

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "F" NEW DELHI

BEFORE SHRI NARENDRA KUMAR BILLAIYA, ACCOUNTANT MEMBER
AND
SHRI CHALLA NAGENDRA PRASAD, JUDICIAL MEMBER

आ.अ.सं./I.T.A No. 3112/Del/2014

निर्धारणवर्ष/Assessment Year: 2011-12

DCIT, Circle-14(1), Room No. 221, 2 nd Floor, C.R. Building, I.P. Estate, New Delhi.	<u>बनाम</u> Vs.	Power System Operation Corporation of India Ltd., B-9, 1 st Floor, Qutab Institutional Area, Katwaria Sarai, New Delhi.
		PAN No. AAFCP2086B
अपीलार्थी Appellant		प्रत्यर्थी/Respondent

आ.अ.सं./I.T.A No. 4145/Del/2017

निर्धारणवर्ष/Assessment Year: 2014-15

Addl. CIT Room No. 211, C.R. Building, I.P. Estate, New Delhi.	<u>बनाम</u> Vs.	Power System Operation Corporation of India Ltd., B-9, 1 st Floor, Qutab Institutional Area, Katwaria Sarai, New Delhi.
		PAN No. AAFCP2086B
अपीलार्थी Appellant		प्रत्यर्थी/Respondent

आ.अ.सं./I.T.A No. 101/Del/2017

निर्धारणवर्ष/Assessment Year: 2013-14

Addl. CIT, Special Range-7, Room No. 211, C.R. Building, I.P. Estate, New Delhi.	<u>बनाम</u> Vs.	Power System Operation Corporation of India Ltd., B-9, 1 st Floor, Qutab Institutional Area, Katwaria Sarai, New Delhi.
		PAN No. AAFCP2086B
अपीलार्थी Appellant		प्रत्यर्थी/Respondent

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आ.अ.सं./I.T.A No. 2718/Del/2016
निर्धारणवर्ष/Assessment Year: 2012-13

ACIT, Circle-20(1), Room No. 219, 2nd Floor, C.R. Building, I.P. Estate, New Delhi.	बनाम Vs.	Power System Operation Corporation of India Ltd., B-9, 1st Floor, Qutab Institutional Area, Katwaria Sarai, New Delhi.
		PAN No. AAFCP2086B
अपीलार्थी Appellant		प्रत्यर्थी/Respondent

निर्धारितीकीओरसे /Assessee by	S/Sh. Ved Jain, CA Aditya Chhajed, CA Ashish Goel, CA
राजस्वकीओरसे /Revenue by	Sh. T. Kipgen, CIT DR

सुनवाईकीतारीख/ Date of hearing:	18.01.2022
उद्घोषणाकीतारीख/Pronouncement on	31.03.2022

आदेश / O R D E R

PER C.N. PRASAD, J.M.

All these appeals filed by the Revenue are directed against different orders of the Ld. Commissioner of Income Tax (Appeals) for the AYs 2011-12 to 2014-15. Since the grounds raised by the Revenue are common they were heard together and disposed of by this common order for the sake of convenience.

2. The first common ground in all these appeals of Revenue except for the figures is relating to surplus profit remained in Bank account maintained for UI/CC/RE charges whether income in the hands of the assessee and the grounds read as under:

1. Whether on the facts & in the circumstances of the case, the ld. CIT(A) has erred in holding that Surplus profit remained in Bank accounts maintained for UI/CC/RE charges is not income in the hands of assessee company under provisions of the Income Tax Act, 1961 and deleted the addition of Rs.1973,33,00,000/-.
 2. Whether on the facts & in the circumstances of the case, the ld. CIT(A) has erred in holding that Income of surplus in the bank accounts maintained by the assessee company for UI/CC/RE charges is diverted at source before it reaches the assessee.
 3. Whether on the facts & in the circumstances of the case, the ld. CIT(A) has erred in holding that since prior approval from regulatory authority is required surplus in the bank accounts for UI/CC/RE charges cannot by any stretch of imagination be utilized by the assessee company for any purpose ignoring the fact that such approval is only the part of procedure laid down as check and balance, only.
 4. Whether on the facts & in the circumstances of the case, the ld. CIT(A) has erred in holding that transfer of surplus amount by assessee company to another assessee PSDF is not taxable in the hands of assessee company because PSDF is registered under section 12A ignoring the fact that the PSDF is a separate and distinct entity and transferring of funds to it is nothing but application of the income by the assessee.
 5. Whether on the facts & in the circumstances of the case, the ld. CIT(A) has erred in holding that the surplus profit remained in bank accounts maintained for UI/CC/RE charges is not income per-se and still there is diversion of income at source for the same without appreciating that the above noted two versions are self contradictory and cannot subsist at the same time.
 6. Whether on the facts & in the circumstances of the case, the ld. CIT(A) has erred in holding that interest earned from the bank deposits maintained for UI/CC/RE charges is not income in the hands of assessee company under provisions of income tax act, 1961.
3. Briefly stated the facts that the assessee company is wholly owned subsidiary of Power Grid Corporation of India, the Government of India Enterprise incorporated on 20.03.2009. Being a Public Limited Company under the Companies Act, 1956 assessee obtained certificate for commencement of business on 23.03.2010. By virtue of Section 27(2) of Electricity Act (EA), 2003 CTU had been operating the Regional Load

Dispatch Centers (RLDC) till September, 2010. As notified by the Government of India vide notification dated 27th September, 2010 the Assessee Power System Operation Corporation Limited (POSOCO) a wholly owned subsidiary of power grid is operating the National Load Dispatch Center (NLDC) and RLDC from 01.10.2010. For the FY 2010-11 relevant to AY 2011-12 the assessee company filed its return electronically on 29.09.2011 declaring gross total income of Rs. 54,01,87,320/- which was revised on 29th September, 2012 declaring income of Rs. 54,00,01,990/-. In the course of assessment proceedings assessee also filed a revised computation of income, wherein taxable income was admitted at Rs. 62,19,75,667/-. The assessment was completed u/s 143(3) on 31.01.2014 for the AY 2011-12 determined the income of the assessee under normal provisions of the Act at Rs. 1981,70,00,000/-. The Assessing Officer while computing the income made addition of Rs. 1973,33,00,000/- being surplus remained in Pool account of UI/RE/CC and interest income earned from bank deposit of such UI/RE/CC accounts as income of the assessee. In the course of assessment proceedings the Assessing Officer required the assessee as to why the surplus remained in Pool account for UI/RE/CC and interest income earned from bank deposit on such accounts should not be taxed as income of the assessee. In reply the

assessee submitted vide letter dated 20.11.2013 as under:

Receipts & payments of Unscheduled Inter Charge (UI)/Reactive Energy(RE)/Congestion Charges/Transmission Charges. Unscheduled Inter Charge (UI)/Reactive Energy (RE)/Congestion Charges accounts and Transmission charges are collected by the Regional Load Despatch Centres in accordance with the regulations of the Central Electricity Regulatory Commission(CERC). Unscheduled Inter Charge (UI)/Reactive Energy (RE)/Congestion Charges accounts are maintained by RLDC'S on behalf of Regional Power Committee (RPC) & these RPC are established by Government of India (Ministry of Power) under Electricity Act, 2003. All these receipts & payments of UI/RE/Congestion are maintained on behalf of RPC which are the statutory bodies of GOI and receipts and payments are compensatory mechanism for the power overdrawal /under injection by generators and does not attract TDS under Income Tax Act, 1961. All these receipts are taken into liability accounts and as and when the payments are made from these collections/surplus remitted to Power System Development Fund(PSDF), these accounts are debited. No Income accrues to the assessee from these transactions.

Further Assessee vide its letter dated 27.01.2014 submitted as under:

1) Your honor has desired to confirm whether the balance calculated as per schedule submitted on 15.01.2014 for Rs 472.21 cr represent surplus amount for the current assessment year after all the settlements and free to be used for the purpose as specified by CERC. In this connection we submit that surplus amount left in UI/CC/IRE/RE after the all the settlements is required to be deposited with the Power system development fund(PSDF) as per central electricity regulatory commission (unscheduled interchange charges and related matters) regulations, 2009, and Congestion charges in terms of central electricity regulatory commission (measures to relieve congestion in real time operation) regulations, 2009, Reactive energy account commission- central electricity regulatory commission (Indian Electricity Grid Code) regulations, 2010. Therefore, the surplus after settlements is not free to be used. The balance amount is required to be remitted to PSDF, as specified in the respective regulations. Reference is also taken from regulation 3 of Central Electricity Regulatory Commission (Power System Development Fund) Regulations, 2010. which specifies following Constitution of the Fund:

3. Constitution of Fund

(1) There shall be constituted a fund to be called the "Power System Development Fund" and there shall be credited thereto.-

(a) Congestion charges standing to the credit of the "Congestion Charge Account" after release of amounts payable to Regional Entities entitled to receive congestion charge along with interest, if any, in accordance with the Central Electricity Regulatory Commission (Measures to relieve congestion in real time operation) Regulations, 2009 as amended from time to time:

(b) Congestion amount arising from the difference in the market prices of different regions as a consequence of market splitting in power exchanges in accordance with Central Electricity Regulatory Commission (Power Market) Regulations, 2010.

(c) ~~Unscheduled Interchange charges standing to the credit of the "Unscheduled Interchange Pool Account Fund" after final settlement of claims of Unscheduled Interchange Charges in accordance with the Central Electricity Regulatory Commission (Unscheduled Interchange Charges and related matters) Regulations, 2009 as amended from time to time;~~

d) RLDC reactive energy charges standing to the credit of Reactive Energy Charges Account;

(e) such other charges as may be notified by the Commission from time to time: Provided that amounts representing the sources as specified in sub-clauses (a) to (d) of clause 1 of this regulation and lying in the custody of Central Transmission utility together with interest earned thereon upto 30th of April, 2010 shall be credited to the Fund.

(2) The agencies which are authorized to collect Congestion charges, Congestion amount, Unscheduled Interchange charges, Reactive energy charges under the respective regulations and such other charges as may be notified by the Commission from time to time, shall transfer to the credit of the Fund the balance amounts in charges under sub clause (a) to (e) of clause (1) of this regulation on monthly basis on such other basis as deemed fit by the Managing Committee in accordance with Regulation 5.

(3) Separate account shall be maintained for each fund represented in sub-clauses (a) to (e) of clause (1) of this regulation subject to other terms and conditions as specified in the relevant regulations.

Thus, It is clear that balance amount of Congestion charges, Congestion amount, Unscheduled Interchange charges, Reactive energy charges under the respective regulations as specified in sub clause (a) to (e) of clause (1) of above-mentioned regulation 3 and such other charges as may be notified by the Commission from time to time, are transferred to the credit of the Power System Development Fund. Power system Development fund (PSDF) is a exempt Fund u/s 12A of the Income Tax Act, 1961, a copy of the Registration certificate under Section 12A for exemption of the PSDF fund is enclosed as per annexure 2. The government vide its letter dated 10th January 2014 has

made scheme for operationalization of the Power System Development Fund. A copy of the letter is enclosed as per annexure 3 .Since the balance left in these accounts after settlement of claims of generating station and beneficiaries along with interest earned thereon are required to be compulsorily deposited with the PSDF, amount of Rs.727.98 Crores(modified from 475.21 cr) left in the UI/RE/CC pool account fund and interest earned there as on last day of the previous year is payable to PSDF and therefore cannot be treated as income of POSOCO in AY 2011-12.

3.1 However, not convinced with the submissions made by the assessee the Assessing Officer held that surplus in Pool account under head UI/RE/CC and interest income earned from deposit of those accounts is Revenue receipt taxable in the hands of the assessee by observing as under:

Conclusion:

After analyzing all the facts of the case, regulations of UI/CC/RE, submissions & contentions made by the assessee it is concluded that these charges are levied for maintaining grid discipline through the commercial mechanism, and are in nature of revenue receipts. After final settlement there will be amount left due to capping that is excess amount is recovered from defaulters and passed on to beneficiaries at a lower rate resulting always positive balance in pool accounts and amount forfeited due to gaming activity. The assessee company has incurred massive capital expenditure on the machinery, computer system, manpower, technical personnel, supervisory control & data acquisition system SCADA to keep data of generation and utilization of electricity and to make schedules to calculate the recovery and allocation of charges under UI/CC/RE. The company is bearing all the capital expenditure and related revenue expenditure for the purpose of maintaining these activities and revenue expenditures to control, maintain, supervise the above UI/CC/RE mechanism have been debited to profit & loss account & bank accounts included in balance sheet accordingly. But the company has routed transaction of receipts and payments in the pool accounts under UI/CC/RE through balance sheet only and not through profit & loss account, yet the company has incurred capital expenditure as well as revenue expenditures debited to profit & loss account to control, maintain, supervise the mechanism of recovery through UI/CC/RE. The assessee has control over day to day activities of the controlling, supervising, regulating and analyzing the generation and drawl of electricity and also prepares weekly schedules to calculate the amount leviable upon defaulters as UI/CC/RE and payable as incentive to beneficiaries, the amount recovered from defaulters includes profit margin which at all is neither transferred to beneficiaries nor refunded to consumers directly or indirectly through reduced tariff and is kept in pool accounts through capping mechanism. It is thus established that receipts under UI/CC/RE and interest income earned from deposit of these funds are in nature of income of revenue nature in the hands of the assessee and surplus amount remained in form of profit after payment to beneficiaries should form part of total income of the assessee and is liable to tax under income tax act,

1961. Further with reference to provision of section 10 and 12A chapter VIA and above mentioned judicial rulings it is established that surplus/profit amount left in pool accounts contains balance of recovery-payments due to profit portion and capping on payments and amounts forfeited due to gaming activities and interest income earned on those funds is a routine business income and is taxable in the hands of the assessee. The surplus/profit along with interest income is not at all refunded to the consumers of electricity directly or indirectly through reduction in tariff. The transactions under UI/CC/RE are neither incurred nor accounted in the books of account of CERC it cannot be said to be income of CERC exempt under section 10(23BBG). Further the assessee is not a trust registered under section 12A of income tax act nor accounts under UI/CC/RE are registered as trust and so surplus in the pool accounts along with interest income earned cannot be claimed as exempt income of trust. Further the GOI has not notified in any official gazette the funds under UI/CC/RE hence they cannot be treated as exempt under section 10(46) of income tax act. Transfer of profits/surplus of pool accounts to a trust registered u/s 12A does not make transferred funds as exempt income in the hands of donor hence amount transferred to PSDF are not eligible for deduction under provisions of income tax act, 1961. Further payment to PSDF is not covered by provisions of chapter VIA also accepted by the assessee in its return of income hence payment to power sector development fund PSDF is not eligible for deduction under chapter VIA of income tax act. Hence in view of above analysis it is established that surplus in pool accounts under head UI/CC/RE and interest income earned from deposit of funds under those accounts is revenue receipts taxable in the hands of the assessee.

4. The assessee carried the matter before the Ld. Commissioner of Income Tax (Appeals) and the Ld. CIT(Appeals) deleted the addition by holding that these amounts cannot be considered as income of the assessee as the surplus amounts in the regulatory accounts were never received by the assessee as income. The Ld. CIT(Appeals) also held that assessee was merely overseeing the collections in the four regulatory accounts and the amounts were diverted before they reached the assessee at source itself and the assessee cannot use these amounts in the regulatory accounts for any purpose. Against this order the Revenue is in appeal before us.

5. The Ld. DR strongly supported the orders of the Assessing Officer and the Ld. Counsel for the assessee placed reliance on the orders of the Ld. Commissioner of Income Tax (Appeals). The Ld. Counsel for the assessee further submits that in view of the notification of Ministry of Finance the amounts in the form of congestion charges, unscheduled interchange charges, RLDC reactive energy charges, etc. are considered as Public Money under the provisions of Electricity Act, 2003 and the Power System Development Fund balance will be deposited in the Public Account. The Ld. Counsel submits that assessee is only a custodian for the funds and by virtue of this notification. The assessee is acting only as a trustee of these funds. The Ld. Counsel therefore, submits that on appreciation of the facts of the assessee and various notifications issued by the Ministry of Finance, Government of India, Central Electricity Regulation Commission (CERC) etc., the Ld. CIT(A) has rightly held that the surplus amounts in Regulatory accounts are not income of the assessee.

6. Heard rival submissions and perused the orders of the authorities below. We have carefully perused the orders of the Ld. CIT(Appeals) and find that the Ld. CIT(A) on examining various notifications issued by the Government of India, CERC, NLDC which is Nodal Agency and considering the detailed submissions of the assessee which is a Government of India Enterprise he concluded that surplus amounts in the Regulatory Accounts were never received by the assessee as income, the assessee was merely

overseeing the collections in the Regulatory accounts, the amounts were diverted before they reached the assessee at the source itself. Thus, there is a diversion by overwrite title. The assessee cannot use the amounts in the regulatory accounts for any other purpose. Therefore, the amounts cannot be considered as the income of the assessee. While holding so the Ld. CIT(Appeals) given the following elaborate findings: -

6.2. In the assessment order the main issue in respect of which addition has been made to the income of the appellant pertains to the surplus in the pool account for UI/RE/CC/CR. The AO stated that the surplus in the pool account should form profits and income of the appellant - POSOCO. The appellant on the other hand stated the surplus in the regulatory account was not its income.

6.3. The appellant - POSOCO (Power System Operation Corporation Ltd.) is a wholly owned subsidiary of Power Grid Corporation, a Govt. of India enterprise. Power Grid Corporation is a Indian Govt. owned transmission company. Power Grid Corporation transmits about 50% of the total power generated in Indian on its transmission net work. Electricity generated by entities like NTPC are thereafter transmitted to various SEB's through the transmission network of Power Grid Corporation.

6.4. The appellant company POSOCO was incorporated vide certificate of incorporation dated 20.03.2009. Vide notification dated 27.09.2010, the appellant was to operate the National Load Despatch Centre and the Regional Load Despatch Centre's w.e.f. 01.10.2010. The principal function of the appellant was to regulate the electricity generation grid and enforce statutory regulations.

6.5. The appellant - POSOCO was also formed to handle power management functions of NLDC and RLDC and to ensure the integrated operation of the grid in an efficient manner. The basic functions of the appellant were therefore two fold, commercial and load management functions.

6.6. Functions of POSOCO were listed out by the Ministry of Power directive vide letter no. 41/20/2005- PG dated 4th July, 2008. The functions were as below:

- "(i) To supervise and control all aspect concerning operations and manpower requirement of RLDCs and NLDC. All the employees and executives working with RLDCs and NLDC will be from the cadre of POSOCO. Presently POSOCO is a wholly owned subsidiary of POWERGRID. All the employees will be from the cadre of POWERGRID.
- (ii) To act as the apex organisation for human resources requirement of NLDC and RLDCs.
- (iii) To ensure planning and implementation of infrastructure required for smooth operation and development of NLDC and RLDCs.
- (iv) To coordinate the functioning of NLDC and all the RLDCs.
- (v) To advise and assist state level Load Despatch Centres, including specialised training etc.
- (vi) To perform any other function entrusted to it by the Ministry of Power



6.7. The functions of the NLDC & RLDCs as per section 28(4) of the Electricity Act were to collect such fees & charges from the generating companies or licensees engaged in interstate transmission of electricity as may be specified by the Central Commission.

6.8. Further, the NLDC & RLDCs were to implement the various regulations under the authority of various Regulatory Acts and the NLDC & RLDC were to maintain various regulatory funds.

6.9. The NLDC Rules were made in 2004. The NLDC was created at the Centre for optimum scheduling and despatch of electricity among RLDCs. The NLDC was the apex body to ensure integrated operation of the National Power System and had the following functions specified by the Ministry of Power notification dated 2nd March, 2005:

- (i) Supervision over the Regional Load Despatch Centres;
- (ii) Scheduling and despatch of electricity over inter-regional links in accordance with grid standards specified by the Authority and grid code specified by Central Commission in coordination with Regional Load Despatch Centres;
- (iii) Coordination with Regional Load Despatch Centres for achieving maximum economy and efficiency in the operation of National Grid;
- (iv) Monitoring of operations and grid security of the National Grid;
- (v) Supervision and control over the inter-regional links as may be required for ensuring stability of the power system under its control;
- (vi) Coordination with Regional Power Committees for regional outage schedule in the national perspective to ensure optimal utilization of power resources;
- (vii) Coordination with Regional Load Despatch Centres for the energy accounting of inter-regional exchange of power;
- (viii) Coordination for restoration of synchronous operation of national grid with Regional Load Despatch Centres;
- (ix) Coordination for trans-national exchange of power;
- (x) Providing operational feed back for national grid planning to the Authority and the Central Transmission Utility;
- (xi) Levy and collection of such fee and charges from the generating companies or licensees involved in the power system, as may be specified by the Central Commission.
- (xii) Dissemination of information relating to operations of transmission system in accordance with directions or regulations issued by Central Electricity Regulatory Commission and the Central Government from time to time.

6.10. The functions of RLDCs were listed out in Section 28 of Electricity Act, 2003:

- (i) Be responsible for optimum scheduling and despatch of electricity within the region, in accordance with the contracts entered into with the licensees or the generating companies operating in the region;
- (ii) Monitor grid operations;
- (iii) Keep accounts of quantity of electricity transmitted through the region;
- (iv) Exercise supervision and control over the inter-State transmission system; and
- (v) Be responsible for carrying out real time operations for grid control and despatch of electricity within the region through secure and economic operation of the regional grid in accordance with the Grid Standards and the Grid Code.
- (vi) To levy and collect such fees & charges from the generating companies or licensees engaged in inter-state transmission of electricity as may be specified by the Central Commission.

6.11. Functions to be performed by the RLDCs and NLDC were further specified as under:

- (i) Open Access in Inter-state transmission: Open Access in Inter-state Transmission has been introduced by CERC in the year 2004 after enactment of the Electricity Act, 2003. The present Regulation in vogue was notified in 2008, which was subsequently amended w.e.f. 15.06.2009.
- (ii) NLDC has been designated as nodal agency for collective transactions through Power Exchanges as per Power Market Regulations.
- (iii) Congestion management: CERC has notified Regulations on Measures to relieve congestion in real time operation on 22.12.2009. RLDCs are to maintain separate accounts for congestion charges for collection and disbursement to different entities.
- (iv) Sharing of Inter-State Transmission Charges and Losses: As per CERC Regulations dated 15.06.2010 on Sharing of Inter-State Transmission Charges and Losses, NLDC has been designated as Implementing Agency (IA).
- (v) Renewable Energy Certificates (REC): CERC has brought in a mechanism of renewable energy certificates to facilitate states with limited renewable generation to meet their renewable purchase obligation (CERC Regulations dated 14.01.2010). NLDC has been designated as the central agency by the CERC.
- (vi) Renewable Regulatory Fund: The Indian Electricity Grid Code provides for constitution of a renewable regulatory fund. NLDC has to maintain the Fund.
- (vii) Power System Development Fund: CERC has notified the Power System Development Fund Regulations on 04.06.2010. The Power System Development Fund Regulations also provide for a managing committee headed by Head of NLDC. Head of RLDCs & NLDC are members of this managing committee. The secretariat of this Fund is also managed by NLDC by two executives nominated as secretary of PSDF and treasurer of PSDF. The accounts of the fund are to be managed by NLDC.
- (viii) Disaster management: As per Ministry of Power letter dated 27th May 2009, NLDC is required to act as Central Control Room in case of natural and man made emergencies / disasters.
- (ix) Forum of Load Despatchers (FOLD): FOLD has been constituted by the Forum of Regulators (FOR) in their ninth meeting held on 14th Nov, 2008. NLDC is providing secretarial services to the FOLD.
- (x) Maintenance of Pool Accounts: Operation of Regional UI Pool accounts, regional reactive energy account and congestion charge account shall be maintained by RLDCs as per IEGC, 2010. Operation of Congestion account by NLDC as per Power Market Regulations of CERC.

6.12. The other major functionary is the CERC or Central Electricity Regulation Committee. The CERC is a key regulation of the power sector in India. It is a statutory body functioning with quasi judicial status u/s 76 of the Electricity Act, 2003. It is basically concerned with electricity tariff regulation.

6.13. The section 79(1)(c) of the Electricity Act enables the CERC to regulate interstate transmission of electricity. The CERC formulated a mechanism to ensure that grid discipline is maintained. A commercial mechanism has been evolved by which those who breach the discipline will be compelled to pay what is referred to as "unscheduled interchange charges. In order to reduce congestion a "congestion charge" is further levied. A "market splitting congestion" is also levied and the last is "reactive compensation for failure to maintain voltage." The payments on account of all these levies are all received in the Regulatory accounts.

6.14. The Govt. of India vide Gazette notification dated 25th May 2005 established regional power committees (RPC) for every specified region such as North, South, West, East and North East. The RPC was empowered to raise bills for levies to be credited to the Pool Accounts. The levies were as per para 6.13 above.

6.15. Regulatory Accounts are those accounts in which charges levied by the CERC for breach of discipline are deposited. The amounts to be levied are levied by the respective Regional Power Committees. The NLDC & RLDCs are the ones who collect the charges levied. The regulatory funds are of 4 types:

1. "Congestion Charge Account" maintained by each RLDC in accordance with the Central Electricity Regulatory Commission (Measures to relieve congestion in real time operation) Regulations, 2009 as amended from time to time.
2. "Congestion Account" arising from the difference in the market prices of different regions as a consequence of market splitting in power exchanges in accordance with Central Electricity Regulatory Commission (Power Market) Regulations, 2010.
3. "Regional Unscheduled Interchange Pool Account Fund" maintained and operated by the concerned RLDCs in each region in accordance with the Central Electricity Regulatory Commission (Unscheduled Interchange Charges and related matters) Regulations, 2009 as amended from time to time.
4. "Regional Reactive Energy pool account" in accordance with Central Electricity Regulatory Commission (Indian Electricity Grid Code) Regulations, 2010.

6.16. NLDC/RLDCs are mere custodian of funds in the Regulatory Accounts till the balance amounts are transferred to the PSDF.

6.17. The Regulatory Pool Accounts are maintained in a fiduciary capacity only by POSOCO and it has no lien on the money in these Accounts. Some of the utilities have to pay to the Regulatory Pool while some have to receive amounts from the Pool. The payable/receivable weekly statement is generated by the Regional Power Committees (RPCs). The payable and receivable amounts are not equal and as per the CERC Regulations there is a residual amount generated. These residual amounts are transferred to the Power System Development Fund (PSDF) created by CERC and which has recently been treated as a Public Account based on the Union Cabinet's decision.

The PSDF is therefore an account where the surplus from the Regulatory Account are transferred.

6.18. The Regulatory Pool Account is maintained and operated under respective regulations and the surplus in these amounts are transferred to the Power System Development Fund or PSDF in accordance with the CERC regulations.

6.19. The above charges are settled between those who pay and those who need to receive. After final settlement of claims there are surplus amounts which lie in accounts maintained by RLDC's. In order to enable CERC to plough back these funds for effective purposes of regulation of interstate transmission the amounts are pooled and credited into a special fund called the PSDF.

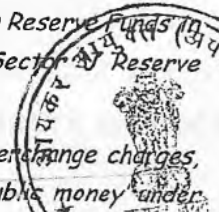
6.20. The Ministry of Finance vide notification dated 26.04.2013 has stated that the funds in the PSDF are to be placed in the Public Account of India. The notification states as under:

"1. The proposal for operationalisation of Power System Development Fund (PSDF) by placing the same in the Public account of India and entrusting National Loan Despatch Centre (NLDC) with the responsibility of maintenance, operation of the fund and also disbursement from the fund has been examined.

2. The general accounting guidelines for operationalising the 'Power System Development Fund (PSDF) are as follows:

(i) A separate minor head with the nomenclature 'Power System Development Fund' may be opened under the Major Head '8235-General and other Reserve Funds (in the subsection b) Reserve Funds not bearing interest' of Sector '3 Reserve Funds' in the Public Account of India:

(ii) Amounts in the form of congestion charges, unscheduled interconnectance charges, RLDC reactive energy charges, etc. which are considered 'public money' under



the provisions of Electricity Act, 2003 and the Power system Development fund Regulations may be deposited in the head of account mentioned at (i) above;

- (iii) *The withdrawal of funds from the reserve fund may be made through appropriations authorized by Parliament after making a suitable provision in the Demands for Grants of Ministry of Power under the appropriate heads of accounts below the major Head '2801-Power' while releasing the amount, the same may be recovered from PSDF kept in the Public Account of India. The recovery may be shown under a distinct minor head 'Deduct Amount met from Power System Development Fund' under the Major Head '2801-Power' so that the amounts released from PSDF do not impact the net expenditure of the Ministry of Power / Government;*
- (iv) *Ministry of Power will keep a watch on the balances available in the PSDF periodically so that at any time that there is no excess withdrawal from the fund than the accretions therein;*
- (v) *Releases from the fund may be made in suitable installments after getting the approval of Parliament through Demands of Grants;*
- (vi) *A DDO may be declared for this purpose for preference of claims to PAO and issue of cheques/bank advices by the PAO;*

3. *Direct deposit of funds in the consolidated Fund of India and transfer of the same with due appropriation authorized by Parliament, to PSDF is not suggested as the quantum of fund likely to be collected under the Regulations are not known at this stage and in case of heavy collections, huge appropriation is required for transfer of the funds to PSDF.*

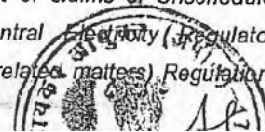
4. *Ministry of Power may draw up the detailed accounting procedure based on the broad accounting guidelines in consultation with Controller of Accounts, Ministry of Power and Controller General of Accounts for getting the concurrence of C&AG.*

5. *This issues with the approval of Joint Secretary (Budget)."*

6.21. Regulation 3 of the PSDF regulations provides as under:

"1. There shall be constituted a fund to be called the "Power System Development Fund" and there shall be credited thereto:-

- (a) *Congestion charges standing to the credit of the "Congestion Charge Account" after release of amounts payable of Regional Entities entitled to receive congestion charge along with interest, if any, in accordance with the Central Electricity Regulatory Commission (Measures to relieve congestion in real time operation), Regulations, 2009 as amended from time to time;*
- (b) *Congestion amount arising from the difference in the market prices of difference regions as a consequences of market splitting in power exchanges in accordance with Central Electricity Regulatory Commission (Power Market) Regulations, 2010.*
- (c) *Unscheduled Interchange charges standing to the credit of the "Unscheduled Interchange Pool Account Fund" after final settlement of claims of Unscheduled Interchange Charges in accordance with the Central Electricity Regulatory Commission (Unscheduled Interchange Charges and related matters) Regulations, 2009 as amended form time to time;*



(d) RLDC reactive energy charges standing to the credit of Reactive Energy charges Accounts;

(e) Such other charges as may be notified by the Commission from time to time; Provided that amounts representing the sources as specified in sub-clauses (a) to (d) of clause (1) of this regulation and lying in the custody of Central Transmission Utility together with interest earned thereon upto 30th of April, 2010 shall be credited to the fund.

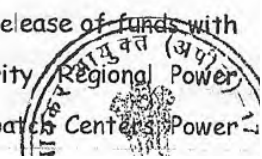
2. The agencies which are authorized to collect Congestion charges, Congestion amount, Unscheduled Interchange charges, Reactive energy charges under the respective regulations and such other charges as may be notified by the Commission from time to time, shall transfer to the credit of the Fund the balance amounts in the charges under sub-clauses (a) to (e) of clause (1) of this regulation on monthly basis or such other basis as deemed fit by the Managing Committee in accordance with Regulation 5.

3. Separate account shall be maintained for each fund represented in sub-clauses (a) to (e) of clause (1) of this regulation subject to other terms and conditions as specified in the relevant regulations."

6.22. PSDF regulations notified by the CERC also cover guidelines on utilization of the Fund, disbursement of the Fund in respect of projects, schemes and activities, procedure for identification and prioritization of the projects, schemes and activities, constitution of the managing committee and the role of this committee.

6.23. The utilization of fund is for the purpose being permissible under the relevant regulations specified by the Commission. Subject to the provisions of Regulation 6, the amounts in the funds are to be disbursed for the projects, schemes or activities mentioned under Regulation 4 of the regulations. The Managing Committee has to prepare a detailed procedure for disbursement from the Fund consistent with the provisions of the regulations and it was further clarified that no amount from the fund shall be disbursed without the approval of the Commission.

6.24. The Managing Committee as constituted under Regulation 7 was to scrutinize the schemes or activities proposed to be financed from the Fund and if all the schemes or activities could not be sanctioned due to shortage of resources in the Fund, the Managing Committee was to prioritize the projects, schemes or activities for release of funds with the approval of the Commission. The Central Electricity Authority Regional Power Committees, generating companies, transmission licensees, Load Despatch Centers, Power



Exchange were to furnish necessary details of the projects & schemes or activities to the Managing Committee to facilitate identification and prioritization of the schemes.

6.25. The Managing Committee was appointed by the Commission for the administration of the Fund, and consists of the following members:-

- (i) Head of NLDC/entity entrusted with the function of NLDC and RLDCs shall be designated by the Commission as the Chairperson of the Managing Committee;
- (ii) Representative of each of the Regional Power Committees (RPC);
- (iii) Representative of each of the RLDCs;
- (iv) an officer of NLDC, not below the rank of General Manager, as nominated by the head of NLDC shall be the Member Convenor; and
- (v) Two independent external members.

6.26. The bank accounts of the Fund were to be operated by any two persons designated as authorised signatories by the Managing Committee from time to time. The authorized signatories were not to make any withdrawal from the accounts of the Fund except through proper authorisation and/or after sanction from the Managing Committee.

6.27. All properties of the Fund, whether movable or immovable, would vest in the name of the Fund and would be administered by the Managing Committee and no part of the Fund would be used directly or indirectly by way of dividend, bonus or otherwise, or by way of profit to persons who at any time are or have been members of the Fund or to any of them or to any person claiming through them:

The funds from the Regulatory Accounts which are transferred to the PSDF. Cannot be utilized except by the approval of the committee.

6.28. To clarify the position further, the appellant produced a copy of the decision taken by the CERC in the petition No.35/MP/2014. The CERC has clearly stated that the NLDC & RLDC'S are mere custodian of the funds. Further that the funds accruing in the different regulatory amounts are never intended to be income of the NLDC/RLDC's. The order is as below:

"The representative of the petitioner, Power System Operation Corporation Limited, submitted that in compliance with the Central Electricity Regulatory Commission (Unscheduled Interchange Charges and related matters) Regulation, 2009, Central Electricity Regulatory Commission (Measures to relieve congestion in real Time operation)



Regulations, 2009, Central Electricity Regulatory Commission (Power Market) Regulations, 2010 and the Central Electricity Regulatory Commission (Indian Electricity Grid Code) Regulations, 2010, NLDC/RLDCs have been maintaining and operating the Regulatory Pool Accounts under the respective regulations and the surpluses from these accounts are transferred to Power System Development Fund account in accordance with the Central Electricity Regulatory Commission (Power System Development Fund) Regulations, 2010 (PSDF Regulations). The representative of the petitioner further submitted that necessary exemptions have been obtained for PSDF account under Section 12A of the Income Tax Act, 1961.

2. The representative of the petitioner further submitted that on 31.1.2014, the petitioner has been served with a demand notice of about ` 879.29 crore by the Income Tax Department (IT Department) for the assessment year 2011-12. In the demand notice, IT Department has considered the surplus in the regulatory pool accounts as income of POSOCO for the six month period from 1.10.2010 to 31.3.2011 and has directed to deposit the same within thirty days from the date of the notice. IT department has further stated in the said notice that if the amount is not paid within the specified period, a simple interest at the rate of 1% for every month or part of a month from the date commencing after end of aforesaid period would be payable in accordance with Section 220 (2) of the Income Tax Act, 1961 failing which POSOCO will be liable to pay penalty.

3. The representative of the petitioner submitted that POSOCO (NLDC/RLDCs) have a limited role in the management and operation of the regulatory pool accounts as the same is governed as per the provisions of the various Regulations and even the utilization of funds from these accounts is also subject to approval by the Central Commission. Since PSDF has been created as a consolidation of the surpluses obtained from the various regulatory pool accounts and PSDF has been exempted from Income Tax under section 12A of the Income Tax Act, 1961, the same exemption also applies to the surpluses arising out of the various regulatory accounts.

4. The representative of the petitioner submitted that in the above background, the present petition has been filed with the following prayers: "(i) The Hon`ble Commission may declare that the surplus in the Regulatory Pool Accounts is not the income of POSOCO (POWERGRID for the period up to 30.9.2010) and further declare that NLDC/RLDCs are only nodal agency operating and maintaining the Regulatory Pool Account as an agent on behalf of the Hon`ble Commission. The money collected under these functions be considered as a part of income exempted under Section 10 (46) of the Income Tax Act, 1961; (ii) Without prejudice to the relief prayed above in the event that the petitioner is required to make the payment of ` 879.29 crore or any other sum as levied by the Revenue Department on the money collected under regulatory function, the same may be paid from the PSDF; (iii) The Hon`ble Commission may also consider evolving a comprehensive framework for the removal of the difficulty, by formation of a separate entity with a new PAN number to deal with all the Regulatory Funds already created and to be created in future and settlement thereof, or any other such mechanism as may be considered appropriate in the opinion of the Hon`ble Commission; (iv) Pass any such order/s that the Hon`ble Commission may deem fit in the circumstances of the case."

5. We have heard the representative of the petitioner. In Prayer (iii) as quoted above, the petitioner has requested for formation of a separate entity with new PAN number to deal with the existing regulatory funds and the regulatory fund that may be created in future. The prayer involves policy issues and needs to be decided in consultation with the concerned entities. Accordingly, we direct issue of notice to the respondents. We also direct issue of notice to the Ministry of Power which has been vested with the responsibility of maintenance and operation of the PSDF funds as part of public account pursuant to the decision of the Union Cabinet. We have dealt with the prayers (i) and (ii)

above in order to enable the petitioner to take up the matter at the appropriate forum for relief from the demand notice received by it from the IT Department.

6. National Load Despatch Centre has been created by the Central Government under section 25 of the Electricity Act, 2003 (the 2003 Act) and is discharging the functions under the 2003 Act, National Load Despatch Centre Rules, 2005 as notified by the Central government and various regulations specified by this Commission in exercise of powers under section 178 of the 2003 Act. Similarly, Regional Load Despatch Centres for the five regions in the country have been created by the Central Government under section 27 of the 2003 Act and have been discharging their functions under section 28 of the 2003 Act and various regulations specified by this Commission. Section 28(4) of the 2003 Act provides that "the Regional Load Despatch Centre may levy and collect such fees and charges from the generating companies or licensees engaged in inter-State transmission of electricity as may be specified by the Central Commission". The Central Commission in exercise of its power under section 178 read with section 28(4) of the 2003 Act has specified the Central Electricity Regulatory Commission (Fees and Charges of Regional Load Despatch Centres and other related matters) Regulations, 2009 which governs income and expenditure of the National Load Despatch Centre and Regional Load Despatch Centres.

7. NLDC and RLDCs have been assigned the responsibilities to implement the various regulations in discharge of their functions under 2003 Act. Some of the regulations provide for regulatory funds which are generated during the course of enforcement of these regulations. The provisions of these regulations are discussed as under:

(a) Central Electricity Regulatory Commission (Unscheduled Interchange Charges and Related Matters), Regulation, 2009 provides for commercial mechanism in the form of Unscheduled Interchange Charges to maintain grid discipline. Regulation 9(2) provides for the Regional Unscheduled Interchange Pool Account Fund as under:

"(2) All payments on account of Unscheduled Interchange charges including Additional Unscheduled Interchange charges levied under these regulations and interest, if any, received for late payment shall be credited to the Funds called the "Regional Unscheduled Interchange Pool Account Fund" which shall be maintained and operated by the concerned Regional Load Despatch Centers in each Region in accordance with the provisions of these regulations. Provided that the Commission may by order direct any other entity to operate and maintain the respective Regional Unscheduled Interchange Pool Account Funds."

(b) Central Electricity Regulatory Commission (Unscheduled Interchange Charges and Related Matters), Regulation, 2009 has been repealed by the Central Electricity Regulatory Commission (Deviation Settlement Mechanism and Related Matters) Regulations, 2014 and Regional Unscheduled Interchange Pool Account Fund has been rechristened as Regional Deviation Pool Account Fund. Regulation 9 (2) of the said regulations provides as under:

"(2) All payments on account of Charges for Deviation including Additional Charges for Deviation levied under these regulations and interest, if any, received for late payment shall be credited to the funds called the "Regional Deviation Pool Account Fund", which shall be maintained and operated by the concerned Regional Load Despatch Centre in each region in accordance with provisions of these regulations. Provided that - (i) the Commission may by order direct any other entity to operate and maintain the respective "Regional Deviation Pool Account Fund"

(c) Regulation 8 of the Central Electricity Regulatory Commission (Measures to relieve Congestion in Real Time Operation), Regulations, 2009 provides as under:

"8. (1) Each Regional Load Despatch Center shall maintain a separate bank account called "congestion charge account" wherein all money received on account of congestion charge shall be credited. The amount standing to the credit of Congestion Charge Account, if any, shall be transferred to a Fund at Regular Intervals as per the methodology notified by the commission.

(2) Congestion Charge account shall presently be maintained and operated by the Regional Load Despatch Center in the same manner as the account for Unscheduled Charges: Provided that Congestion Charge account may be maintained by any other entity as the commission may direct by notification from time to time."

(d) Regulations 33 of the Central Electricity Regulatory Commission (Power Market) Regulations, 2010 provides as under:

"33. Power Exchange Congestion Amount management: The Power Exchange may be vested with Congestion Amounts arising from the difference in market prices of different regions as a consequence of market splitting. The Congestion Amount shall be maintained in a separate account by the Power Exchange to be transferred on the next working day to a regulatory fund as may be directed by the Commission. Provided that until the time the aforesaid fund is created congestion amount shall be transferred to National Load Despatch Centre account and once such a fund is created the NLDC shall transfer the congestion amount in favour of such fund."

(e) Para 11 of Annexure-I of the Central Electricity Regulatory Commission (Indian Electricity Grid Code) Regulations, 2010 provides as under:

"11. RPC Secretariats shall also issue the weekly statement for VAR charges, to all regional entities who have a net drawal/ injection of reactive energy under low/high voltage conditions. These payments shall also have a high priority and the concerned regional entities and other regional entities shall pay the indicated amounts into regional reactive pool account operated by the RLDC within 10 (ten) days of statement issue, provided that the Commission may direct any entity other than RLDC to operate the regional reactive pool account. The regional entities who have to receive the money on account of VAR charges would then be paid out from the regional reactive pool account, within two (2) working days from the receipt of payment in the Reactive pool account."

8. It is apparent from the above that NLDC/RLDCs have been assigned the functions to maintain various regulatory funds accounts under the authority of the respective regulations. It has been provided in these regulations that the Commission may also designate some other entity to maintain these funds which means that NLDC/RLDCs are managing as the custodian of these funds till some other entity is identified. From the beginning, it has been the intention of the Commission that the funds accruing into the various regulatory accounts shall not form part of the income of NLDC/RLDCs. Subsequently, the surpluses from these funds were transferred to Power System Development Fund created under Central Electricity Regulatory Commission (Power System Development Funds) Regulations, 2010 (PSDF Regulations). Regulation 3 of the PSDF Regulations provides as under:

"3. Constitution of the Fund:

(1) There shall be constituted a fund to be called the "Power System Development Fund" and there shall be credited thereto.-

(a) Congestion charges standing to the credit of the "Congestion Charge Account" after release of amounts payable to Regional Entities entitled to receive congestion charge along with interest, if any, in accordance with the Central Electricity Regulatory Commission (Measures to relieve congestion in real time operation), Regulations, 2009 as amended from time to time;

(b) Congestion amount arising from the difference in the market prices of different regions as a consequence of market splitting in power exchanges in accordance with Central Electricity Regulatory Commission (Power Market) Regulations, 2010.

(c) Unscheduled Interchange charges standing to the credit of the "Unscheduled Interchange Pool Account Fund" after final settlement of claims of Unscheduled Interchange Charges in accordance with the Central Electricity Regulatory Commission (Unscheduled Interchange Charges and related matters) Regulations, 2009 as amended from time to time;

(d) RLDC reactive energy charges standing to the credit of Reactive Energy Charges Accounts;

(e) such other charges as may be notified by the Commission from time to time:

Provided that amounts representing the sources as specified in sub-clauses (a) to (d) of clause (1) of this regulation and lying in the custody of Central Transmission Utility together with interest earned thereon upto 30th of April, 2010 shall be credited to the Fund.

(2) The agencies which are authorized to collect Congestion charges, Congestion amount, Unscheduled Interchange charges, Reactive energy charges under the respective regulations and such other charges as may be notified by the Commission from time to time, shall transfer to the credit of the Fund the balance amounts in the charges under sub-clauses (a) to (e) of clause (1) of this regulation on monthly basis or such other basis as deemed fit by the Managing Committee in accordance with Regulation 5.

(3) Separate account shall be maintained for each fund represented in sub-clauses (a) to (e) of clause (1) of this regulation subject to other terms and conditions as specified in the relevant regulations.

9. Under the regulatory scheme, surplus available in the regulatory accounts maintained in accordance with the provisions of the various regulations mentioned in para 7 above are to be transferred into the PSDF account which shall be operated by the Managing Committee which is an entity distinct from NLDC/RLDCs. The Commission had also intended that PSDF funds would be operated as a distinct funds and necessary exemptions under the Income Tax for the collection of the funds and interest thereon should be obtained. In this connection, para 1.2 of the Statement of Reasons to the PSDF Regulations is relevant which is extracted as under:

"1.2 The surplus amounts available in various regulatory accounts are meant for utilisation for the purpose as stipulated in the relevant regulations. Presently, accounts are maintained by the RLDCs and shown in their books of accounts. Strictly speaking, these are regulatory funds and as such, do not belong to the RLDCs. In order to deal with such funds independently, maintain proper books of accounts, process the applications for approval of various schemes by the Commission for sanction of grant out of these funds and for keeping track of the progress of the on-going projects financed out of such funds, the Commission considered it necessary to specify separate regulations so that surplus funds available under various account could be brought under the Power System Regulatory Fund and necessary exemptions on the collection of fund and interest earned thereon may be sought under the Income Tax Act, 1961."

10. After constitution of the Managing Committee and PSDF funds in accordance with PSDF Regulations, Managing Committee has taken necessary steps and obtained exemption from the Income Tax authorities for the PSDF funds under section 12A of the Income Tax Act, 1961. Since PSDF has been exempted under section 12A of the Income Tax Act, 1961, we direct the petitioner to take up the matter with the Income Tax authorities to treat the sources of the PSDF as exempted from Income Tax.

11. The demand notice has been issued by IT Department treating the funds in the regulatory accounts maintained by NLDC/RLDCs before their transfer to the PSDF as income of NLDC/RLDCs. In this connection, it is clarified in the light of the discussion in the preceding paras that the funds accruing in the different regulatory accounts are never intended to be income of NLDC/RLDCs and the expenditures from these funds are to be made strictly for the purpose specified in the respective regulations after regulatory approval by this Commission. NLDC/RLDCs are mere custodian of these funds till the balance amounts are transferred to the PSDF which has been exempted under section 12A of the Income Tax act, 1961. The petitioner is directed to take up the matter with the competent authorities under the Income Tax Act, 1961 including any legal remedy available for withdrawal or setting aside of the demand notice from IT Department.

12. The petitioner has prayed for a direction that in the event it is required to make payment of Rs.879.29 crore as per the demand notice of the IT Department, it may be allowed to pay the same from PSDF. We are of the view that since as per the decision of Ministry of Finance, monies available in PSDF will be transferred to the Public Account of India and will be maintained and operated by the Monitoring Committee constituted in accordance with the Ministry of Power, Government of India OM 29/9/2010-R&R (Vol. II) dated 10.1.2014, the petitioner is advised to take up the matter with the Monitoring Committee.

13. On the prayer (iii) of the petition, the Commission would like to take a decision after hearing all parties. Accordingly, notices are issued to all respondents and Ministry of Power to file their responses by 25.3.2014. The petitioner is directed to serve copy of the petition on the respondents and Ministry of Power immediately, if not already served.

14. The petition shall be listed for hearing on 17.4.2014."

6.29. Since the appellant could not produce the order of the CERC before the AO, it was considered as additional evidence. The order was thus sent to the AO for a report vide letter dated 25.03.2014.

6.30. The AO sent reports as under:

"Kindly refer to your office letter F.No. CIT(A)-XVII/2013-14/335 dated 25.03.2014 on the above mentioned subject.

2. The submissions of the undersigned on the contents of above referred letter and on the additional evidence produced by the assessee before your goodself are submitted as here in under.

3. At the very outset the undersigned craves to draw your kind attention to the fact that the assessee's petition to the fact that the assessee's petition before the CERC & the order of the CERC, now sought to be relied upon by the assessee before your goodself, being a development subsequent to passing of the assessment order on 31.01.2014, were never brought to the notice of the undersigned before completion of the assessment. Hence, the same constitute additional evidence production of which before your goodself has to be as per the provisions of Rule 46A of the IT Rules, 1962. Evidently, the assessee has not spelt out as to how it is covered by any of the circumstances enumerated in sub rule 1(a) to 1(d) of the Rule 46A, which covers only exceptional circumstances under which the assessee can produce before your goodself any evidence, whether oral or documentary, other than the evidence produced by it during the course of proceedings before the AO. The Hon'ble Delhi High Court has held in the case of CIT vs. Manish Buildwell Pvt. Ltd. reported in (2011) 245 CTR (del) 397 that once the assessee invokes rule 46A and prays for admission of additional evidence before the CIT(A), the procedure

prescribed in the said rule has to be scrupulously followed. Hence, unless the assessee proves that it is covered by the sub rule 1 of the rule 46A, it cannot be permitted to produce the additional evidence permitted to produce the additional evidence before your goodself. On the examination of the above referred 'additional evidence' the undersigned is of the considered opinion that the assessee's case is not covered by any of the clause of sub rule 46A(1) of the IT Rules, 1962. Hence, its production before your goodself is not in conformity with the provisions of law.

4. Without prejudice to the above noticed discussion, on merit also it is submitted that the Hon'ble CERC has no jurisdiction to determine as to what receipt would constitute assessable income of the assessee liable to income tax, the determination of which is in the exclusive domain of the Assessing Officer as per the provisions of the Income Tax Act, 1961, as he alone, as a quasi judicial authority, has been given the duty of determining taxable income of the assessee as per the provisions of the Income Tax Act, 1961 which is a separate and independent code into itself and gives no scope for any interference by the Hon'ble CERC in the matter of determination of total income of the assessee. Needless to reiterate that the undersigned has dwelt upon with the issues involved in this case on the arguments raised by the assessee in the assessment proceedings in detail and as per provisions of the Income Tax Act, 1961, a speaking assessment order has been passed after fully taking care of the principle of natural justice. Hence, any remedy available to the assessee against the above referred assessment order, if any, has to be within the frame work of the Income Tax Act, 1961 and by the authorities competent for the same under the provisions of the Income Tax Act, 1961. Evidently, the Hon'ble CERC is not amongst the authorities contemplated in the Income Tax Act, 1961. Hence, any order of the Hon'ble CERC may not have any impact on the determination of the total income of the assessee as discussed above.

5. It is therefore requested that the order of the Hon'ble CERC may not be entertained in view of the facts mentioned above and also in view of the facts that it is a additional evidence filed before your honour therefore not liable to be admitted as per the provisions of Rule 46A of the Income Tax Rules, 1962.

6.1 It would not be out of place to bring to your kind notice that vide notification No. L-1(1)/2009-CERC New Delhi dated 30.03.2009, the Hon'ble CERC has laid down the regulations regarding application of funds collected through UI/RE/CC charges which are as under:-

(1) The amount left after final settlement of claims of Unscheduled Interchange charges of the generating station and the beneficiaries shall be utilised, with the prior approval of the Commission, for either or both of the following activities:

(a) Servicing of investment for transmission schemes of strategic importance, Provided that the Central Transmission Utility in consultation with Central Electricity Authority shall identify the inter-State transmission schemes of strategic importance, not being utilised up to optimum level and seek prior approval of the Commission for servicing of capital costs during the initial years from amount left in the "Unscheduled Interchange Pool Fund" after settlement of claims of Unscheduled Interchange Charges. Provided further that when utilisation of such transmission line or transmission system included in the transmission schemes of strategic importance reaches the optimum level of utilisation, the cost of such scheme shall be recovered from the users of the scheme in accordance with the methodology specified by the Commission.

(b) Providing ancillary services including but not limited to 'load generation balancing' during low grid frequency as identified by the Regional Load Despatch Centre, in accordance with the procedure prepared by it, to ensure grid security and safety:

(2) The amount of fund, allocable for the purposes specified under clause (1), shall be decided by the Commission from time to time.

6.2 It is very clear that the application of funds collected under UI/RE/CC is under the domain of the assessee company, and its holding company i.e. Power Grid Corporation of India Ltd. with the approval of the CERC. It is, also clear from the regulations that all the funds maintained in the nomenclature of UI/CC/RC etc are exclusively maintained by Regional load dispatch centres and accounts have to be maintained separately and should be audited also. The company under regulations of CERC is maintaining these accounts and has included transaction under UI/CC/RE in financial books of the company and have been shown in balance sheet.

6.3 The UI charges payable on account of over-drawl by the buyer or the beneficiary and under-injection by the generating station or the seller and receivable for under-drawl by the buyer or the beneficiary and over-injection by the generating station or the seller. The charges are transferred to pool account. The amount left after final settlement of claims of Unscheduled Interchange charges of the generating station and the beneficiaries shall be utilised, with the prior approval of the Commission, for either or both of the above noted activities, but will not in any case be refunded to consumers of electricity either directly or through reduction in tariff.

6.4 These charges are levied for maintaining grid discipline through the commercial mechanism, and are in nature of revenue receipts. After final settlement there will be amount left due to capping that is excess amount is recovered from defaulters and passed on to beneficiaries at a lower rate resulting always positive balance in pool accounts and amount forfeited due to gaming activity which will be utilized for above mentioned purposes after permission from commission. Here it is imperative to note that there is difference in UI/RE/CC charges recovered & distributed which shows that there will be some profit element in UI charges collected though levied to penalize the over-drawl or under injection but it will remain in nature of the profit in the hands of RLD. Mere contention that RLDs maintain these funds under strict supervision of CERC will not alter the fact that these are activities of routine business nature and profit earned from them should be liable to tax. Since these funds are exclusively maintained by RLD, in present case the assessee company and accounts are also maintained by the assessee company the receipts & payments of the various charges are done in regular business course under the norms and guidelines of CERC. Hence, it will not be incorrect to say that maintenance of the said funds is under the routine activity of the assessee company and excessive balance remained in the account along with interest earned on the deposit in fund account should be treated as income under head business or profession during the year. Further the assessee company has incurred massive capital expenditure on the machinery, computer system, manpower, technical personnel, SCADA to keep data of generation and utilization of electricity and to make schedules to calculate the recovery and allocation of charges under UI/CC/RE. The company is bearing all the capital expenditure and related revenue expenditure for the purpose of maintaining these activities which have been debited to profit & loss account & treated in balance sheet accordingly. But the company has routed transaction in the pool accounts under UI/CC/RE through balance sheet only and not through profit & loss account, yet the company has incurred capital expenditure as well as revenue expenditures debited to profit & loss account to control, maintain, supervise the mechanism of recovery through UI/CC/RE. The assessee has control over day to day activities of the controlling, supervising, regulating and analyzing the generation and drawl of electricity and also prepares schedules to calculate the amount leviable upon defaulters as UI/CC/RE and payable as incentive to beneficiaries, the amount recovered from defaulters includes profit margin which at all is not transferred to beneficiaries and is kept in pool accounts through capping mechanism.

6.5 In view of the above facts, it is evident that the funds collected in the UI/CC/RE pool is the income of the assessee. It has the right of application of these funds. It is a different matter that the assessee has not done so. This does not take away from the fact that these funds are the assessee's own income which can be utilised by it and its holding company with approval of CERC.

7. Therefore, in view of above submissions, the assessee's contention that the charges collected in these pool accounts are not its income is not acceptable.

8. In the end, it is prayed the undersigned may kindly be given any opportunity to heard if your goodself considers it necessary."

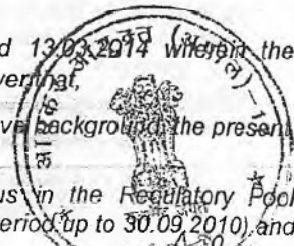
Kindly refer to the remand report submitted vide this office letter F.No.DCIT/Circle-14(1)/2013-14/2847 dated 26.03.2014 in response to your office letter F.No. CIT(A)-XVII/2013-14335 dated 25.03.2014 on the above mentioned subject.

2. In continuation to the above referred remand report submitted by this office, the following points are being additionally submitted:-

(a) Kindly refer to Para 4 of the CERC order dated 13/03/2014 wherein the petitioner i.e. the assessee company has submitted in its prayer that,

"The representative of the petitioner submitted that in the above background the present petition has been filed with the following prayers:

"(i) The Hon'ble Commission may declare that the surplus in the Regulatory Pool Accounts is not the income of POSOCO (Powergrid for the period up to 30.09.2010) and



further declare that NLDC/RLDCs are only nodal agency operating and maintain the Regulatory Pool Account as an agent on behalf of the Hon'ble Commission. The money collected under these functions be considered as a part of income exempted under Section 10(46) of the Income Tax Act, 1961.

.....

(iii) The Hon'ble Commission may also consider evolving a comprehensive framework for the removal of the difficulty, by formation of a separate entity with a new PAN number to deal with all the Regulatory Funds already created and to be created in future and settlement thereof, or any other such mechanism as may be considered appropriate in the opinion of the Hon'ble Commission."

(b) From the above grounds of appeal of the assessee, it is clearly evident that the assessee company considers the amount in the various pool accounts as income and, therefore, is requesting the Hon'ble Commission to consider it as income exempt under Section 10(46) of the Income Tax Act, 1961. The assessee company has also requested the Commission to evolve a comprehensive mechanism by creating a separate entity with a new PAN number for dealing with these Regulatory Funds. Therefore, the assessee company has conceded to the fact that the amounts in the various pool accounts is a form of income and thus the necessity of requesting for seeking exemption of the same as per the provisions of the Income Tax Act, 1961.

(c) However, it remains a fact that till such time as exemption is obtained from the Income Tax Department for these amounts in various pools reflected by the assessee company in its books of accounts, the same would be treated as income in the hands of the assessee company. This is more so because the various revenue and capital expenses debited in its Profit & Loss Account as on 31.03.2011 also includes the expenses that were incurred in connection with these various pool accounts reflected by the assessee in its books of accounts.

(d) It is patently wrong that the assessee has not routed these amounts through its Profit & Loss Account but has taken it straight to the balance sheet on the one hand, when on the other hand, the assessee is incurring and debiting expenses towards these accounts in its Profit & Loss Account and as capital expenditure.

(e) Therefore, this amount cannot be treated as exempt income and should have been offered as income of the assessee when it is claiming expenses against the same.

4. This report is being submitted in continuation to the earlier report with the request to kindly take the same into consideration."

6.31. I have admitted the evidence submitted under Rule 46A. The CERC had passed the order only on 13.03.2014. Therefore the appellant could not have produced the order before the AO at the time of assessment proceedings.

6.32. Copies of the remand reports received from the AO were given to the appellant for comments. The appellant gave its reply as under:

- 1) In reply to DCIT Remand report dated 25-Mar-2014 in Remand report no. F.No.DCIT/Circle-14(1)/2013-14/2828, wherein the DO had mentioned that notice u/s 143(2) was sent by the ITO, Ward 26(1) vide notice dated 01-Aug-2012 fixing the case for 22-Aug-2012. The photocopy of the registered speed post evidencing the dispatch of the notice is attached. In reply it is submitted that the Appellant Company had not received the said notice. As per the Appellant's record, the first notice was served on the Appellant in August 2013.
- 2) We would therefore reiterate our submission already made with reference to Ground no. 1 & 2. We would leave it to your goodself for adjudicating the same.
- 3) As regards the remand letter no. F.No. DCIT/Circle-14(1)/2013-14/2860 dated 28-03-2014, our reference is invited to our written submission -2 dated 30-Mar-2014 wherein in Para 1.2 we had made it clear that section 12 A was never claimed in the hands of the Appellant Company. In fact registration u/s 12 A was granted to PSDF.

4.01) It has never been the case of the Appellant that it had claimed exemption u/s 10(46) of the Income tax Act. In fact this is not the part of the Grounds of appeal raised by the Appellant in the instant case. The AO has quoted as per the prayer of the Appellant in the petition filed to CERC. Part 4 of the CERC order dated 13-Mar-2014. In the prayer of the Appellant company there was a typographical error in mentioning the section, which was later on rectified. Instead of 10(46), the section 10(23BBG) has been typed which clearly exempts the income of CERC. Accordingly the AO's remand report is wrong to this extent.

4.02) In the prayer of the petition to CERC, it was specifically prayed that the Commission may consider and to evolve a comprehensive mechanism for such regulatory funds. The Appellant company had never conceded nor requested before any Authority that the Pool Account is forming part of the Income of the Appellant Company. Such Regulatory Pool accounts, since diverted at source itself cannot form part of the income of the Appellant.

4.03) As regards the various Revenue and Capital Expenditure debited in the Profit and Loss a/c of the Appellant as on 31-Mar-2011 thus does not include any expense or the income of the Pool Account. The report of the AO is factually wrong and the correct facts are mentioned below :

- a) POSOCO's income is from Fees & Charges levied to all constituents including Power Generators and Distributors. The Fees & Charges have following components :
- i) Return on Equity
 - ii) Interest on Loan
 - (iii) Depreciation
 - (iv) Human Resources Expenses
 - v) Operation & Maintenance expenses other than (iv) above
 - vi) Interest on Working Capital

The total expenditure including Repairs & maintenance of all Fixed assets, Salary, etc. incurred on all activities including Regulatory activities are fully reimbursed as part of tariff which is already included as the income and the expenditure of the Appellant company as per P&L A/c for the Assessment year 2011-12 which is under Appeal.

b) In view of the above, the AO has erred in his Remand report that such expenses have been incurred out of the various Pool Accounts, which is totally erroneous. Further, in the Balance Sheet of the Appellant Residual Amount is to be transferred to PSDF has been shown as an item of Asset in the form of Bank Balance together with accrued interest thereon. Corresponding liability pending transfer to PSDF is reflected in the liability side of the Balance Sheet.

c) In the Profit & Loss A/c of the Appellant, the income that accrues/arises of the Appellant company has rightly been reflected. A complete details of the Revenue account is already forming part of the paperbook already filed. The Pool Account which does neither belong to nor any right to accrue the same in the hands of the Appellant, cannot be routed through P&L A/c. As regards routing it through Balance Sheet, it has been covered in point b) above.

In view of the aforesaid submission, the remand report dated 28-mar-2014 is wrong both on facts and on Law.

d) With reference to Remand letter no. F.No. DCIT/Circle 14(1)/2013-14/2847 dated 26-03-2014 the following reply is made :

i) The AO in his Remand Report had mentioned that the order of the CERC pursuant to the Petition before the CERC is subsequent to the completion of the Assessment proceedings. Accordingly, Rule 46A of Income Tax Rules, 1962 shall apply. Basically it is not in the form of additional evidence. The AO having raised the huge demand on the Appellant which is supposed to be deposited by first week of March 2014. Against such demand of the AO, and also considering the fact that the Appellant has no right to utilize the Pool Account, had no alternative except to approach CERC for directions in this regard.

ii) While disposing off the petition of CERC vide order dated 13-Mar-2014 had discussed the petition of the Appellant and had observed that the Pool account is not the income of CERC/MOP. It is action of the AO in raising such demand, the Appellant company had approached the CERC for direction. This action could only take place after the assessment proceedings wherein the demand was raised. Accordingly, in real sense it is not an additional evidence as contemplated in Rule 46A. Accordingly the AO's observation in his Remand report relying on Jurisdictional High court decision in the case of CIT vs. Manish Buildwell Pvt. Ltd. reported in 245 CTR (del)/397 is wrong since it is not a case of additional evidence as per Rule 46A.

(iii) The para 6.1 of the AO's remand report is only an extract from the Regulation.

iv) In para 6.2 of the said remand letter, the AO had wrongly come to the conclusion and wrongly stated that the application of the fund collected under the Pool Account is under domain of the Appellant company with the approval of the CERC. In fact, the Appellant company has no access to such Regulatory funds and only acting as a Nodal Agency on behalf of Govt. of India.

(v) In para 6.3 the AO had allegedly mentioned that the fund will not in any case be refunded to consumers of electricity either directly or through reduction in tariff. But actually the fact remains that the said fund is ultimately transferred to PSDF. Hence it is wrong on the part of the AO to mention that it is refunded to consumers of electricity is a directly or through a reduction in tariff. It may be seen from the PSDF Notification 10-04-2013, the said fund has been declared as Public Fund and purpose of utilization which will benefit the power sector in accordance with said notification.

vi) The AO has wrongly observed in para no 6.4 that there is difference in UI/RE?CC charges recovered & distributed which shows that there will be some profit element in UI Charges collected though levied to penalize the over-drawl or under injection but it will remain in nature of the profit in the hands of RLDC. Mere contention that RLDCs maintain these funds under strict supervision of CERC will not alter the fact that these are activities of routine business nature and profit earned from them should be liable to tax.

The facts of case is that respective RPCs are metering and billing all the Regulatory activities, whereas the Appellant is only collecting the funds and custodian till such time the accounts are settled by RPCs and residual money is transferred to Government. In view of the above said facts, the contention of the AO is wrong to conclude that the surplus is the profit of the Appellant Company. His opinion is based on mere surmises and against the facts.

As regards the observation of the AO with reference to the capital expenditure and related revenue expenditure have already been dealt with in the above paragraph 4.03.

vii) As per para 6.5 of the AO's remand letter it is mentioned that the Appellant has no right of application of the Pool funds and such right is only vested with Govt. of India. This has been more elaborately mentioned in the written submission already filed with you. Hence the AO is wrong in coming to the conclusion that these funds are the income of the Appellant and can be utilized.

viii) Paragraph 7 & 8, no specific rebut is necessary since it is only reiteration by the AO that it is the income of the Appellant for which we have already rebutted more elaborately in the written submission 1 and written submission 2 and also this reply to the remand report of the AO."

6.33. From a perusal of all the documents, I have noted that the appellant has never stated that its income should be exempt u/s 10(46).

6.34. Further, the appellant has also clearly stated that no amount from the surplus fund forms part of its income. The interest received by the appellant is on a sum which is totally distinct from the surplus fund.

6.35. The interest of Rs.4.55 crores has accrued on STOA Bank account and forms part of the appellant's income. The AO has not considered Rs.7.35 crores which is interest accrued on the Regulatory Account as the appellant's income.

6.36. The expenditure incurred as stated by the appellant is from other sources and the appellant cannot touch any part of the amounts in the Regulatory Accounts for incurring any expenditure.

6.37. The appellant has quoted the case of CIT vs. Delhi State Industrial Development reported in ITA No. 359 2002 dated 24.04.2007 wherein it is stated as under:

6. The Tribunal reversed the view taken by both the Assessing Officer as well as the Commissioner of Income-tax (Appeals). It was held that the scheme had been floated by the Delhi Administration and the assessee was merely a developer. Neither the plots in the scheme nor the Narela revolving fund, created as a result of the scheme, were the property of the assessee but they belonged to the Delhi Administration. The assessee erroneously utilised the funds by investing them in the banks and earned interest thereon which was credited in the profit and loss account of the assessee but when the CAG raised an objection, the assessee duly accepted the mistake and reversed the entries in the books.

7. It is quite clear from the above that the amounts lying in the Narela revolving fund and the interest earned by investing surplus funds in the banks, was not the property of the assessee and, therefore, was not even the income of the assessee. The Narela revolving fund and the interest earned on surplus funds belonged to the Delhi Administration. Therefore, there is no question of adding the amount to the income of the assessee, which was only a development agency.

8. We cannot find any fault with the reasoning adopted by the Tribunal particularly since there was no income in the hands of the assessee and credits were duly reversed on the advice of the Comptroller and Auditor- General of India. Therefore, no substantial question of law arises for consideration.

9. The appeal is dismissed."

6.38. A perusal of all documents submitted is indicative of the fact that the objective behind creation of the PSDF was to have a fund the amount from which could be used for public purposes. Subsequently, the Ministry of Finance also placed the funds in the Public Account of India.

6.39. The appellant POSOCO acts as a collecting agent only for collecting the various charges levied which are deposited in the Regulatory Accounts. The overall management of the Regulatory Accounts is not with the appellant. The invoices are raised by the RPC. The appellant cannot use any amount from the Regulatory Accounts. The entire sum which is the surplus from the Regulatory Accounts is then transferred to the PSDF.

6.40. Thus, no part of the above Regulatory Pool Accounts is used by RLDCs/NLDC under POSOCO. The RLDCs/NLDC main source of income is through the Fees and Charges as per the CERC Regulations.

6.41. The appellant further stated that it has its own sources of income as distinct from the Regulatory Accounts which are as under:

"1) *RLDC Fees and Charges - As per the NLDC.*

As per order of CERC, all the users of the RLDC pay RLDC Fees and charges to the respective RLDC in line with such CERC order on monthly basis. This income is recognized a 'Reserve form Operations'.

2) *Short Term Open Access Charges (STOA) are collected under the 'Short Term Open Access Charges Regulation, 2008' issued by CERC. This comprises of:*

(a) *Application - Income A/ced by POSOCO fees.*

(b) *Scheduling and System Operation charges - Income A/ced by POSOCO*

(c) *Transmission Charges - (ISTS) - Amount collected by POSOCO and Transferred to CTU for further disbursement to Long Term Customers.*

(d) *Transmission Charges (State) - Amount collected by POSOCO and Transferred to STU/SLDL.*

3. *Bank Interest earned on STDA Bank Account.'*

6.42. The expenditure incurred by the appellant is as under:

"Major heads of expenditure of POSOCO are on account of the following four heads:

- 1) *Employee Cost - includes salary and staff welfare expenses.*
- 2) *Administration Cost - Office expenses and other overhead expenses.*
- 3) *Depreciation - Depreciation of office assets and SCADA system.*
- 4) *Finance Cost - Interest on loan taken as back to back arrangements from Power Grid."*

6.43. Source of Capital Expenditure of POSOCO is as under:

"Under the CERC order regarding 'RLDC Fees and charges Regulation, 2009' POSOCO is paid for (capital expenditure) need of the company. Major heads of CAPEX are:

- 1) *Supervisory Control Data Acquisition (SCADA) System installed at all RLDC's/NLDC which is used for monitory of Power System Operation of the entire country.*
- 2) *Communication system installed all RLDCs.*
- 3) *Civil Expenditure - For major renovation of RLDC offices."*

6.44. The entire 'CAPEX' requirement of POSOCO is through 'RLDC Fees and Charges' as approved by CERC and there is no other source of funding for 'CAPEX' needs.

I shall now define income and whether the amount which is surplus in the Regulatory Accounts can be termed as "income" of the appellant as per the I. T. Act, 1961.

6.45. Income is defined as earnings or revenue earned by a person. In this case no amount has been earned by the appellant. The appellant can never utilize the amount in question for its use. The appellant has no control over the amount in question. Earnings of a person is only when the amount is received by the person.

6.46. I shall now consider the concept of Diversion by overriding title - If an amount by nature of an obligation is diverted before it reaches the appellant, it is not income. But when income is required to be applied to discharge an obligation after it reaches the appellant, it is application of income.

6.47. The term 'income' in 2(24) is inclusive and not exclusive. Therefore, the term "income" also includes items which are excluded in section 2(24).

6.48. As per section u/s 2(24) income is:

"2. Definitions.--In this Act, unless the context otherwise requires,-

(24) "income" includes-

(i) profits and gains ;

(ii) dividend ;

(iii) voluntary contributions received by a trust created wholly or partly for charitable or religious purposes or by an institution established wholly or partly for such purposes, 31or by an association or institution referred to in clause (21) or clause (23)32, or by a fund or trust or institution referred to in sub-clause (iv) or sub-clause (v) 33or by any university or other educational institution referred to in 34sub-clause (iiia) or sub-clause (vi) or by any hospital or other institution referred to in 34sub-clause (iiia) or sub-clause (vi) of clause (23C), of section 10, 81or by an electoral trust :..."

6.49. In CIT vs. Sunil J. Kinariwala (2003) 259 ITR 10 the Hon. Apex Court observed:

"If a 3^d person becomes entitled to receive an amount under an obligation of an assessee.

Even before he could lay claim to received it as his in ome, therefore would be diversion of income by overriding title."

"After receipt of income, by the assessee, the same is in discharge of the obligation of the assessee, it will be a case of application of income by the assessee".

6.50. Therefore, whereby under an obligation if income is diverted before it reaches the appellant, it is not taxable. But where an income is required to be applied to discharge an obligation after such income reaches the appellant, the same consequences would not follow.

6.51. The Hon'ble court in the case of CIT VS. Sitaldas Tirath Das observed *"The first is the case in which the income never reaches the assessee, who even if he were to collect it, does so, not as part of his income, but for and on behalf of the person to whom it is payable."*

6.52. The AO has quoted various case laws. However, the facts of all the cases are very different from this case. In this case the receipts go directly to the regulatory account and cannot be utilized by the appellant for any purpose without prior approval. The case of the appellant is clearly diversion of income at source.

6.53. However, in the all cases quoted by the AO, income was received by the appellant and then the income was applied for other purposes. This is application of income.

The appellant has stated that the bills are raised by the Regional Power Committee which consists of member from Central Electricity Authority State Regulatory Boards and State utilities. Copies of bills were shown to me at the time of appellate proceedings.

6.54. The AO has stated that in the accounts, the appellant has not taken the amounts in its books. The appellant has stated that the account is taken only in the balance sheet if there is any outstanding as on 31st March. No entries are made in the P & L A/c as it is not its revenue.

6.55. The AO has stated that exemption u/s 12A has been granted to the PSDF in respect of these surplus amounts transferred to it and not on the amounts in the Regulatory Accounts. In my view, there does not appear any ~~loft~~ in taking the same amount in the hands of the appellant as income and then stating that this amount is not taxable in the hands of PSDF. Further, the amounts in question pertain to an account which is now a public account.

6.56. The AO has stated that the concept of such a fund is not mentioned in any provision of section 10. Section 10 talks of incomes which do not form part of total income. As I have stated that the surplus funds in the first instance is not considered as "income". There is therefore no question of making a reference to section 10.

6.57. In my view the amounts in the regulatory accounts cannot be in the nature of income. The NLDC & RLDC'S are merely collecting the sums and then depositing the amount in PSDF. At source itself the amounts go to the Regulatory Accounts.

6.58. The AO has further stated that the I. T. Act, 1961 and CERC are separate legislations and the provisions of Electricity Act and CERC can have no overriding effect on the I. T. Act, 1961. In my view the CERC has merely clarified the position.

6.59. The AO had observed in his order about the term 'gaming' and was under the belief that the Appellant had flexibility and had manipulated by gaming to its benefit.

6.60. The appellant has given definition of the term "Gaming",

"(ee) 'gaming' in relation to these regulations, shall mean an intentional misdeclaration of declared capacity by any generating Station or seller in order to make an undue commercial gain through Unscheduled Interchange charges.

The inter-state generating stations are required to generate electricity as per schedule issued by the Regional Load Despatch Centre. Deviation from schedule if any, i.e. over-generation or under-generation is settled through unscheduled inter-change (UI) charges. The deviation can be of two types, deliberate or inadvertent. It is difficult to maintain generation exactly as per schedule and some small positive / negative deviations would always be there. However, there may be situations where, the station foresees high UI rates and deliberately declares lower availability in order to generate more as UI and make more money (differential between UI rate and fuel cost). In order to discourage such a situation, the Commission has made explicit provision on elimination of gaming in the clause 6 of the UI regulations. Clause 6(6) of the UI Regulations as amended in 2010 is quoted below:

(6) The Commission may, either suo motu or on a petition made by RLDC, initiate proceedings against any generating company or seller on charges of gaming and if required may order an inquiry in such manner as decided by the Commission. When the charge of gaming is established in the above inquiry, the Commission may, without prejudice to any other action under the Act or regulations thereunder, disallow any Unscheduled Interchange charges received by such generating company or the seller during the period of such gaming.

Thus as per the Regulations applicable in 2010-11 (w.e.f. 3.5.2010), only the Commission is empowered to disallow any UI charges during the period of gaming. As per the clause 6(4) of the earlier UI Regulations (applicable between 1.4.2009 to 2.5.2010), RLDCs were required to investigate gaming, however if gaming was found, the extra UI charges earned by the station was made zero and the amount was adjusted in UI pool account of the beneficiaries. The Regulation is quoted below:

(4) For any generation from the generating stations other than hydro generating stations beyond the specified limits, the Regional Load Despatch Centre shall investigate so as to ensure that there is no gaming. Generating stations shall be entitled to recover the Unscheduled Interchange charges only if the investigation establishes that there is no gaming. If gaming is found by the Regional Load Despatch Centre, the corresponding Unscheduled Interchange charges payable to the generating station on account of such extra generation shall be reduced to zero and the amount shall be adjusted in UI pool account of the beneficiaries in the ratio of their capacity share in the generating station."

Gaming activity is also a part of UI function and any amount collected will be forming part of pool account. The appellant has stated that at no point of time RLDC (POSOCO) received any amount due to gaming.

6.61. All facts point towards the conclusion that the surplus amounts in the Regulatory Accounts were never received by the appellant as income. The appellant was merely overseeing the collections in the 4 Regulatory Accounts. The amounts were diverted before they reached the appellant at source itself. The amounts therefore cannot be considered as income of the appellant. Only if the amounts are received by the appellant can it be income. The appellant cannot use the amounts in the Regulatory Accounts for any purpose. Thus the funds do not belong to the appellant and cannot be considered as its income. The amount of Rs.19,73,33,00,000/- is therefore deleted. The grounds of appeal are ruled in favour of the appellant.

7. None of the above findings were rebutted by the Revenue. It is the finding of the Ld. CIT(A) that the surplus amounts in the regulatory accounts were never received by the assessee a Government of India Enterprise. It is the finding of the Ld. CIT(A) that the amounts in regulatory accounts were diverted before they reached the assessee at the source itself and the assessee was merely overseeing the collections in the regulatory accounts. It is the finding of the Ld. CIT(A) that there is diversion by overriding title and the assessee cannot use the amounts in the regulatory accounts for any purpose and, therefore, it cannot be income of the assessee. These findings have not been rebutted with evidences by the Revenue.

8. We also observe from the submission of the assessee which was also extracted from the Ld. CIT(Appeals) in his order at page 22 and notification was issued by Ministry of Power for the operationalization of Power System Development Fund (PSDF) and utilization of funds deposited therein. As per the notification the money PSDF shall be deposited under the Public Account. The money is utilized for the schemes sanctioned by Govt. of India after techno-economic appraisal by a committee headed by a Chairperson - CEA and duly approved by the Regulator. The assessee also contended that referring to DOL from Secretary Power to Secretary Revenue letter dated 28.02.2014. It is the contention that as per the Cabinet approval NLDC is the nodal agency for implementation of the scheme formulated for utilization of PSDF funds.

It is also submitted that the Secretary in his letter dated 28.02.2014 at para 5 had categorically mentioned that POSOCO is only acting as a nodal agency for the said function and the money in these pool accounts belong to CERC/MOP as observed by the CNAG. Assessee also referred to in “as observed by the CNAG in its report that the function of disciplining and regulating the grid are part of function of Central Electricity Regulatory Commission (CERC) and the funds lying in PSDF should not lie outside the Government Accounting System. The assessee further made its submissions before the Ld. CIT(A) as under:

4. In this background the issue was taken up with Union Cabinet by this Ministry. After considering the proposal the Union Cabinet on 2nd January, 2014 had approved the operationalization of Power System Development Fund (PSDF) and also the scheme formulated for utilization of funds deposited therein based on the procedure laid down in the Central Electricity Regulatory Commission (CERC) Power System Development Fund Regulations, 2010. As per Cabinet approval obtained, NLDC is the Nodal Agency for implementation of the Scheme. Detailed scheme indicating how the surplus is created and the mechanism for its utilization is enumerated in the MOPs letter dated 10/01/2014 (Copy of the MOP letter No. 29/9/2010-R&R (Vol.-II) dated 10/01/2014 is at Annex-I).

5. The RLDCs and NLDC (POSOCO) have to maintain different Pool Accounts for setting payments amongst the member utilities connected to the grid under CERC regulation. These Pool Accounts relate to imbalance settlement, Voltage control and Network congestion and offer an elegant way of managing the entire electricity market at the inter-state level. POSOCO is only acting as a nodal agency for the said function and the money in these Pool Accounts belongs to CERC/MOP as observed by C&AG.”

8.1 From the above it is clear that Regional Power Committees (RPCs) constituted under Govt. Notification and functioning as a part of CEA and the bills are raised by such RPCs are the income of Govt. of India. POSOCO is functioning as the custodian of Funds only.

9.1 The interest earned/accrued on the above Fund is also forming part of Central govt. fund and as per the Constitution of India the same cannot be brought under the tax net.

10.1 A combined reading of CERC order/ notification and a letter from Secretary Power to Secretary Revenue alongwith various legislation regarding the pool account as enumerated above in this submission, it is clear that the income taxed by the AO is not the income of the Appellant. This is clearly a diversion income by overriding title. Hence the entire income is not liable to be added to the income of the Appellant.

11.1 Where income is sliced away from person receiving it before its accrual in favour of another, there is diversion by overriding title. In contrast, there is application, if the income already accrued to one person is parted with in favour of another. Tax is not chargeable in the first instance and in latter case it becomes taxable.

12.1 In the case of diversion by over-riding title, the income gets split up at the threshold itself. The recipient is not taxable on the income, which he has to part with because of the over-riding title. It is not necessary for him to prove that he has either right to exemption or revocation because the income was never his.

13.1 In most of the cases, the distinction between diversion by overriding title and application of income would be found to be one based upon agreement. It is because

*the concepts are basically legal and hence, as pointed out by the Supreme Court in a number of cases, what is relevant for consideration is that there is a legal obligation. But in the absence of a legal obligation created by oneself without any compulsion by way of a pre-existing right on the part of the person in whose favour it is created, it may not be easy to establish diversion at source. But the decisions in *Tollymunge Club* reported (1979) 107 ITR 776 (S) and *Bijli Cotton Mills* (1979) 116 ITR 300 (SC) do indicate that there is no necessity for a pre-existing right in every case as long as the amount can be shown to be not belong to the assessee at the time of receipt, and the other party parted with the same with the knowledge that the amount does not belong to the person to whom he makes the payment.*

14.1 *The Supreme Court in *Dalmia V CIT* 237 ITR 617 held that where the assessee company, the owner of two cement factories situated in Pakistan, agreed to sell and transfer them under an agreement whereunder the profits and loss arising from the operations were to be on account of the purchaser during the specified period, the profits were diverted to the purchaser in terms of the agreement and were not taxable in the hands of the assessee company.*

In view of the foregoing facts, legislation and various judicial pronouncement, it is prayed that the a addition of Rs.1933.33 crores may kindly be deleted.

9. None of the above submissions of the assessee were counted by the Revenue as not true. Therefore, in view of the elaborate findings of the Ld. CIT(Appeals), we do not see any valid reason to interfere with the findings in holding that the surplus in Pool accounts under the head UI/CC/RE and interest income from banks on these accounts is not income of the assessee. Thus, we sustain the orders of the Ld. CIT(Appeals) for all these assessment years i.e. AY 2011-12 to AY 2014-15 on the issue of taxability of surplus in Pool account of UI/CC/RE and interest income from banks on these deposits in bank account from such accounts. The common ground nos. 1 to 6 raised by the Revenue in all these appeals are rejected.

10. The second common ground no. 7 raised for the assessment years 2012-13 and 2013-14 relates to deletion of disallowance made u/s 43B(b) of the Act in respect of provision made for post retirement medical benefits to employer. The Assessing Officer while completing the

assessment noticed that the assessee has created provision for retirement/package, post retirement medical benefit in the profit and loss account and the same has not been added back by the assessee in its computation of income. The assessee was asked to justify as to why the same should be allowed as deduction and the assessee submitted that the provision has been made on the basis of actuarial valuation, they are quantified and, therefore, they are allowable as deduction. Not convinced with the submissions the Assessing Officer disallowed provision for post retirement medical benefits u/s 43B of the Act. On appeal the Ld. CIT(Appeals) deleted the disallowance.

11. The Ld. DR placed reliance on the orders of the Assessing Officer and the Ld. Counsel for the assessee supported the orders of the Ld. CIT(A).

12. Heard rival submissions. It is not in dispute that the quantification done by the assessee in respect of post retirement medical benefits was on actuarial valuation as per accounting policy of the company. When once the quantification was done on actuarial valuation basis the liability is ascertained liability as held by the Hon'ble Supreme Court in the case of Bharat Earth Movers Vs. CIT [245 IGR 428]. On perusal of the order of the Ld. CIT(Appeals), we observe that the Ld. CIT(Appeals) following the decisions of Supreme Court in the case of Metal Box Company of India Limited [73 ITR 53], Bharat Earth Movers Vs. CIT, Protos Engineering

Company Pvt. Ltd. Vs. CIT [282 ITR 550] and the decision of the jurisdictional High Court in the case of CIT vs. Ranbaxy Laboratory Limited [334 ITR 431] deleted the disallowance made by the AO u/s 43B(b) of the Act. We see no infirmity in the order passed by the Ld. CIT(Appeals). Thus, we sustain the Ld. CIT(Appeals) order. Ground no. 7 raised by the Revenue in its appeals for 2012-13 and 2014-15 is rejected.

13. The only ground left for adjudication in Revenue's appeal in AY 2014-15 is in respect of deletion of prior period expenses for the Ld. CIT(A). The AO while completing the assessment, on perusal of financial statements and notes on accounts no. 2.24 and the Income Tax return filed for the assessee, noticed that assessee debited an amount of Rs. 10.63 crores as prior period expense. The assessee was required to explain as to why this amount should not be disallowed. The assessee explained that interest on pruning up was revised based on CERC order in the year under consideration on the basis of revised calculation for financial years 2010-11 to 2012-13 and, therefore, interest became payable and since this interest is relating to earlier years the same has been claimed as prior period expenses. Not convinced with the submissions of the assessee the AO disallowed 10.63 crores and added to the income of the assessee. On appeal the Ld. CIT(A) deleted the disallowance holding that the adjustments made during the year is on the basis of regulation issued by CERC for which the liability has crystallized during the year under consideration. However, prior period expenditure

to the extent of 10.17 lakhs on account of training cost, transit hostel maintenance and depreciation pertaining to prior period was held to be not allowable in the absence of supporting furnished by the assessee. The balance prior period expenses of 10.52 crores has been allowed as deduction by the Ld. CIT(A).

14. The Ld. DR strongly supported the orders of the AO, whereas the Ld. Counsel for the assessee relied on the orders of the Ld. CIT(Appeals). This aspect of the matter has been considered by the Ld. CIT(A) with reference to the submissions made by the assessee as well as the averments made by the Assessing Officer and following the decision of the Delhi High Court in the case of DCIT vs. Indag Rubber Limited [280 ITR 194] deleted the prior period expenses to the extent of 10.52 crores observing as under: -

“5.3 I have carefully considered the assessment order, written submission furnished by and the case laws relied upon by the Ld. AR. The AO disallowed Rs. 10,63,03,285/- as prior period expenses debited in the P&L A/c as it was added back in the computation of income. The Ld. AR has submitted that net prior period expenditure/income has been claimed during the year arising from Regulation issued by the CERC for the period 2009-2014 and the said expenditure had arisen on the basis of actual working of Truing up on the basis of base rate on Truing up liability as on 31.03.2014 arising out of the CERC order. In the case of DCIT vs. Indag Rubber Limited (2006) 280 ITR (AT) 194 (Delhi), the Hon’ble Court has observed as under:

“It has been held that even though the expenditure relate to previous year, actual carrying on of business which is live business cannot be cut off exactly, especially is an organization where activities are carried out through various site offices. Since prior period expenses were of routine nature in business carried on by assessee and even if the payments were delayed because of procedural delay and due to various administrative reasons, expenses were allowable

in the relevant assessment year. In case no specific material instance the same cannot be disallowed.”

5.4 *Considering the facts of the case, I am of the view that the claim is more in the nature of prior period adjustments made during the year on the basis of regulation issued by CERC for which liability has crystallized during the year. In the absence of any contrary finding by the AO, the disallowance is not sustainable. However, the appellant has not substantiated as to how prior period expenditure of Rs. 10,17,947/- on account of training cost, transit hostel maintenance and depreciation pertaining to prior period is allowable during the year. No supporting are available to show that liability for these expenses crystallized during the year. In view thereof, out of the total net prior period expenditure of Rs. 10,63,03,285/-, disallowance of Rs. 10,17,947/- is confirmed and the balance i.e. Rs. 10,52,85,338/- is directed to be deleted. This ground of appeal is partly ruled in favour of the appeal.”*

15. On perusal of the Ld. CIT(Appeals) order, we do not see any valid reason to interfere with the findings of the Ld. CIT(Appeal) in deleting the prior period expenses of Rs. 10.52 crores. Thus, we sustain the order of the Ld. CIT(A). Ground no. 7 of grounds of appeal of Revenue for AY 2014-15 is rejected.

16. In the result, all the appeals of the Revenue are dismissed.

Order pronounced in the open court on 31/03/2022

Sd/-
(NARENDRA KUMAR BILLAIYA)
ACCOUNTANT MEMBER

Sd/-
(C.N. PRASAD)
JUDICIAL MEMBER

Dated: 31/03/2022

*Kavita Arora, Sr. P.S.

Copy of order sent to- Assessee/AO/Pr. CIT/ CIT (A)/ ITAT (DR)/Guard
file of ITAT.

By order

Assistant Registrar, ITAT: Delhi Benches-Delhi