

**IN THE INCOME TAX APPELLATE TRIBUNAL**  
**Hyderabad ' B ' Bench, Hyderabad**  
*(Through Video Conferencing)*  
**Before Shri S.S. Godara, Judicial Member**  
*AND*  
**Shri Laxmi Prasad Sahu, Accountant Member**

<b>ITA Nos.1606 to 1608/Hyd/2016</b>		
Assessment Years: 2011-12 to 2013-14		
The Deputy Commissioner of Income Tax, Circle - 1(1), Hyderabad.	Vs.	M/s. AP Power Generation Corporation Limited, Vidyut Soudha, Khairatabad, Hyderabad - 500 082. PAN No.AACCA2734J.
(Appellant)		(Respondent / Cross Appellant)
<b>ITA No.1656/Hyd/2016</b>		
Assessment Year: 2011-12		
M/s. AP Power Generation Corporation Limited, Vidyut Soudha, Khairatabad, Hyderabad - 500 082. PAN No.AACCA2734J.	Vs.	The Deputy Commissioner of Income Tax, Circle - 1(1), Hyderabad.
(Appellant)		(Respondent / Cross Appellant)
Assessee by:		Sri M. Chandramouleswara Rao, AR.
Revenue by:		Sri Y.V.S.T. Sai, DR.
Date of hearing:		15/09/2021
Date of pronouncement:		17/09/2021

**ORDER**

**PER S. S. GODARA, J.M.**

The instant batch of four appeals pertains to a single assessee namely M/s. A.P. Power Generation Corporation Limited. The Revenue's three appeals ITA Nos.1606 to 1608/Hyd/2016 for

A.Ys. 2011-12 to 2013-14 arise against the CIT(A)-1, Hyderabad's separate orders; all dated 17.08.2016, passed in case Nos.0169/2014-15/CIT(A)-1/Hyd/16-17, 0015 and 0239/2015-16/CIT(A)-1/Hyd/16-17 respectively; involving proceedings u/s 143(3) of Income Tax Act, 1961 (in short, "the Act"). The assessee on the other hand has filed its cross appeal ITA No.1656/Hyd/2016 for A.Y.2011-12.

Heard both the parties. Case files perused.

2. We come to the lead A.Y. 2011-12 involving Revenue and assessee's cross appeals ITA Nos.1606 and 1656/Hyd/2016. The Revenue's and assessee's former three substantive grounds in their respective appeals raise the issue of correctness of sec.14A r.w. Rule 8D disallowance of Rs.53,11,71,260/- made in assessment order dated 12.05.2014 and partly upheld in the lower appellate discussion. There does not appear to be much dispute about the crucial fact that the assessee had indeed made its investments in sister concern(s) as a strategic measure and in SBI mutual funds. Learned counsel vehemently submitted in light of the assessee's annual report for the impugned assessment year that the assessee has not declared any exempt income which could trigger application of Sec.14A r.w. Rule 8D of the I.T. Rules in light of case law Chemninvest Ltd. Vs. CIT (2015) 378 ITR 33 (Del), CIT Vs. Corrttech Energy Pvt. Ltd. 223 Taxmann.com 130 (Guj) and CIT Vs. CIT Vs. Chettinad Logistics Pvt. Limited (2017) 80 taxmann.com 221 (Madras). The Revenue's stand on the other hand is that this clinching aspect has nowhere been seen raised or considered either in assessment or in the CIT(A)'s order.

3. Faced with this situation, we deem it appropriate to restore the instant first common issue back to the Assessing Officer

for his afresh factual verification to the limited extent as to whether the assessee had declared any exempt income in its books or not. We further wish to make it clear in case it is found that the assessee had not declared any such exempt income in its books, the impugned disallowance would stand deleted. And if it emerges that it had indeed disclosed such exempt income, the Assessing Officer would decide the issue afresh wherein the taxpayer would be at liberty to raise all factual as well as legal objections. The Revenue as well as assessee's instant former three substantive grounds in their respective appeals are allowed for statistical purposes in above terms.

4. We next advert to Revenue's 4<sup>th</sup> and 5<sup>th</sup> substantive grounds seeking to reverse CIT(A)'s action in deleting accrued interest on mercantile basis addition(s) of Rs.20,00,04,00,000/- and Rs.36,57,00,000/- involving DISCOMS having by "PPAs" agreements involving varying sums. The CIT(A)'s lower appellate discussion deleting the impugned addition(s) reads as follows :

7. Ground 3: Addition of interest Rs.200,04,000/- & Rs.36,57.00,000/- on belated payment of power supply bills by DISCOMS:

*During the course of assessment proceedings, the Assessing Officer disallowed Interest Charges for the delay by the DISCOMS in the payment of power supply bills. The Assessing Officer contended that late payment charges collectible from the DISCOMS was mandate in accordance with the PPAs between the Applicant company and DISCOMS. The Applicant is following mercantile law of accounts and the amounts collected should be offered as Income credited to profit and loss account, as the same stand taken in the earlier years, As per clause 3.1.15 of power project Agreement between Andhra Pradesh power Generation corporation Limited and Andhra Pradesh Distribution Companies dated 22-12-2009, interest for delayed payments beyond a period two month from the date of billings receivable by the Applicant from the DISCOMS at the rate of 1.25% per month surcharge with effect from 22-12-2009.*

*Before me, the Applicant submitted that computation of late payment interest by adopting certain percentage of interest is fictitious and there is no legally enforceable power purchase agreement enabling the assessee company to charge such late payment surcharge in force. In Applicant's own case for the Assessment Year*

2009-10, the Hon'ble ITAT, Hyderabad Bench B in ITA No.600//Hyd/14, deleted the addition made on levy of interest or surcharge for delayed payments. The Applicant further submitted that there are no further directions available to the Applicant Company for the financial year ending 31-03-2011 receiving from the APERC granting entitlement for claiming late payment surcharge from DISCOMs until 2014. Therefore, in the absence of any directions from the APERC allowing the Applicant Company to charge late payment interest from the DISCOMS for delay in payment of powers supply bills, the Applicant cannot be charged to income tax on such interest amounts which did not accrued or earned in the relevant previous year.

Its seen that in Applicant's own case for the Assessment Year 200910, the Hon'ble ITAT, Hyderabad Bench-B in ITA No.600/Hyd/ 14 deleted the addition made on levy of interest or surcharge for delayed payments on DISCOMS. The ITAT noted:

*"Having regard to the facts of the case including especially the absence of any clause in the relevant agreement for the levy of interest or surcharge for the delayed payment and the order of the Andhra Pradesh Electricity Regulatory Commission, denying the claim of the assessee for such interest / surcharge, we are of the view that the assessee was not entitled to claim any interest on the delayed payments from the DISCOMS for the year under consideration, and such interest income cannot be said to have accrued to the assessee for the year, as rightly held by the learned CIT(A).*

*Following the above decision of the Hon'ble ITAT, this ground is allowed."*

5. Suffice to say, it has come on record that the instant issue is no more res integra in view of the fact that this tribunal's Co-ordinate bench (supra) decided the same in assessee's favour and against the department (detailed order available at Page 158 of the paper book). We therefore adopt judicial consistency to affirm the CIT(A)'s action in deleting these grounds in absence of distinction on facts or law; as the case may be. The Revenue fails in its 4<sup>th</sup> and 5<sup>th</sup> substantive grounds.

6. Lastly come Revenue's ground Nos.VI to VIII seeking to revive the assessment findings adding an amount of Rs.194.62 crores towards penalties for non-performance and deleted in the CIT(A)'s order as under :

“Ground-4: Addition of Rs.194,62,00,000/- towards Non-performance penalties from contractors credited in the project cost by the Appellant:

*During the course of assessment proceedings, the Assessing Officer found that the assessee has recovered Rs.194.62 crores as penalties from the contractors / suppliers for non-performance / damages / delay in supply of materials. The Assessing Officer dismissed the assessee's contention on the ground that it is not considered the claim of the supplier / contractors and as long as it is not considered and paid the damages so collected are revenue in nature. The contention of the assessee is that they are to be credited to the project cost is also not acceptable because it has not done so which would ultimately go to reduce the depreciation liable under the Act. Since these are penalties in nature they are to be treated as other revenue recognized by the assessee and offered to tax.*

*Before me, the Applicant submitted that they have credited such recoveries to the concerned project cost and reduced the cost of the project by such amounts. However, in the assessment, the amount of such damages were added to the total taxable income by treating revenue in nature and were not reduced from the capital cost of the project and were only kept in the miscellaneous deposits account. The Applicant relied on the decision of the Hon'ble Supreme Court in CIT Vs. Saurashtra Cement Limited (2010) 325 ITR 422(SC). In this case, the Hon'ble Supreme Court held that the damages were directly and intimately linked with the procurement of capital asset and therefore the damages are not received / earned in the ordinary course of business. Thus, it is a Capital Receipt in the hands of the Applicant.*

*In the light of the above, the Assessing officer is directed to verify ether this amount which is capital receipt, is to be reduced from the project cost or not. The asset cost has to be reduced by this capital receipt for which the receipt has been invoked. The addition of Rs.194,62,00,000/-as receipt of non-performance penalty is deleted as a revenue income, however. the same Is to be reduced from the capital cost of the asset/project cost.”*

7. Learned CIT-DR fails to rebut the clinching fact that the CIT(A) has gone by hon'ble apex Court's decision in Saurashtra Cement Limited (supra) that such damage pertaining to capital

asset is in nature of a capital receipt than revenue. He has further direct the Assessing Officer to verify the nature of assessee's corresponding receipts. The Revenue cannot be held to be an aggrieved party per se since the nature of the receipt is yet to be determined i.e. whether pertaining to project cost or not. We thus decline the Revenue's instant three substantive grounds as well going by the very analogy.

No other ground has been pressed before us.

This Revenue's appeal ITA No.1606/Hyd/2016 is partly allowed for statistical purposes in above terms.

8. We now advert to the assessee's 4<sup>th</sup> substantive ground in cross appeal ITA No.1656/Hyd/2016 challenging bad debt disallowance of Rs.64,35,000/-. Both the Assessing Officer as well as CIT(A) hold the same to be a mere provision than an actually written off liability. We find no force to affirm the impugned disallowance since pages 137 to 143 in paper book sufficiently indicate that the assessee's board of directors had duly confirmed the agenda regarding withdrawal of the impugned claim on 16.08.2010 which has neither been disputed in the course of assessment nor in CIT(A)'s order. We thus hold that the assessee's impugned bad debt claim deserves to be allowed. We ordered accordingly. Its cross appeal ITA 1656/Hyd/2016 is partly allowed in above terms.

9. Next comes the Revenue's twin appeals 1607 and 1608/Hyd/2016 seeking to revive identical Sec.14A r.w. Rule 8D disallowance (s) involving varying sums and penalties for non-performance addition(s) amounting to Rs.130.24 crores and Rs.100.66 crores which already stand restored to the Assessing Officer qua the first and dismissed pertaining to latter issue;

respectively in its lead A.Y. 2011-12's appeal ITA No.1606/Hyd/2016. We thus adopt judicial consistency in absence of any distinguished facts or law to accept the Revenue's instant former substantive grounds for statistical purposes and decline the latter in the very terms. These twin appeals are partly allowed for statistical purposes therefore.

No other ground has been pressed before us.

10. To sum up, the Revenue's instant three appeals in ITA Nos.1606 to 1608/Hyd/2016 are partly allowed for statistical purposes and assessee's cross appeal ITA No.1656/Hyd/2016 in A.Y. 2011-12 is partly allowed in above terms. A copy of this common order be placed in the respective case files.

Order pronounced in the Open Court on 17<sup>th</sup> September,2021.

<b>Sd/-</b> <b>(LAXMI PRASAD SAHU)</b> <b>ACCOUNTANT MEMBER</b>	<b>Sd/-</b> <b>(S.S. GODARA)</b> <b>JUDICIAL MEMBER</b>
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Hyderabad, dated 17<sup>th</sup> September, 2021.

**TYNN / sps**

Copy to:

S.No	Addresses
1	M/s. AP Power Generation Corporation Limited, Vidyut Soudha, Khairatabad, Hyderabad – 500 082.
2	The Deputy Commissioner of Income Tax, Circle – 1(1), Hyderabad.
3	CIT (A)- 1, Hyderabad
4	Pr. CIT – 1, Hyderabad
5	DR, ITAT Hyderabad Benches
6	Guard File.

*By Order*

