

IN THE INCOME TAX APPELLATE TRIBUNAL KOLKATA BENCH '(B)', KOLKATA
[Before Shri P.M. Jagtap, Vice President (KZ) & Shri A.T. Varkey, JM]

I.T.A. Nos. 1726 & 1727/Kol/2018
Assessment Year: 2014-15 & 2015-16

&

S.A. Nos. 18 & 19/Kol/2020
(Arising out of ITA Nos. 1726 & 1727/Kol/2019)
Assessment Year: 2014-15 & 2015-16

West Bengal Pollution Control Board.....Appellant
10A, Block - LA, Paribesh Bhawan,
Sector - III, Bidhannagar,
Kolkata - 700 098.
[PAN: AAALW 0078 N]

VS

A.C.I.T, (Exemption), Circle - 1(1), Kolkata.....Respondent
10B, Middleton Row, 6th Floor,
Kolkata - 700 071.

Appearances by:

Shri Miraj D. Shah, AR appearing on behalf of the Assessee.

Shri I, Jamir, CIT, DR appearing on behalf of the Revenue.

Date of concluding the hearing : February 26, 2020

Date of pronouncing the order : March 20, 2020

ORDER

PER P.M. JAGTAP, VICE-PRESIDENT (KZ)

These two appeals filed by the assessee against two separate orders both dated 14.05.2019 passed by the Ld. CIT(A) - 25, Kolkata for Assessment Year 2014-15 & 2015-16 involve common issues and the same, therefore, are being disposed of by a single consolidated order along with the corresponding stay applications filed by the assessee being S.A. Nos. 18 & 19/Kol/2020.

2. Although as many as 15 identical grounds are raised in these two appeals by the assessee, the learned counsel for the assessee has pressed and argued Ground Nos. 4, 5 & 10 which read as under:

"4. For that the lower authorities failed to consider that the grant given by the Government were for specific purposes and it could not be treated

income of the assessee and therefore the same should have been excluded in the assessment.

5. For that the lower authorities failed to consider that income which did not accrue or arise to the appellant was assessed wrongly as its income.

10. For that in the facts and circumstances of the case the receipts of the Board are covered under Article 289 of the Indian Constitution and hence not liable to tax."

3. The relevant facts of the case apropos these Ground Nos. 4, 5 & 10 are that the assessee is a Government Organisation with the main objective of performing activities of controlling pollution. The return of income for the year under consideration was filed by it on 19.11.2015 declaring total income at nil after claiming exemption u/s 10(46) of the Income Tax Act, 1961. During the course of assessment proceedings, the AO noticed that the assessee was notified u/s 10(46) on 04.04.2016 from A.Y. 2016-17 to 2021-22 vide Notification No. 25/2016 in F. No. 196/11/2015-ITA-I. He also noted that the assessee was not in possession of any certificate or notification on the basis of which exemption u/s 10(46) could be claimed / allowed for the year under consideration i.e. A.Y. 2014-15. He accordingly disallowed the assessee's claim for exemption u/s 10(46) for the year under consideration and treating the assessee as an AOP, he computed the entire surplus of Rs. 40,60,04,865/- as the income of the assessee in the assessment completed u/s 143(3) of the Act vide an order dated 02.12.2016.

4. Similarly the claim of the assessee for exemption u/s 10(46) for A.Y. 2015-16 was disallowed by the AO and treating the assessee as an AOP, the surplus of Rs. 53,22,73,708/- was computed by the AO as

the total income of the assessee vide an order dated 23.11.2017 passed u/s 143(3) of the Act.

5. Against the orders passed by the AO u/s 143(3) for both the years under consideration, appeals were preferred by the assessee before the Ld. CIT(A) and while disposing of the same vide his impugned orders, the Ld. CIT(A) adjudicated upon only few grounds raised by the assessee dismissing the other grounds as not pressed. Aggrieved by the orders of the Ld. CIT(A), the assessee has preferred these appeals before the Tribunal.

6. We have heard the arguments of both the sides and also perused the relevant material available on record. As submitted by the learned counsel for the assessee, the issues raised in Ground Nos. 4, 5 & 10 in the present appeals were also raised by the assessee by way of specific grounds raised in the appeals filed before the Ld. CIT(A). He has also submitted that a detailed submission was made on behalf of the assessee in support of its case on these issues and the same as extracted by the Ld. CIT(A) at page no. 32 to 41 of his impugned orders was as under:

“39. Ground No. 4, 5 & 5: The assessee was constituted u/s 4 of the Water (Prevention and Control of Pollution) Act, 1974 under the name "West Bengal Pollution Control Board". The preamble of the Act reads as under:

"An Act to provide for the prevention and control of water pollution and the maintaining or restoring of wholesomeness of water, for the establishment, with a view to carrying out the purposes aforesaid, of Boards for the prevention and control of water pollution, for conferring on and assigning to such Boards powers and functions relating thereto and for matters connected therewith.

WHEREAS it is expedient to provide for the prevention and control of water pollution and the maintaining or restoring of wholesomeness of water, for the establishment, with a view to carrying out the purposes

aforesaid, of Boards for the prevention and control of water pollution and for conferring on and assigning to such Boards powers and functions relating thereto.”

40. From the preamble itself it can be seen that the assessee-board was created to discharge governmental function relating to environment and in particular for prevention & control of water pollution as' well as for maintaining / restoring wholesomeness of water. The assessee-board was also entrusted with the task of prevention, control and abatement of air pollution and giving effect to decisions taken in United Nations Conference and Human Environment. Further the assessee-board was empowered to act as state-agent for preservation of natural resources of the earth which includes quality of air and control of air pollution.

41. Under various provisions of the environment legislatures, namely the Water (Prevention and Control of Pollution) Act, 1974 and The Air (Prevention and Control of Pollution) Act, 1981, it can be seen that the assessee is created, controlled and performed as desired by the government. As for example, u/s 4 of the Water Act, the state government specifies the powers conferred on it and assigns the functions to be performed. U/s 17 of the Water Act, the assessee has to plan a comprehensive programme for the prevention, control or abatement of pollution of streams and wells in the state and to secure the execution thereof; Further it has to advise the state government on any matter concerning the prevention, control or abatement of water pollution; Over and above it has to perform such other functions as may be prescribed / entrusted to it by the state government. Further just like a government department, it has to mobilize its resources from the budgetary allocation, it has to borrow money only on government approval and it has to place its budget before the government. Further it has to incur expenditure in accordance with the instructions laid down under the General Financial Rules and other instructions issued by the government from time to time. U/s 50 of the Water act, all members & officers of the assessee-board shall be deemed to be public servants within the meaning of section 21 of the Indian Penal Code while acting in pursuance of any of the provisions of this Act.

42. Considering the above statutory aspects, the appellant contends that the income derived by it, is the income of the State and is therefore not liable to tax under Article 289(1) of the Constitution of India. Without prejudice, it is contended that the activities of the appellant board constitute the functions incidental to the ordinary functions of the State and therefore, its income is immune from tax under Clause (3) to Article

289 of the Constitution of India. In fact the state cannot allow the functions to be discharged by any private entity. These functions can only be discharged by the state or any one appointed by it on its behalf to discharge the above state functions.

43. It is submitted that the functions performed by the appellant broadly fall under **Article 48A of the Constitution of India** which provides for protection and improvement of environment falling under the directive principles of State Policy in Part IV of the Constitution of India and accordingly, any income derived in the exercise of functions performed by the State or incidental to ordinary functions of the State is not liable to tax under **Article 289(1) / 289(31) of the Constitution of India**.

40. Apart from the above, the distinguishing features of the assessee which entitles to consider its income as 'state income' are as follows:

- a) The appellant board does not carry on any business / commercial activity.
- b) The appellant board is only a regulatory body for public welfare.
- c) The appellant board was appointed exclusively for carrying out the state function or the state obligation mandated by the Constitution of India as well as by the statute.
- d) The functions to be discharged by the Board are set out in the Water (Prevention and Control of Pollution) Act, 1974 and The Air (Prevention and Control of Pollution) Act, 1981.
- e) The appellant board is vested with powers which only a state discharge and not any private entity or a private organization.
- f) If the veil of the assessee board is lifted, it would be seen that state is the person running and controlling the board.
- g) Even possessing of own funds or PAN No. does not make any difference since the appellant board is acting as an exclusive agent of the state for performing a state function and a state obligation which falls wholly in the realm of state domain.
- h) As the activity carried on by the board is of such a nature which the state alone can carry on, the income generated / derived from such activity has to be treated as income of the state government.

41. The relevant provision contained under article 289(1) of the Constitution of India, is reproduced as follows:

"Exemption of property and income of a State from Union taxation (1) the property and income of a State shall be exempt from Union taxation.

(2) Nothing in clause (1) shall prevent the Union from imposing, or authorising the imposition of, any tax to such extent, if any, as Parliament may by law provide in respect of a trade or business of any kind carried on by, or on behalf of, the Government of a State, or any operations connected therewith, or any property used or occupied for the purposes of such trade or business, or any income accruing or arising in connection therewith.

(3) Nothing in clause (2) shall apply to any trade or business, or to any class of trade or business, which Parliament may by law declare to be incidental to the ordinary functions of government,"

42. Thus Article 289 is divided into three parts: while clause (1) of Article 289 says that the property and income of State shall be exempt from union taxation, clause (3) provides that nothing in clause (2) which talks about imposition of tax, shall apply to any trade or business, which parliament may by law declared to be incidental to the ordinary functions of government. Thus, a plain reading of the aforesaid clauses of Article 289 makes it clear that they are independent of each other and speaks of three different situations

43. Section 4 of the Water (prevention and control of Pollution) Act, 1974, empowers the state government to constitute a state pollution control board through a notification published in the official gazette for exercising such powers and functions as may be assigned to the board under the Act. Similarly, section 4 of The Air (prevention and control of pollution) Act, 1981, provides that state pollution control boards constituted under section 4 of The Water (prevention and control of pollution) Act, 1974 shall be deemed to be the state board for the prevention and control of air pollution. Further other provisions of both the aforesaid Acts, including assimilation of funds, preparation of budget, spending of money, borrowings for short term & long term etc. leaves no room for doubt that the state government exercises control over the functioning of the board.

44. Further section 62 of The Water (prevention and control of pollution) Act, 1974 empowers the state government to supersede the state pollution control board and upon such supersession, the state government takes over all the powers, functions and duties performed by the state board and also property owned or controlled by the board shall vest in the state government. Therefore, from the aforesaid provisions, it can be seen that though the board apparently seems to possess an independent entity, in

fact it is not so. Mere possession of PAN or having separate logo will not change the real situation.

45. Therefore, examining the provisions contained under the Water Act, 1974 or the Air Act, 1981 vis-a-vis the provisions contained under Article 48A read with Article 289 of the Constitution of India, it is evident that the board is exercising the powers/functions as an agent/extended arm of the state government and these cannot be characterized to be in the nature of trade or business. Article 48A of the Constitution states that "The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country". The assessee-board was constituted under the Water Act, 1974 / the Air Act, 1981 to do this state function assigned by the Constitution and accordingly all receipts/income as were accrued / arises to the assessee, essentially accrued/arisen to the state government. When the property or income of state is exempt from union taxation and when the board has no real existence other than the state, the expression 'income of a state' as incorporated under Article 289(1) has to be interpreted to mean, the income of the board. In other words, the board cannot be considered as some authority other than the state for all real purpose. Therefore, the assessee is eligible to claim immunity from taxation under clause (1) of the Constitution.

*46. Even the Water (prevention and control of Pollution) Act, 1974 & The Air (prevention and control of pollution) Act, 1981 clearly stipulates that the board can be dissolved by the state government at any time and immediately upon such eventuality the property vests with, the state government. Therefore considering the various provisions of the environmental legislations and considering the **Article 48A & Article 289 of the Constitution**, the income / receipts of the assessee-board can be fairly interpreted to mean as the income / receipts of the state government and such income / receipt did not accrue / arise in the hands of the assessee-board. U/s 4 of the IT Act income tax is chargeable in respect of total income. When the income does not accrue / arise to the assessee, nothing is includible in the total income computed u/s 5 of the IT Act. Therefore, when the income / receipt accrues to the government and not to the assessee-board, is eligible to get immunity from taxation under article 289(1) of the Constitution of India.*

47. Without prejudice we further submit that all the receipts made in various heads, are capital receipts and therefore not subjected to Income tax. The main receipts of the assessee-board are comprised of appropriation of funds by the state government from state consolidated

fund as required u/s 35 of the Water (prevention and control of Pollution) Act, 1974 and by the central government from the consolidated funds of India u/s 8 of the Water (Prevention and Control of Pollution) Cess Act, 1977 from the proceeds collected under the Act. The funds so released by the government / collected by the assessee-board on behalf of the government, requires to expend only to meet the specified objectives as enumerated in the respective enactments. In other words, the assessee was not the owner of the fund and cannot claim any right to use the fund in any manner that it desires, rather the assessee was under obligation to spend the fund for the specific purpose as enumerated in the Water Act, 1974, the Air Act, 1981 & the Water Cess Act, 1977. In essence the whole fund as held by the assessee-board is meant to protect the environment, to conserve the natural resources as well as to promote the state's overall objective of public welfare. Thus by nature all the receipts in the hands of the assessee-board are capital receipts and therefore not liable to be includible in the total income for levy of income tax u/s 4 of the Income Tax Act"

*48. It is well settled that every receipt or amount received/accounted, is not income and to consider the same, it is required to examine the nature, character and purpose of any realization. Amount received is income in the hands of the assessee, if he has title/right over the said amount in form of dominion and right to use the said amount. This principle was substantiated by the Hon'ble Delhi High Court in the case of **CIT Vs. DTTDC** in ITA Nos. 166/2001, 161,/2004 & 320/2004 & ITR Nos. 30-33/1997. The facts of the aforesaid case are identical to the facts of the assessee's case in the present appeal. The assessee is a Government company and as directed by the Government, the assessee-company undertook a massive investment programme in transport infrastructure. As the same requires substantial fund, the assessee was allowed to run retail trade in country liquor and held the money under a fund named "Transport infrastructure Utilisation Fund". The assessee did not consider the same as income on the ground that these receipts were mandatorily required to be spent for construction of flyovers etc. and were not to be regarded as receipts which are in the nature of income. While dealing with the aforesaid claim of the Assessee, the Hon'ble Delhi High Court observed as follows:*

'25. Every receipt or amount received/accounted, is not income. Amount received is income in the hands of the assessee if he has title/right over the said amount in form of dominion and right to use the said amount. When examining, the concept of income' one has to keep in mind, commercial reality, specialty of the situation rather than pure theoretical or doctrine

aspects. The business aspect of the matter has to be viewed as a whole but without disregarding the statutory language. Depending upon the nature and character of the deposits/payments, should be given to hold whether or not the amount received was income/profit."

49. In the case of Siddeshwar Sahakari Sakhar Karkhana Ltd. vs. CIT & Ors., (2004) 270 ITR 1 (SC), the word 'income' or 'profit' was examined and interpreted. In the said case, issue arose whether deposits/payments made in different heads/parties was diversion of income at source or not and whether the deposits/funds have to be included in the income earned. The Supreme Court emphasized that the nature and character of the deposits/payments is determinative and relevant.

50. In the case of CIT vs. Bazpur Coop. Sugar Factory Ltd (1988) 172 ITR 321 (SC), the question arise as to whether the amounts credited to loss equalization and capital redemption reserve fund were held to be income/profit. The Apex Court held that all realizations do not get impressed with the character of revenue receipts includable in the taxable income and when the assessee does not have unfettered dominion over the money, the same cannot be treated as income. The Supreme Court expounded that the following questions should be raised and answered:

"(1) Do the receipts bear a character of income at the time it reached the hands of the assessee?

(2) Does the title in the receipt vest with the assessee?

(3) Does the assessee exercise complete dominion over the funds in question?

(4) Does the assessee regarded the money as that of a third party or treat the money of that of a third party/, with assessee having no unfettered dominion over the same?

(5) Does the assessee stand in the position of debtor in relation to those funds/deposits?

(6) What is the primary purpose of collection of said amount?"

51. In the present case, the assessee-board requires only to fulfil the objective of the Water Act, to expend all the receipts the Air Act and other environmental Laws. Therefore considering the facts of the case read with the principal established by the Hon'ble Delhi High Court and the terms of reference stated by the Apex Court, the receipts in the hands of the assessee-board requires to consider as capital receipts not liable to tax.

52. Prayer: In view of the above and in view of the fact of the case we submit that no income had accrued/arisen in the hands of the assessee-

board and that all the receipts of the assessee-boards are only capital receipts and that all the receipts/income of the assessee-board are state income covered under Article 289 of the Constitution, the receipts/incomes are not liable to be taxed under the provisions of the Income Tax Act, 1961. Accordingly, we pray before the Hon'ble CIT(A) to set aside the assessment determining a total income of Rs. 40,60,04,865/-"

7. The learned counsel for the assessee has contended that Ld. CIT(A) however dismissed the relevant grounds by mentioning in his impugned orders that they were not pressed. He has contended that the said grounds were not only pressed by the assessee but even a detailed submission in support of the issues raised therein was made by the assessee which was extracted by the Ld. CIT(A) in his impugned orders. He has contended the Ld. CIT(A) therefore was not justified in dismissing the grounds as not pressed and urged that the matter may be sent back to the AO for deciding these issues as same were not even considered and decided by the Assessing Officer. Keeping in view all the facts of the case as borne out from the record, we are inclined to accept this contention of the learned counsel for the assessee. Even the ld. DR has not raised any objection for sending the matter back to the AO for adjudication of these vital issues relating to the assessment of the assessee for both the years under consideration after proper and necessary verification. We accordingly set aside the impugned orders of the ld. CIT(A) on these issues and restore the matter to the file of the AO for deciding the same on merit in accordance with law after giving the assessee proper and sufficient opportunity of being heard.

8. As a result of disposal of the corresponding appeals of the assessee for A.Y. 2014-15 and 2015-16 by us, the stay applications

filed by the assessee being S.A. Nos. 18 & 19/Kol/2020 have become infructuous and the same are accordingly dismissed.

9. In the result, both the appeals of the assessee are treated as partly allowed for statistical purpose while both the stay applications of the assessee are dismissed.

Order Pronounced in the Open Court on 20th March, 2020.

Sd/-
(A.T. VARKEY)
JUDICIAL MEMBER

Sd/-
(P.M. JAGTAP)
VICE PRESIDENT

Dated: 20/03/2020
Biswajit, Sr. PS

Copy of order forwarded to:

1. West Bengal Pollution Control Board, 10A, Block – LA, Paribesh Bhawan, Sector – III, Bidhannagar, Kolkata – 700 098.
2. ACIT, (Exemption), Circle – 1(1), 10B, Middleton Row, 6th Floor, Kolkata – 700 071.
3. The CIT(A)
4. The CIT
5. DR

True Copy,

By order,

Assistant Registrar / H.O.O.
ITAT, Kolkata