed deduction u/s 37(1) of the Act in respect of provisions made for providing a possible future warranty claim during years of unexpired warranty in respect of products sold during the accounting periods in question. The Hon'ble Karnataka High Court held that since there was nothing on record to indicate that any such expenses have been incurred or laid out by the assessee as has been claimed before the authorities below, the AO was justified in rejecting the assessee's claim. It has reported that it was the assessee who had not placed any material either before the AO or before the appellate authorities.

18. In the case of Thermax Babcock & Wilcox Ltd (Supra), the assessee therein had claimed deduction in respect of warranty in its account on the ground that it was under an obligation to replace the defective components of boilers during the warranty period and that amounts provided represented estimated liabilities in respect of that obligation. When the liability under warranty clause in contract did not accrue during the relevant accounting years, merely because provision had been made as per

accounting standards or that it was in consonance with established commercial principles, it could not be allowed under the I.T. Act. It was further held that since no boiler had been delivered or commissioned during the relevant A.Y, there was no material with reference to any liability under warranty and thus there was not even a semblance of liability during the relevant period let alone accrued liability.

19. The common principles that emerge from the above case laws relied upon by the learned Counsel as well as the Revenue are that a provision can be allowed as a deduction only if it is an ascertained liability and if it is computed on actuarial basis or on the basis of past experience and the provision is made on a scientific basis. The Hon'ble Supreme Court in the case of Rotork Controls India (P) Ltd (Supra) has laid down 4 tests for allocating a provision. It held that as per the recognized practice when a party has the present obligation as a result of the past events, settlement of which is expected to result in an outflow of resources and in respect of which a reliable estimate of the amount of obligation is possible, then a provision made to meet such an obligation is allowable u/s 37(1) of the Act.

20. In the case before us, we find that there is a case for the assessee to collect the charges from the customers at $5.73 per MMBTU w.e.f. 1.12.2008, because as per the intimation dated 29.10.2008 from GAIL to the assessee, Ravva Satelllite JV was likely to revise the price and that such revised price to $5.73 per MMBTU is applicable w.e.f. 1.12.2008. After such intimation,

the assessee had agreed to pay at the finally agreed revised price and also received the fuel from Ravva Satellite JV thereafter. Therefore, there is an implicit obligation of the assessee to pay the revised price, subject to the maximum of $ 5.73 per MMBUT. Thus, the liability had accrued during the relevant A.Ys. The discussions between GAIL and Ravva JC on revision of price continued, but remained inconclusive till Feb.2017, when it was finalized that the GAIL shall charge the assessee at US $ 4.30 per MMBTU only, till 2014 and thereafter at $5.73 per MMBTU. Therefore, the liability of the assessee to pay at the revised price is an ascertained liability and not a contingent liability as held by the Revenue. The assessee was liable to pay the revised charges w.e.f. 1.12.2008 but the revised charges were not finalized though the maximum price which could be revised or increased was mentioned in the communication from GAIL. The learned DR's submissions that the price is fixed by the Govt. is also strictly not correct. From page 34 of the paper book filed by the assessee which is a copy of the new domestic natural gas price 2014, dated 25.10.2014, it is seen that the cost of the price shall be determined in accordance with the formula given therein and it was also clarified that the cost of the price so determined under these guidelines was not to be applicable where prices have been fixed directly for a certain period of time, till the end of such period. Therefore, we are of the opinion that the claim of the assessee u/s 37(1) of the Act is allowable particularly since the assessee itself has offered the cessation of liability to tax in the year of crystallization. Therefore, the appeals of the assessee are allowed.

21. In the result, assessee's appeals are allowed.

Order pronounced in the Open Court on 19th November, 2019.

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| **Sd/-** | **Sd/-** |
| **(S. RIFAUR RAHMAN)** | **(P. MADHAVI DEVI)** |
| **ACCOUNTANT MEMBER** | **JUDICIAL MEMBER** |

Hyderabad, dated 19th November, 2019.
***Vinodan/sps***

Copy to:

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2 Dy.CIT, Circle 1(1) Hyderabad
3 CIT (A)-1 Hyderabad
4 Pr. CIT – 1 Hyderabad
5 The DR, ITAT Hyderabad
6 Guard File

*By Order*