

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'F', NEW DELHI**

**BEFORE SH. ANIL CHATURVEDI, ACCOUNTANT MEMBER
AND SH. SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER**

(THROUGH VIDEO CONFERENCING)

ITA No.7146/Del/2017
(for Assessment Year 2014-15)

Paschimanchal Vidhyut Vitran Nigam Ltd., C/o. Adv. Vinod Kumar Goel, 200, Western Kutchery Road, Meerut PAN No. AAACP 5610 N	Vs.	DCIT Circle - 2 Meerut
(APPELLANT)		(RESPONDENT)

And

ITA No.7308/Del/2017
(for Assessment Year 2014-15)

DCIT Circle - 2 Meerut	Vs.	Paschimanchal Vidhyut Vitran Nigam Ltd., C/o. Adv. Vinod Kumar Goel, 200, Western Kutchery Road, Meerut
(APPELLANT)		(RESPONDENT)

Assessee by	Shri Vinod Goel, Adv.
Revenue by	Smt. Sushma Singh, CIT- D.R.

Date of hearing:	28/10/2020
Date of Pronouncement:	02/11/2020

ORDER

PER ANIL CHATURVEDI, AM:

The cross appeals filed by the assessee and Revenue are directed against the order dated 29.09.2017 of the Commissioner of Income Tax (A), Meerut relating to Assessment Year 2014-15.

2. The relevant facts as culled from the material on records are as under:

3. Assessee is a subsidiary company of U. P. Power Corporation Ltd. and is stated to be engaged in the business of power distribution. Assessee filed its return of income for A.Y. 2014-15 on 30.09.2014 declaring loss of Rs. 7,64,82,79,964/-. The case was selected for scrutiny and thereafter, the assessment was framed u/s 143(3) of the Act vide order dated 02.12.2016 and the total loss was determined at Rs. 20,11,28,97,324/-. Aggrieved by the order of AO, Assessee carried the matter before CIT(A) who vide order dated 29.09.2017 in Appeal No. 227/2016-17 granted partial relief to the assessee. Aggrieved by the order of CIT(A), assessee and Revenue are now in appeal before us. Assessee in ITA No. 7146/Del/2017 has raised the following grounds of appeal :

“1. That AO as well as CIT(A) has not considered that disallowance Electricity Duty payable U/s 43B of

Rs.2,08,76,00,000/- is arbitrary, unjust and not according to law. The Ld AO totally ignored the fact that the Electricity Duty is not covered under the provisions of Section 43B as it is not a tax, duty or cess imposed on the assessee.

- 2. That AO as well as CIT(A) has not considered the case laws, hence addition made by AO and confirmed by CIT(A) is bad in law.*
- 3. That the assessee has right to add, modify or delete any ground during the appeal proceeding.”*

4. On the other hand, Revenue in Appeal No.7308/Del/2017 has raised the following grounds :

- “1. Whether in the facts and circumstances of the case, the Commissioner of Income Tax (Appeals) has erred in law and fact in deleting the addition of Rs.9,86,28,93,000/- made the AO u/s 40(a)(ia) of the I.T. Act, 1961 for no deduction of tax at source on Transmission / Wheeling charges u/s 194J by ignoring the Advance Ruling made by the Authority of Advance Ruling (Income Tax) in the case of Ajmer Vidyut Vitran Nigma Ltd. in AAR No.1012 of 2010 dated 27th August 2012, wherein it has been held that “the transmission, and wheeling charges paid by the applicant to RPVN are in the nature of fees for technical services and the applicant is obliged to without tax thereon under section 194J of the Act.*
- 2. That in the facts and circumstances of the case, the order of the Commissioner of Income Tax (A), Meerut may be set aside and that of the AO be restored.*
- 3. That the appellant craves leave to add, modify and/or delete any ground(s) of appeal.”*

5. We first proceed to decide the quantum appeal in Appeal No 7146/Del/2017 for A.Y. 2014-15.

6. During the course of assessment proceedings, AO on perusing the details of “current liabilities” noticed that assessee had shown Rs. 590.10 lakhs (rounded off) under the head electricity duty and other levies payable to Government. On the basis of the details furnished by assessee, AO noticed that assessee had made assessment of electricity duty of Rs. 5,52,98,00,000/- of which Rs. 3,44,22,00,000/- was adjusted from the subsidy and the balance amount of Rs.2,08,76,00,000/- was not paid by the assessee before filing the return of income. Assessee was asked to justify as to why the amount unpaid not be disallowed u/s 43B of the Act to which the assessee *inter alia* submitted that electricity duty is tax on electricity consumption imposed on the consumer based upon their consumption. It was further submitted that assessee collects the duty from the customer and pays to the U. P. Government and the amount of electricity duty is deducted by the U. P. Government from the subsidy given by it. It was thus submitted that electricity duty is collected by the assessee on behalf of Government of U. P. and the provisions of section 43B are not applicable to the assessee. The submissions of the assessee were not found acceptable to AO. AO was of the view that provisions of 43B are applicable to the amounts which have remained unpaid till the date of filing the

return of income and accordingly he disallowed Rs.208,76,00,000/-. Aggrieved by the order of AO, assessee carried the matter before CIT(A) who upheld the order of AO. Aggrieved by the order of CIT(A), assessee is now before us.

7. Before us, Learned AR reiterated the submissions made before the lower authorities and further placed reliance on the decision of Hon'ble Kerala High Court in the case of Kerala State Electricity Board Vs DCIT (2010) 329 ITR 91. He further submitted that identical issue arose in assessee's own case in A.Y. 2015-16 and the Hon'ble ITAT vide order dated 16.01.2020 (in ITA No 4980/Del/2018) has decided the issue in Assessee's favour. He pointed to the relevant findings of the order and further submitted that since the facts of the case under consideration is identical to that of A.Y. 2015-16, the ground be decided similarly.

8. Ld DR on the other hand supported the order of lower authorities. She further submitted that the reliance placed by the assessee in the case of Kerala State Electricity Board Vs. DCIT (2010) 329 ITR 91 is misplaced because the Act under which the electricity duty was collected in the case of Kerala Electricity Board (supra) is different from the Act under which the present assessee had collected the electricity duty. She further relied on the decision of Hon'ble Gujarat High Court in the case of CIT vs.

Ahmedabad Electricity Co. Ltd. (2003) 262 ITR 97 and CIT vs. Gujarat Vikas Nigam Ltd. (2010) 322 ITR 539 (Guj).

9. We have heard the rival submissions and perused the materials available on record. The issue in the present ground is with respect to disallowance u/s 43B. We find that identical issue arose in Assessee's own case in A.Y. 2015-16 and the Co-ordinate Bench of the Tribunal decided the issue by observing as under:

14. *"We have heard the rival submissions and perused the material available on record. We find that the section 4 and 5 of the Electricity Duty Act 1963 reads as under:*

"(4) Every consumer belonging to any of the classes specified in column (2) of the Schedule shall pay every month to the Government in the prescribed manner a duty calculated at the rate specified against that class in column(3) thereof:

Provided that in cases where the supply of energy to a consumer is regulated by an agreement entered into between the Government or the licensee and the consumer it shall be competent for the government either to reduce the rate at which duty is leviable on such consumer or to exempt such consumer from payment of duty under this section subject to, such terms and conditions as maybe imposed by the Government.

(5) Every licensee shall collect and pay to the Government at the time and in the manner prescribed, the Electricity Duty payable u/s.4 of this Act on the units

*of energy consumed by every c supplied by him the .
duty so payable shall amount recoverable by the
licensee in be a debt due by him*

16. Thus, as per section 4 of the such Act the duty is levied on the consumer of electricity specified in column 2 of the schedule and u/s.5 of the Act, the assessee is oblige to collect from the consumers above mentioned duty and pay to the Government at the time and in the manner as prescribed by the rules, thus we find that the Electricity Duty collected on behalf of the Government of Uttar Pradesh as their agent and credited to the State Government Account periodically as directed by the State Government. Sometimes, the duties also adjusted against the subsidy received by the assessee from the Government of Uttar Pradesh. Thus, the amount so collected as electricity Duty is not air tax payable by the assessee but the same is amount collected by the assessee as the agent of State of Uttar Pradesh, therefore, this does not amounts any sum payable by the assessee by way of tax duty or fee by whatever name called under any the tithe being in force as-provided u/s.43B(a) of the Act. We further find that the issue is squarely covered in favour of the assessee by the decision of Honble Kerala High Court in the case of Kerala State Electricity Board vs. DCIT [2010J 329 ITR 91 (Kerala) wherein the Hon'ble Kerala High Court has held in para 23 to 27 as under:

...“23. Coming to the next question of whether Section 43Bof the Act

.....

We are therefore of the opinion that Section 43B cannot be invoked in making the assessment of the liability of the appellant under the Income Tax Act with regard to the amounts collected by the appellant pursuant to the obligation cast on the appellant under Section 5 of the Electricity Duty Act, 1963.”

17. Thus, in the light of above decision, we find that the assessee has collected amount as agent on behalf of State of Uttar Pradesh pursuant to the statutory obligation to collect such an amount only as agent of the Government of Uttar Pradesh, as per provisions of Section 4 & 5 the Electricity Duty Act, 1963, therefore, the same is not covered under Clause u/s. 43B(a) of the Act as the any sum payable by the assessee by way of tax duty which means the tax is the indicative of nature of liability. Therefore, the obligation of the assessee being an agent of Uttar Pradesh Government the amount collected by duty is in the fiduciary capacity, therefore, respectfully following the principle laid down in the aforesaid decision, we allow the appeal of the assessee on this ground.”

10. Before us, no distinguishing feature in the facts of the case under the year under consideration and that of A.Y. 2015-16 has been pointed out by the Revenue but however Revenue has placed reliance on the decisions of Hon'ble Gujarat High Court cited herein above. It is a settled legal position that the rule of consistency is required to be followed by the Income-tax authorities and that in the absence of any difference in the facts and circumstances of the case for the assessment year under consideration, the Assessing Officer is not justified in disallowing the claim. Further, Revenue has also not placed any material on record to demonstrate that the order of the Co-ordinate Bench of Tribunal passed in the case of assessee for A.Y. 2015-16 has been stayed/ set aside or overruled by higher judicial forum. In such a situation, following the rule of consistency and following the order of the Tribunal in the assessee's own case for A.Y. 2015-16 and

for similar reasons hold that AO was not justified in disallowing the expenditure by invoking the provisions u/s 43B. We therefore, set aside the order of CIT(A) and **thus the ground of appeal of the assessee is allowed.**

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

12. We now take up Revenue's appeal in ITA No.7308/Del/2017 for A.Y. 2014-15.

13. During the course of assessment proceedings, AO noticed that assessee had claimed expenditure under the head "wheeling charges/ transmission charges" but it had not deducted any TDS on such expenditure. The assessee was asked to show cause as to why the expenditure not be disallowed u/s 40(a)(ia) of the Act on account of failure to deduct TDS. Assessee's submissions including the reliance placed on the decisions cited by the AO in his order were not found acceptable to AO. AO therefore, disallowed the expenses of Rs. 9,86,28,93,000/- u/s 40(a)(ia) of the Act.

14. Aggrieved by the order of AO, assessee carried the matter before the CIT(A). The CIT(A) after considering the submissions of

the assessee decided the issue in favour of the assessee by observing as under:

“I have gone through the facts relating to this ground and considered the assessment order and the detailed submissions of the Ld AR on the issue. After having considered various judgments cited by the Ld AR and considering the question of applicability of provisions of TDS to the case of the assessee, I am of the considered opinion that the AO is in the wrong in applying the provisions of TDS to the present case. The crux of the matter being, that the provisions of TDS are not applicable on the wheeling/transmission charges. And since the provisions of TDS do not apply to this particular aspect, therefore, there can be no scope for Revenue to apply the provisions of section 40(a)(ia) of the Income Tax Act. Thus addition of Rs.986,28,93,000/- on account of application of Section 40(a)(ia) of the Act is hereby deleted.”

15. Aggrieved by the order of CIT(A), Revenue is now before us.

16. Before us, Ld DR supported the order of AO. Ld AR on the other hand supported the order of CIT(A).

17. We have heard the rival submissions and perused the material on record. The issue in the present ground is with respect to disallowance made by AO u/s 40(a)(ia) of the Act which has been deleted by CIT(A). We find that CIT(A) after relying on the various decisions, that were cited by it before CIT(A) and which has been referred to by CIT(A) in his order, has given a finding that provisions of TDS are not applicable to

wheeling/transmission charges and therefore, no disallowance can be made u/s 40(a)(ia) of the Act. Before us no fallacy in the findings of CIT(A) has been pointed out by the Revenue. In such a situation we find no reason to interfere with the order of CIT(A) and **thus the ground of Revenue are dismissed.**

18. In the result, appeal of Revenue is dismissed.

19. In the combined result, assessee's appeal in ITA No.7146/Del/2017 is allowed and Revenue's appeal in ITA No.7308/Del/2017 is dismissed.

Order pronounced in the open court on 02.11.2020

Sd/-
(SUDHANSHU SRIVASTAVA)
JUDICIAL MEMBER

Priti Yadav, Sr.PS

Sd/-
(ANIL CHATURVEDI)
ACCOUNTANT MEMBER

Date:- 02.11.2020

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI