

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

(Through Video Conferencing)

BEFORE SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER
AND
SHRI K.NARASIMHA CHARY, JUDICIAL MEMBER

ITA Nos. 4684 & 5515/Del/2017

Assessment Years : 2013-14 & 2014-15

DCIT, CIRCLE 18(2),
NEW DELHI

(Appellant)

Vs. NTPC ELECTRICAL SUPPLY COMPANY
LTD., NEW DELHI
NTPC BAHWAN, CORE-7, SCOPE
COMPLEX, INSTITUTIONAL AREA,
LODHI ROAD, NEW DELHI - 110003
(PAN: AABCN7520Q),
(Respondent)

Appellant by : Ms. Pramita M. Biswa, CIT(DR)

Respondent by : Shri Ved Jain, Advocate & Sh. Ashish
Goel, CA

Date of hearing : 04.08.2020

Date of pronouncement : 07.08.2020

ORDER

PER K NARASIMHA CHARY, JM :

These two appeals are preferred by Revenue challenging the deletions made by the Learned Commissioner of Income Tax (Appeals)-6, Delhi ("Ld. CIT(A)"), for the assessment years 2013-14 and 2014-15 in the case of M/s NTPC Electric Supply Company Ltd ("the Assessee").

2. Learned Assessing Officer made an addition of Rs. 66,20,53,855/- for the assessment year 2013-14 and Rs. 65, 10, 39, 448/-for the assessment year 2014-15 on account of the interest earned by the

Assessee in the respective previous years on the deposit in its bank account out of the funds received by the Assessee to be used for its own and the claim of transfer of interest income to the payer holding that it was in contravention of section 60 of the Income Tax Act, 1961 (for short "the Act"); and a sum of Rs. 2,58,93,067/- on account of retirement and other benefits claimed by the Assessee treating the same as uncertain liabilities in respect of the assessment year 2014-15. These are the subject matter of these 2 appeals.

3. Brief facts of the case are that the Assessee is engaged in the business of distribution of electricity, consultation, supervision and project and inspection services; that it was incorporated on 21/8/2002 as a wholly-owned subsidiary company of NTPC Ltd (A Government Undertaking) with the objective to make foray in supply and distribution of electricity; and that the company has been entrusted with the rural electrification work under Rajiv Gandhi Gramin Vidyutikaran Yojana (RGGVY).

3.1 Insofar as the claim of the Assessee in respect of the addition of interest income is concerned, case of the Assessee has been that the Ministry of Power ("MOP") had launched the RGGVY also called Bharat Nirman Programme of the Government of India, under which every village and poor households were to be provided electricity by 2012. For the formulation and implementation of the scheme, the MOP has entrusted the NTPC and other CPSUs with the REL Ltd as the nodal agency since they have technical and professional competence. A Memorandum of Understanding (MOU) was signed on 16/8/2004 between the NTPC and the REC wherein they have agreed to be associated in the formulation and implementation of the project and as per the MOU funds required for

execution of the project it shall be realisable directly to the NTPC by the REC including a fixed percentage of service charges and no other charges were payable to NTPC to stop their after a supplementary agreement was also entered between the REC and NTPC Ltd where under the NTPC is entitled to establish a suitable organisational structure for the implementation of the project and consequently NTPC assigned the project work to the Assessee company, a wholly-owned subsidiary of NTPC Ltd. The Supplementary Agreement provides that for project financing by REC Ltd., construction and implementation, taking over of the project, shall be discharged by the Assessee-Company, on behalf of NTPC. Assessee Company received funds from REC Ltd., in line with the direction of the Government of India and were kept in a separate bank account as a fixed deposit in the State Bank of Hyderabad, and interest earned on such deposit has also been credited to such a bank account. According to the clarification of the Ministry of Power (MOP) the interest earned of such funds was to be accounted for and used for the cost of the project and such interest is not an income of the Assessee Company. Pursuant to the directions issued by the MOP and REC Ltd., the Assessee utilized the interest amount for the cost of the project and transferred unutilized interest to the Ministry of Power. In these circumstances, the Assessee Company contented before the AO that interest received by it cannot be treated as its income.

3.2 Ld. AO, however, did not dispute the facts stated by the Assessee, but did not accept the contention of the Assessee that

interest is not their income, and made the additions in question holding that the funds deposited with the bank are the Assessee's funds only on which interest income was earned; that it is the Assessee's account which has credited by the bank with such interest income; that the certificate of TDS deducted by the bank has been issued in the name of the Assessee only, and therefore, forms part of it is Assessee's income; and that the Assessee has failed to point out any provision in the Act, which may grant an exemption to the Assessee from taxing such interest income.

3.3 Aggrieved by the order of the Ld. AO, Assessee preferred appeals before the Ld. CIT (A), and the Ld. CIT(A) deleted the said additions relying on the order passed by a Coordinate Bench of this Tribunal in the Assessee's own case for the AY 2009-10 by holding that the condition stipulated in the grant of funds clearly provides that the interest earned on deposit shall be used for the cost of projects by the way of adjustment in the last instalment, that, therefore, there is no difference in the funds granted by the Govt. and the interest credited in the bank account of the Assessee, so far as Assessee is concerned; that both the items are to be utilized towards the cost of the project and both the item are not available to be used as income of the Assessee; that the Government of India clarified that the interest accrued on the funds deposited is not the income of the Assessee company. On this premise, Ld. CIT(A) held

that the AO has erred in treating the interest component as income of the Assessee Company.

4. Revenue, therefore, preferred these appeals aggrieved by the said findings of the Ld. CIT(A).

5. At the outset, Ld. AR submitted that the learned CIT(A), while deleting the addition has relied upon the order passed by the Tribunal in the Assessee 's own case for the AY 2009-10 in ITA No. 240/Del/2013 dated. 11.01.2017; that the appeal of the Revenue against such an order, before Hon'ble Delhi High Court in the case of PCIT v. NTPC ELECTRIC SUPPLY COMPANY in Appeal No. ITA No. 511/2017 was dismissed and the decision of the Ld. CIT(A) and the Tribunal were confirmed.

5.1 Further appeal by the Department before Hon'ble Supreme Court in (Civil) Diary No(s). 11488/2018, was also dismissed and thereby the issue attained finality. For the A.Y. 2011-12 also the Hon'ble Delhi High Court in ITA No. 486/2018 upheld the deleted addition made by the Ld. AO on the account of interest credited by the Bank. The Tribunal deleted the similar addition in AY 2012-13 in ITA NO. 777/Del/2017. Copies of the orders of the Tribunal, Hon'ble High Court and the Hon'ble Supreme Court are produced. We perused the same. There is no dispute that interest income amount in question was earned by the Assessee on the deposit of advances received from REC Ltd. for Rajiv Gandhi Gramin Vidyutikaran Yojana

('RGGVY'); that a Memorandum of Understanding ('MOU') was signed on 16th August 2004 between REC and the Assessee whereby inter alia it was agreed that interest earned on the deposits would be used as part of the cost of the projects and no other purpose; that according to the clarification of the Ministry of Power (MOP) the interest earned of such funds was to be accounted for and used for the cost or me project and such interest is not an income or the Assessee company; and that pursuant to the directions issued by the MOP and REC Ltd., the Assessee utilized the interest amount for the cost of the project and transferred unutilized interest to the Ministry of Power.

5.2 In view of the consistent view taken by the Id. CIT(A) in Assessee 's own cases for AY 2009-10, AY 2011-12 and AY 2012-13, the decision of the Coordinate Benches of this Tribunal confirmed by the Hon'ble High Court and the Hon'ble Supreme Court in Assessee 's own case, we are of the considered opinion that the action of the Id. CIT(A) in deleting the disallowance is neither illegal nor irregular and the same cannot be disturbed. We, therefore, decline to interfere with the impugned findings of the Id. CIT(A) on this aspect and Ground No. 1 and 2 in ITA No. 4684/Del/2017 and Grounds No 3 and 4 in ITA 5515/Del/2017 are dismissed.

6. Brief facts of the case on this aspect are that, the assessee is a subsidiary of NTPC Ltd, a Public Sector Undertaking, and is engaged in the business of distribution of electricity, consultation,

supervision, and project & inspection services; that during the course of assessment, the Id. AO noted that the assessee company has debited the expenses of Rs. 2,58,93,067/- towards contribution to the Provided Fund and Superannuation benefit of the employees, and are required the assessee to explain why expenses on superannuation and retirement benefit should not be disallowed.

6.1 Case of the assessee before the learned Assessing Officer was that, that the assessee, being a PSU, is governed by the Dept, of Public Enterprise guidelines; that all the employees of the assessee company are on a secondment basis from the holding company i.e. NTPC Ltd.; that **following the policy of Department of Public Enterprise (DPE), all the payments/emoluments of the employees including the superannuation benefits are made; that the Office Memorandum dated 26.11.2008 of the Department of Public Enterprise, clarifies that the PSU employees superannuation benefits, which include contributory provident fund, gratuity, pension, and post superannuation medical benefit, would be allowed at the rate of 30 percent of the salary, that the holding company, NTPC following the aforesaid memorandum raised the demand equal to 30 percent of the salary of the seconded employees on the assessee company; and that the demand so raised by the NTPC has been paid during the year.**

6.2 Further case of the assessee was that the demand so raised by the NTPC has been paid to it, and that it is the NTPC, who will ultimately settle the employees' benefits in the future and there will

not be any liability on the assessee company. According to the assessee, the claim of the assessee is allowable as legitimate business expenditure.

6.3 Ld. AO, however, did not accept the submissions of the assessee and made the disallowance stating that the *assessee has* not furnished any basis of calculation of superannuation benefit; that the retirement benefit debited in the P/L account is at best an estimate and no actuarial valuation has been provided; and that the liabilities arisen on account of leave, superannuation, and other benefit are not ascertained liabilities.

6.4 Aggrieved by the order of the Ld. AO, the assessee preferred an appeal before the Ld. CIT(A), and the Ld. CIT(A) deleted the said disallowance relying on the order passed by his predecessor for the AY 2009-10 and also on order for the AY 2013-14. Ld. CIT(A) observed that identical issue was considered by his predecessor in the case of the assessee for the AY 2009-10 and answered by stating that post-retirement medical and other benefits were also paid by the assessee during the relevant previous year to the parent company NTPC based on the demand raised by it, as all the employees of the company are on secondment basis from its holding company; that the quantum has also been ascertained as per the DPE direction; and that, therefore, they are ascertained liabilities and hence deductible from the taxable income. While following the above decision, the amount demanded from them was found to have been admittedly paid by the

assessee, and, therefore, there is no future cost as no provision has been made by the company towards postretirement benefits and these are business expenditures, and that the expenses paid by the company are not the future cost to the company because it has been accounted on the basis of demand raised by the NTPC and the direction of DPE.

6.5 Aggrieved by such finding of the Ld. CIT(A), Revenue is in the appeal against the order passed by the CIT(A).

6.6 It is the submission of the Ld. AR that the assessee during the course of assessment has informed the AO that the calculation of employee benefits was done by the Parent Company, NTPC, in compliance with the directions of Department of Public Enterprise, dated 26.11.2008; that since, all the employees all of the company are on the secondment basis from the Parent Company, NTPC Ltd.; that, therefore, NTPC Ltd. has raised demand on the assessee company to pay 30 percent of the salary as per DPE direction; that the assessee company has paid the demand to NTPC Ltd. who in turn has subsequently paid it to the approved funds as per the requirement of the statutory provisions, and this fact was not challenged by the AO. He further submitted that the Assessee, has also submitted that in the future, there will be no demand on the assessee towards the employees' benefit since the payment will be ultimately made by the NTPC. According to him the assessee and the NTPC being a PSU are governed by the DPE guidelines and therefore,

they are bound to follow the same; that the liability to pay the retirement benefit has arisen based on the demand raised by the NTPC following the direction of DPE guidelines; and that, therefore, the liability is an ascertained liability that has been crystallized and discharged by the assessee during the year and the same could not be named as an uncertain provision. He placed the reliance of decision of Hon'ble Supreme Court in the case of Bharat Earth Movers Limited Vs CIT (245 ITR 248), CIT v. Bharat Heavy Electrical Limited, 352 ITR 88 (Del), Metal Box Co. of India Ltd. v. Their Workmen [1969] 73 ITR 53 (SC) in support of his contention.

6.7 Per contra, it is the submission of the Ld. DR that the legality of the view taken by the Assessing Officer or the Ld. CIT(A) revolves around the question as to the status of the impugned employees - whether they are the legal employees of the assessee or the employees to the assessee by the NTPC. She submits that unless and until the authorities below verify this fact, it's not open for the Ld. AR to contend that for successive years the stand taken by the Ld. CIT(A) is consistent and the same had to be taken by this Tribunal also. She submits that it's not the case where the issue was scrutinized by the Tribunal at least once and, therefore, it cannot be said that the Tribunal is bound to follow the untested view taken by the Ld. CIT(A). She submits that there is nothing on record to hold that the employees in question are not the legal employees of the assessee or that the assessee is only an economic employer.

6.8 Ld. AR fairly concedes that this issue has never been considered at the Tribunal's level. He submits that everything is a matter of record and the status of the employees in question is a verifiable fact. He further submits that if the employees in question are not the legal employees of the assessee, but according to the mandate of the Department of Public Enterprise, the NTPC seconded those employees to the assessee and the assessee was to meet the demand equal to 30 percent of the salary of the seconded employees on the assessee company, which obligation the assessee complied with and claimed deduction of such an expenditure, and, therefore, the same is allowable expenditure and it is further NTPC to deposit the amount in the Social Security account of the employee, and if for any reason the NTPC does not do so, they are liable for breach of such an obligation, and not the assessee.

6.9 On this aspect, both the Ld. AR and the Ld. CIT(DR) submitted that the verification of the status of the employees in question - whether they are the legal employees of the assessee are not will clinch the issue and, therefore, for such purpose the matter may be sent back to the file of the learned Assessing Officer who will verify this fact and in case the employees in question are found to be the legal employees of the assessee the addition can be maintained and if not, no such addition could be made. We are in agreement with such a suggestion.

7. Accordingly, we set aside the impugned order on this aspect and remand the issue to the file of the learned Assessing Officer for verifying the fact whether or not the employees in question were the legal employees of the assessee and if such employees were not the legal employees of the assessee, no addition could be made on this count. Grounds No. 1 and 2 of ITA No. 5515/del/2017 are allowed, accordingly, for statistical purpose.

8. In the result, the ITA No. 4684/Del/2017 (AY 2013-14) is dismissed and ITA No. 5515/Del/2017 (AY 2014-15) is partly allowed for statistically purposes.

Above decision was announced on 7th August, 2020.

Sd/-

(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Sd/-

(K.N. CHARY)
JUDICIAL MEMBER

Copy forwarded to: -

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

Assistant Registrar