

आयकर अपीलीय अधिकरण 'ए' न्यायपीठ चेन्नई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH, CHENNAI

माननीय श्री वी. दुर्गा राव, न्यायिक सदस्य एवं
माननीय श्री मनोज कुमार अग्रवाल, लेखक सदस्य के समक्ष।
BEFORE HON'BLE SHRI V. DURGA RAO, JUDICIAL MEMBER AND
HON'BLE SHRI MANOJ KUMAR AGGARWAL, AM

आयकर अपील सं./ ITA No.149/Chny/2021
(निर्धारण वर्ष / Assessment Year: 2016-17)

TAQA Neyveli Power Company Pvt. Ltd. No. 79, Kasthuri Avenue, MRC Nagar, Raja Annamalaipuram, Chennai – 600 028.	बनाम/ Vs.	PCIT, Chennai -3, No. 121, Mahatma Gandhi Road Nungambakkam Chennai – 34.
स्थायी लेखा सं./जी आइ आर सं./PAN/GIR No. AACCS-2753-B		
(पीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थी की ओर से/ Appellant by	:	Shri R. Sivaraman (Advocate) – Ld. AR
प्रत्यर्थी की ओर से/ Respondent by	:	Shri ARV Sreenivasan (Addl.CIT) – Ld. Sr. DR

सुनवाई की तारीख/ Date of Hearing	:	19-04-2022
घोषणा की तारीख / Date of Pronouncement	:	23-05-2022

आदेश / ORDER

Manoj Kumar Aggarwal (Accountant Member)

1. By way of this appeal, the assessee contest legality of revisional jurisdiction u/s. 263 as exercised by Ld. Principal Commissioner of Income Tax, Chennai-3 (Pr. CIT) vide order dated 25.03.2021 against the assessment order framed by Ld. Assessing Officer [AO] u/s. 143(3)

of the Act on 19.12.2018. The grounds raised by the assessee read as under:

1. The order of the Learned Principal Commissioner of Income Tax, Chennai-u/s.263 of the Income Tax Act, 1961 is opposed to law, facts and circumstances of the case and the principles of natural justice.
2. The Learned Principal Commissioner of Income Tax, Chennai-3 ought to have appreciated the fact that the assessment for the AY 2016-17 was selected for scrutiny under CASS, wherein the AO has issued notices calling for specific queries which, inter-alia, included the issues that are the subject matter of notice issued under section 263 of the Act. The Learned PCIT in the SCN has also accepted to the examination of the said fact by the AO.
3. The Learned Principal Commissioner of Income Tax, Chennai-3 erred in law stating that the assessment order passed by the AO is prejudicial to Interest of Revenue.
4. The Learned Principal Commissioner of Income Tax, Chennai-3 failed to appreciate that the twin conditions of Section 263 should be satisfied in order to invoke Section 263.
5. The Learned Principal Commissioner of Income Tax, Chennai-3 failed to appreciate that there is no tax effect liability in order to invoke section 263
6. The Learned Principal Commissioner of Income Tax, Chennai -3 failed to appreciate that Hon'ble AAR has not provided any ruling whether the treatment adopted by the appellant is correct or not.
7. The Learned Principal Commissioner of Income Tax, Chennai-3 failed to appreciate the fact that notional adjustments do not have bearing under the Act.
8. Without prejudice to the above grounds, the purpose of invoking the 263 proceedings were dropped and the Learned PCIT proceeded to complete the revisionary proceedings basis the material available on record which is bad in law.
9. For the aforesaid grounds and for other grounds to be raised at the time of hearing, the order of Principal Commissioner of Income Tax, Chennai-3 may be set aside and justice be rendered.

As evident, the assessee challenges the validity of revisional jurisdiction u/s 263 as exercised by appropriate authority.

2. During hearing, it transpires that the assessee has filed writ petition against revisional jurisdiction for bearing Ld. Assessing Officer (AO) from proceeding further with the assessee's assessment pursuant to the revisional jurisdiction u/s 263. The Writ petition has been disposed-off by Hon'ble High Court of Madras in WP No.5650 of 2022 & WMP No.5737 of 2022 order dated 14.03.2022 as under: -

12. If this arrangement is made, that would save the interest of both the assessee as well as the Revenue. In that view of the matter, this Court is inclined to dispose of this writ petition with the following order.

- That the assessing authority can go ahead with the assessment proceedings pursuant to the notice dated 06.02.2022 on the basis of the order passed by the revisional authority under section 263 of the Act for which the petitioner shall reply or

evidence or documents as sought for in the notice dated 06.02.2022 within a period of two weeks from the date of receipt of a copy of this order.

- It is made clear that, once an order is passed by the assessing authority and if it goes against the interest of the assessee, then pursuant to which no further proceedings including the notice for demand shall be made by the assessing officer against the assessee till the disposal of the appeal which is pending before the Income Tax Appellate Tribunal, for which already date of hearing is given as 07.04.2022.
- In view of the above, the ITAT is hereby directed to complete the hearing of the appeal proceedings and pass orders in the appeal on or before **31.05.2022** on its own merits and in accordance with law.
- It is further made clear that, once an order is passed by the Tribunal, depending upon the outcome of the said order, it is open to the assessing authority to go ahead against the assessee in case if that is necessary, in accordance with law.

With the above observations and directions, this writ petition is disposed of. No costs. Consequently, connected miscellaneous petition is closed.

Accordingly, the appeal has been placed before us for hearing and disposal in a time-bound manner as directed by Hon'ble Court.

Arguments before us

3. The Ld. AR, assailed the revision, inter-alia, on the ground that issue as flagged in the revisional order was extensively examined and verified by Ld. AO during the course of regular assessment proceedings and it was not the case that no enquiries were made by lower authorities. The Ld. AO had already adopted a view which was perfectly valid / justified and therefore, the revision was bad-in-law. Another argument raised by Ld. AR is that the issue for which show-cause notice was issued by revisional authority was ultimately withdrawn whereas other issue was taken up without affording any opportunity of hearing to the assessee which is contrary to statutory mandate of Section 263. To support the arguments, reliance has been placed on various judicial pronouncements, the copies of which have been placed on records. The Ld. AR also filed copies of computation of income etc.

The Ld. Sr. DR, on the other hand, justified the revision and submitted that adequate notice of hearing was already given to the assessee and nothing more was required to revise the order. The Ld. Sr. DR also relied on Explanation-2 to Sec.263 and submitted that the issue raised in the revisional order was not verified by Ld. AO.

4. Having heard rival submissions and after going through the impugned order as well as documents placed before us, our adjudication would be as given in succeeding paragraphs.

Assessment Proceedings

5.1 The assessee being resident corporate assessee is stated to be engaged in generation and sale of power to Tamil Nadu State Electricity Board (TNSEB). Since tax on Book Profits u/s 115JB was higher, the assessee paid Taxes u/s 115JB. The regular return of income was subjected to limited scrutiny and various details were called from the assessee during the course of assessment proceedings. After considering assessee's replies as well as various explanations, Ld. AO accepted the returned income and finalized the assessment on 19.12.2018.

5.2 During the course of regular assessment proceedings, requisite details were called from the assessee vide notices dated 08.10.2018, 15.11.2018 & 28.11.2018 which were duly responded to by the assessee.

5.3 In notice dated 08.10.2018, the assessee was directed to furnish, inter-alia, the details of 'any other amount allowable as deduction' claimed in Schedule BP of return. This item was for Rs.9005.14 Lacs. The assessee, vide reply dated 09.11.2018 submitted the break-up of the same (page 60 of the paper book). One of the items was difference

on account of fair value measurement of the operating financial assets (OFA) for Rs.3958.48 Lacs. The assessee explained the same as under:

Large "any other amount allowable as deduction" claimed in Schedule BP of return

The Company has claimed deduction to the tune of INR 900,514,114, the breakup of which is as follows:

Sl.NO.	Nature of Deduction	Amount (INR)
1	Difference on account of fair value measurement of the Operating financial asset.	395,849,416
2	Provision for bad debts earlier offered to tax in FY 2013-14	499,244,943
3	Fair value gain on financial instruments at fair value designated through profit and loss.	5,419,955
	Total	900,514,114

In this regard, the Company submits the nature of deduction as following:

>Difference on account of fair value measurement of the operating financial asset

The Company has entered into a Power Purchase Agreement ('PPA') with Tamil Nadu Generation and Distribution Corporation (TANGEDCO), formerly known as Tamil Nadu Electricity Board for generation and sale of power.

During the subject AY, the Company has adopted Indian-Accounting Standards ('Ind-AS') for preparation and presentation of Financial statements.

Pursuant to adoption of Ind-AS, the arrangement of the Company has been regarded to be in the nature of Service Concession Agreement. Consequently, the Company has de-recognized its entire infrastructure in the nature of fixed asset and recognized a financial asset to the extent it has an unconditional right to receive consideration in return for the construction of the infrastructure and an intangible right in relation to the residual interest in the infrastructure on expiry of the PPA.

The aforesaid de-recognition of fixed assets, recognition of OFA and recording notional foreign fluctuation difference in respect of OFA, as per books of accounts, is only for the purpose of presentation of financial statements. Given the same, such adjustments do not any bearing on the computation of tax under the normal provisions of the Act.

Accordingly, notional 'foreign exchange' gain on account of currency fluctuation recorded in the P&L on the aforementioned Operating financial asset amounting to INR 395,849,416 has been excluded for the purpose of computing the total income of the Company.

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Fair value gain on financial instruments at fair value through profit and loss

As mentioned above, the Company has adopted Ind-AS for preparation and presentation of financial statements. Under Ind-AS, investments in mutual funds considered as 'Financial Asset' is required to be presented at Fair value in the Financial statement with the difference adjusted to P&L.

Accordingly, notional difference arising on fair valuation amounting to INR 5,419,955 credited to the P&L has been excluded for computing the taxable income of the Company under the normal provisions of the Act.

5.4 Subsequently, in reply dated 14.12.2018, the assessee further clarified the nature of adjustments as under: -

Difference on account of fair value measurement of the operating financial asset:

- The Company has entered into a power purchase agreement ('PPA') (Copy of the agreement enclosed as Annexure-1) with Tamil Nadu Generation and Distribution Corporation [formerly known as Tamil Nadu Electricity Board] ('TANGEDCO') for generation and sale of power.
- During the subject AY, the Company has adopted Indian Accounting Standards ('Ind AS') notified by the Central Government vide notification number G.S.R III(E) dated 16 February 2015 for preparation and presentation of Financial statements. Pursuant to adoption of Ind AS, the business of the Company has been regarded to be in the nature of Service Concession Agreement ('SCA').
- Consequently, the Company has de-recognized the entire items in nature of fixed asset and has recognized an Operating Financial Asset ('OFA') disclosed under the head 'Current Assets'.
- The Company submits that the aforesaid de-recognition of fixed assets, recognition of an OFA and recording of notional fair valuation difference in respect of OFA, as per books of accounts, is only for the purpose of presentation of financial statements and more particularly given the applicability of Ind AS. Given the same, such adjustments do not have any bearing on the taxable income under the provisions of the Act.

In this regard, the Company wishes to highlight the relevant accounting principles basis which the aforesaid accounting treatment has been undertaken as under-

1.1 Accounting principles basis which arrangement of the Company has been regarded to be in the nature of the Service Concession Agreement

Background

SCA are arrangements between a public sector entity (grantor) and a private sector company (operator) for construction of infrastructure assets, in which the grantor controls or regulates the services provided with the infrastructure, their price, and any significant residual interest in the infrastructure. This public-to-private model is a popular model especially in the context of developing toll roads, bridges, airports and power generation, amongst others.

Accounting Principles

Initial Recognition

Under the erstwhile Accounting Standards

- Under the erstwhile Accounting Standards, there is no specific guidance for treatment of arrangements in the nature of SCA, Given the same, the Company has recognized its entire power plant infrastructure as Fixed Assets in the books of accounts and depreciation at the applicable rates prescribed has been consistently charged to the Statement of Profit and Loss ('P&L') over the useful life of assets.
- In other words, the amount incurred towards such items is treated as fixed assets and thus depreciation is claimed thereon.
- Further, depreciation debited to the P&L on such items of fixed assets is added back to the profit for tax purposes and income-tax depreciation as per Section 32 of the Act on such assets

Under Ind AS

- During the subject AY, as mentioned above, the Company has transitioned Into Ind AS for preparation of its books of accounts and Financial Statements.
- The Company has assessed that its arrangement is in nature of SCA under **Appendix A to the Ind AS 11 - Construction Contracts** (*enclosed as Annexure 2*). Accordingly, the Company, as mandated, has not recognized such items as Fixed Assets under the Ind AS accounting methodology.
- Accordingly, the Fixed Assets recognized as per the erstwhile accounting standards has been derecognized and the difference thereon has been adjusted with the Retained Earnings. Thus, there being no fixed assets, the Company has not charged any depreciation in the books of accounts.
- Further, the Company also submits that under the Ind AS accounting requirement, consideration for the services received or receivable by the operator is required to be recognized as a Financial Asset at its fair value.
- Given the same, the Company has recognized a financial asset comprising of the consideration receivable as per the PPA computed in United States Dollar (USD) terms and receivable in Indian currency in the financial statements as "Operating Financial Assets".

Subsequent Measurement

- Under the applicable Ind AS 109, for the purpose of subsequent measurement, financial assets (in the instant case - OFA) is required to be recognized at, *inter-alia*, at amortised cost.

Accordingly, the Company has adopted following treatment for the adjustments effected pursuant to Ind AS adoption-

SLNo.	Nature of Adjustment	Amount (INR)	Treatment adopted in Financial Statement
1	Amortization of OFA	5,763,528	Debited to P&L
2	Fair value measurement of the OFA.	395,849,416	Credited to P&L

- Company submits that the aforesaid items of adjustments is mandated for per presentation and disclosure requirement of the applicable Ind AS and has no bearing for computing the total income.

1.2 Treatment adopted under the provisions of the Act

The Company submits that the entire items of Fixed assets capitalized under the requirement of the erstwhile Accounting Standards since inception has been considered as depreciable Asset forming part of the 'Block of Assets' and thus being eligible, depreciation is claimed thereon as per the applicable rates under Section 32 of the Act.

In other words, the same treatment as has being given for tax purposes before adoption of Ind AS has been continued to be given even post Ind AS.

2. Fair value gain on financial instruments at fair value through profit and loss

- As mentioned above, the Company has adopted Ind AS for preparation and presentation of financial statements. Under the Ind AS 109 accounting methodology, investments in mutual funds is considered as 'Financial Asset' and the same is required to be presented at fair value in the financial statements with the difference adjusted to P&L.
- Accordingly, notional difference arising on fair valuation amounting to INR 5,419,955 credited to the P&L has been excluded for computing the taxable income of the Company under the normal provisions of the Act,

- The Company submits that the aforesaid items of adjustments is mandated for per presentation and disclosure requirement of the applicable Ind AS and has no bearing for computing the total income.

The Company submits that the same treatment as has being given for tax purposes before adoption of Ind AS has been continued to be given even post Ind AS.

We request your good-self to take the above on record. Should you have any reservations, or require any further explanations/clarifications, kindly provide us with a further opportunity to present our case in person or through our authorized representatives and make submissions.

Thanking you,

5.5 It is discernible that the assessee, in a very elaborate manner, replied to the queries raised by Ld. AO in this regard and explained the factors leading to change in accounting treatment to recognize the revenue in the books of accounts. It could also be gathered that Ld. AO accepted the returned income in order dated 19.12.2018 and chose not to disturb the same.

Revisional Proceedings

6.1 Subsequently, upon perusal of case records, Ld. Pr. CIT held an opinion that the order would require revision and accordingly, issued a show cause notice on 19.02.2021, the substantive portion of which read as under: -

2. On perusal of records it is seen that "M/s Taqa Nayveli Power Company Pvt. Ltd. had filed an application on 04.04.2019 raising the following questions before the Hon'ble AAR (IT), Mumbai:

1) Whether the contractual revenue attributed to the Operating Financial Asset ('OFA') and the notional unrealized difference being adjusted to the Statement of Profit and Loss ('P&L') on account of retranslation of its closing balance to the Applicant's functional currency for reporting purposes would not be required to be considered for computation of the book profits chargeable to tax under the provisions of section 115JB of the IT Act?

2) Whether the contractual revenue attributed to the ('OFA') and the notional unrealized retranslation difference being adjusted to the Statement of Profit and Loss ('P&L') on account of reporting of its closing balance to the Applicant's functional currency for reporting purposes would be governed by the provisions of the IT Act?

3. Subsequently, the Hon'ble AAR(IT), Mumbai vide order dated 19/11/2019 had rejected the application filed by the assessee company as not maintainable. In this context, it is seen from the assessment records that the contractual revenue attributed to the 'OFA' and the notional retranslation difference were reduced from the 'P&L' but considered for computing book profits under MAT by the assessee company for A.Ys. 2016-17 as under: -

A.Y.	Adjustments reduced from P&L	Amount reduced from P&L (in Rs.)

2016-17	1) Forex gain on financial assets.	39,58,49,416/-
	2) Fair Value gain on 'financial instruments at fair value through profit or loss.	54,19,955/-

4. It is noticed that the during the scrutiny proceedings for A.Y.2016-17, the accounting treatment of difference on account of fair value measurement of the OFA and Fair value gain on financial instruments at fair value through profit and loss had been examined. This aspect of reducing the difference on account of fair value measurement of the OFA and fair value gain on financial instruments at fair value through profit and loss while computing the company's taxable income under the normal provisions of the Act but offering to tax the difference on account of fair value measurement at fair value through profit and loss under MAT computation, had been accepted by the Assessing Officer in the assessment order passed for the A.Y.2016-17 on 19/12/2018.

5. In light of the Hon'ble AAR(IT), Mumbai order dated 19/11/2019 rejecting the application filed by the assessee company as not maintainable, the difference on account of fair value measurement of the OFA and Fair value gain on financial instruments at fair value through profit and loss is not to be deducted while computing the company's taxable income under the normal provisions of the Act and the same is required to be brought to tax for A.Y.2016-17 u/s.43AA of the Income Tax Act.

6. In view of the above, the Assessment Order passed u/s. 143(3) of the Income Tax Act 1961 on 19.12.2018 appears to be erroneous in so far as it is prejudicial to the interests of revenue.

6.2 The notice was responded to by the assessee vide its reply dated 17.03.2021 as under: -

TRANSACTION W.R.T TO "FOREX GAIN ON FINANCIAL ASSETS" OF THE SCN AMOUNTING TO INR 395,849,416

A. Background of the Company and the transaction under consideration

- The Company is engaged in the business of generation and sale of power to Tamil Nadu Generation and Distribution Corporation [formerly known as Tamil Nadu Electricity Board] ('TANGEDCO'), under a Power Purchase Agreement ('PPA') entered for 30 years from the date of Commercial Operations (15th December 2002).

- During the FY 2015-16, the Company has adopted Indian Accounting Standards ('Ind-AS') for accounting purposes. Under the Ind-AS accounting, the arrangement of the Company with TANGEDCO has been considered to be in the nature of Service Concession Arrangement ('SCA').

Note on Service Concession Arrangement

- A SCA is a binding arrangement between a 'grantor' and an 'operator' in which the latter utilizes / deploys Service Concession Asset ('Service Assets') to provide a public service on behalf of the former for a specified period of time in lieu of consideration over the period of the arrangement.

- Under a SCA-

- > 'Grantor' is the entity that grants the right to use the Service Assets to the Operator;

- >'Operator' is the entity that utilizes Service Assets to provide public services subject to the grantor's control of the asset.

- > Service Assets is an asset used to provide public services in a SCA that is either-

- provided by the operator (construct / develop / acquire or existing asset)

- provided by the grantor (existing asset or update)

- Under Appendix A of Ind-AS 11 - Construction Contracts (presently Appendix C of Ind-AS 115 - Revenue from Contracts with Customers), following are the conditions for application of a public-to-private SCA-

- The grantor controls or regulates what services the operator must provide with the infrastructure, to whom it must provide them, and at what price; and

- The grantor controls through ownership, beneficial entitlement or otherwise, any significant –residential interest in the infrastructure at the end of the term of the arrangement.

- Given that the aforesaid conditions are satisfied in the Company's case, for accounting purposes under the Ind-AS, the Company has assumed the role of *the Operator* while TANGEDCO has assumed the role of the *Grantor* in relation to the subject PPA.

B. Accounting treatment adopted

- In light of above and further as per the requirement of the applicable Ind-AS, the Company has, *inter-alia*, effected the following adjustments for preparing its financial statements-
 - Derecognition of the Power plant infrastructure as a 'Fixed Asset';
 - Recognition of an Operating Financial Asset ('OFA') comprising of the following –
- The present value of the future receivable of the RoE component is denominated at the prevailing exchange rates as on the date of the transition.
- The present value of the incentives receivable on achieving the Plant Load Factor.
 - Recognition of an Intangible asset comprising of the right to receive cash on the residual interest in 'Power plant'.
- Further, as a part of the transition process (from IGAAP accounting to Ind-AS accounting) mandated under the applicable Ind-AS, the difference between the carrying value of the fixed assets (Power plant infrastructure) hitherto recognized and the value of the OFA arising out of the SCA as on the date of transition has been adjusted with the opening revenue reserves of the Company.
- Additionally, the OFA so recognized denominated in USD is initially translated to INR (reporting currency) with the exchange difference being effected through the Statement of Profit and Loss ('P&L'). Subsequently, the same is amortized every year again with such adjustments being effected through P&L.

C. Tax treatment adopted and events transpired in the scrutiny assessment proceedings

- The Company has filed its return of income for the subject AY, declaring a total income of INR 76,655,450 and tax liability of INR 205,344,937 under the Minimum Alternate Tax ('MAT') provisions. The case was selected for scrutiny assessment. During the assessment proceedings, the Company has filed various submissions, provided time to time clarification and furnished the details and explanations called for by the learned Assessing Officer ('AO').
- With respect to the transaction under consideration, the Company has provided detailed explanations for the enquiry made on the taxability of subject transaction (the copy of notice issued by the AO and our submissions filed during the course of the assessment proceedings is enclosed as **Annexure 4** for your goodself's ready reference).
- Further, as your goodself has rightly pointed out in Paragraph 4 of the subject SCN, the AO on perusal of our detailed submissions provided and explanations accorded by our Authorized Representatives has accepted the fact that the transaction under consideration is not taxable and accordingly proposed to not make any adjustment to the return of income filed by the Company.
- Thus, in the instant case, the learned AO had perused all the relevant information/ documents submitted during the proceedings and had accordingly accepted the returned income of the Company. In other words, no adjustment was undertaken to the returned income.

D. Proceedings before the Authority for Advance Rulings ('AAR')

- As you goodself would appreciate from examination of the scrutiny assessment proceedings records, the subject transaction has been reduced for computing the taxable income in normal provisions of the Act. However, with respect to MAT provisions, the Company has not made any adjustments to the book profits.
- Given the above, post completion of scrutiny assessment proceedings of the subject AY, in order to obtain clarity on the taxability of transaction under consideration under the MAT provisions and also to obtain certainty to the tax position adopted for normal provisions, the Company had approached the Hon'ble AAR for determination of the tax liability.
- However, the Hon'ble AAR vide order dated 19 November 2019 had rejected the application on technical grounds and has not issued a binding order on merits for the issues raised. The basis for rejecting the application has been reproduced below:

"8. It is also noticed that the Company has taken a clear standin 2016-17 proceedings before Assessing Officer that contractual revenue attributed to the operating

financial asset (OFA) and notional foreign exchange fluctuations difference is taxable under section 115JB MAT provisions and in fact the income was so offered for tax under the return of income. The Assessing Officer accepted the stand of the Company and passed the order on 19.12.2018 accordingly. "

9. AAR is not an appellate forum. The purpose of the AAR is to have certainty about liability to pay tax and to avoid further litigation in relation to a transaction which has been undertaken or is proposed to be undertaken. The Authority is also barred from entertaining any question which is pending before the Income Tax Authority or Appellate Tribunal or any Court. In other words, the contentious or doubtful issue or question should be raised in advance before the AAR and not when it has already pending before the above-mentioned authorities. **Much less the issue is already deliberated, discussed and concluded before the above referred authorities. In the instant case, identical questions were before Assessing Officer where the Company participated and made detailed submissions and thereafter the matter was concluded.** So, the Company had a fair chance to put forth his points before the Assessing Officer. "

- Given the above, your goodself would appreciate that the Hon'ble AAR has rejected the application filed by the Company as the question raised has been already dealt in the assessment proceedings and that the tax department has accepted the stand adopted by the Company. In other words, the Hon'ble AAR has not provided any ruling whether the treatment adopted by the Company is correct or not. **The Hon'ble AAR has categorically held that given that the issue has already been deliberated, discussed and concluded before the tax authorities it may not interfere on the same.**
- In this regard, your goodself, by placing reliance on the order passed by the AAR rejecting the application of the Company had issued the subject notice asking the Assessee to provide explanations why the transaction under consideration should not be taxed under section 43AA of the Act.
- The Company in this connection objects to your goodself's action of initiating revisionary proceedings based on the submissions on legal aspects as well on merits in the ensuing paragraphs

In the said background, the assessee assailed the revision of the order on the ground that once Assessing Officer exercising his quasi-judicial function has completed the assessment proceedings, the power of revision u/s 263 is to be used with utmost precaution after examining the issues from all angles subject to the satisfaction of the primary twin conditions that the order was erroneous as well as prejudicial to the interest of the revenue. In the present case, Ld. AO had called for requisite details during the course of assessment proceedings which were duly responded to by the assessee and accepted by Ld. AO with due application of mind. It could not be said that the assessment was framed without making enquiries or verification which should have been made. In fact, it was the findings of Hon'ble ARR that the issue had

already been deliberated, discussed and concluded before the tax authorities. Accordingly, the revision was not justified in terms of various judicial pronouncements. Further, Non-mentioning of issue under consideration in the assessment order cannot lead to a conclusion that Ld. AO had not applied his mind as held by Hon'ble Bombay High court in **CIT V/s Fine Jewellery India Ltd. (372 ITR 303)** as well as Hon'ble Delhi High Court in **CIT V/s Vikas Polymers (341 ITR 537)** wherein it was held that once inquiry was made, a mere non-discussion or non-mention thereof in the assessment order cannot lead to an assumption that AO did not apply his mind or that he has not made any enquiry on the subject matter. Similar was stated to be the decision of Hon'ble Bombay High Court in **CIT V/s Gabriel India Ltd. (71 Taxman 585)** which held that once ITO had exercised the quasi-judicial power vested in him in accordance with law and arrived at a conclusion and such a conclusion cannot be termed to be erroneous simply because the Commissioner does not feel satisfied with the conclusion. Similar other decisions were quoted in support of the arguments. On the basis of above, the assessee assailed the validity of revisions proceedings.

6.3 At the same time, the assessee assailed the proposed adjustments on merits which is similar to its reply dated 14.12.2018 as filed before Ld. AO during the course of regular assessment proceedings.

6.4 The Ld. Pr. CIT, after considering assessee's reply, concurred that the provisions of Sec.43AA as introduced w.e.f. 01.04.2017 would be applicable only from AY 2017-18 and therefore, the reference to Sec.43AA in the show-cause notice is treated as withdrawn. The relevant observations were as under: -

6.1 Before going into the merits of the issue, there are certain technical aspects related to mention of Sec.43AA of the Income Tax Act in the show cause notice. On perusal, it is seen that the provisions of Section 43AA of the Income tax Act, 1961 came into statute only from 01.04.2017 applicable from the A.Y.2017-18 after ICDS notified by the CBDT on forex transactions come into effect from AY 2017-18. Since the assessment year under consideration is AY 2016-17, the reference to section 43AA in the show cause notice is treated as withdrawn and the main issue is considered independently on the basis of material available on record.

6.5 Proceeding further, Ld. CIT(A) noted that the assessee had redrawn its Profit & Loss Account as per Ind-AS and recognized certain income in the financial statements. From the terms of Power Purchase Agreement (PPA), it was clear that the assessee was entitled to calculate fixed capacity charges comprising value of approved capital cost, RoE etc. in terms of USD to safeguard its investment and charge the purchaser i.e., TANGEDCO accordingly, Thus, it is clear that the component of forex gain is related to fixed cost (which is taken into account while billing) and therefore it is primarily a revenue item. Accordingly, the assessee has considered the same as revenue in its Profit & Loss Account. Further, the assessee was entitled for return of 16% calculated in USD and therefore, the bills raised in INR would not impact its revenue which is recognized on the basis of USD as per Power Purchase Agreement (PPA).

6.6 Further the assessee was charging depreciation on the power plant as per AS-6 but switched over to revised AS-10 as AS-6 was withdrawn by the ICAI. Therefore, the plea that derecognition of asset would not have effect on income under normal provisions would have no relevance. The issue under consideration was recognition of revenue and not the claim of depreciation. The assessee's plea that the amount recognized as forex gain was nothing but notional amount, it was to be noted that the assessee was to follow mercantile system of accounting to

recognize the revenue and it was required to follow accounting standards to prepare the financial statements. Accordingly, the income so arrived would be income as per Sec.28(i) of the Act subject to computations as per Sec.30 to 43D. The assessee failed to state under which of the provisions of Sec.30 to 43D the amount recognized as forex gain would be deductible. Therefore, prima-facie the claim of said deduction under the normal provisions was not as per law which Ld. AO failed to take note of in the assessment order. The decision of Hon'ble Supreme Court in **CIT V/s Woodward Governor Private Ltd. (312 ITR 254)** wherein it was held that any difference, loss or gain, arising on conversion of the liability on closing rate should be recognized in the Profit & Loss Account for the reporting period. Therefore, the revenue recognized by the assessee could not be deducted under normal provisions. The submission that the amount was notional was not supported by any law. Accordingly, no such deduction could be claimed by the assessee while computing the normal income.

6.7 Regarding assessee's objections to revisional proceedings, the Ld. Pr. CIT held that when the order of Hon'ble AAR came to notice, the relevant assessment records were perused and it was felt that the order was erroneous and prejudicial to the interest of the revenue and the entire issue was considered on merits as per the details available on record at the time of assessment. Regarding submissions that Ld. AO had already considered the issue, it was held that there was failure on the part of Ld. AO to consider the decision of Hon'ble Supreme Court and therefore, the order was erroneous and prejudicial to the interest of the revenue as per Clause (d) of Explanation-2 to sub-section (1) of Section 263. The case also fall under clause (a) of the aforesaid

Explanation-2 since the order was passed without making inquiries or verification which is required to be made.

6.8 The plea that the assessee paid taxes under MAT and therefore, there would be no tax impact was negated on the ground that the assessee would be able to carry forward the MAT credit for set-off in subsequent years.

6.9 Finally, Ld. AO was directed to redo the assessment with following directions: -

8. In the light of the finding that the order of assessment is erroneous so far as it is prejudicial to the interest of revenue at paragraphs 6 & 7 above, the order of assessment dated 19.12.2018 is hereby set-aside to the file of the Assessing Officer for the limited purpose of examining the issue of the foreign exchange gain on OFA as mentioned in para 3 of the show cause notice and the deduction claimed in the computation of income under the head, "income from Business or Profession". The assessing officer is directed to pass appropriate order after giving reasonable opportunity to the assessee. The AO is further directed to look into the claim of the assessee that in the subsequent years it has reversed the forex losses.

Aggrieved as aforesaid the assessee is in further appeal before us.

Our findings and Adjudication

7. Upon perusal of assessee's computation of income as placed on record (page nos. 37 to 41), it could be seen that assessee's Profit as per financial statements is Rs.4515.36 Lacs. While computing income under normal provisions, the assessee has added back an amount of Rs.57.63 Lacs as 'amortization of financial lease' whereas it has deducted 'forex gains on financial assets' for Rs.3958.49 Lacs and 'gain on financial instruments' for Rs.54.19 Lacs. After making all the adjustments, the assessee has computed business income of Rs.616.98 Lacs. The Books Profit u/s 115JB has been computed as Rs.9621.81 Lacs after making permissible adjustments. Upon perusal of the same, it could be seen that though the assessee makes adjustments of aforesaid

three items under normal provisions, no such adjustment has been made while computing Book-Profits u/s 115JB. The same was on the reasoning that the revenues were recognized in the books as per applicable Ind-AS but the same would not impact the taxable revenue of the assessee. As such, in the normal computation, the assessee reverses the impact of Ind-AS and claim depreciation as claimed hitherto.

8. However, we find that the new accounting standard as adopted by the assessee during the year deal with the revenue recognition accruing to assessee under such service contracts. The assessee was mandated by law to follow such accounting treatment. Accordingly, the assessee derecognized the entire items which were held in the nature of fixed assets and recognized the 'operating financial assets' which were disclosed as 'current assets' and the resultant gains were credited to the Profit & Loss Account. In other words, there was paradigm shift in the accounting treatment of revenue recognition from such projects. Therefore, to say that the aforesaid adjustment was mere accounting treatment and would not impact the taxable income under the provisions of the Act would not be a correct proposition since the revenue were to be recognized over the useful life of a project in a particular manner as mandated by the new accounting standard. As per the new accounting treatment, the services were to be recognized as financial asset at its fair value and the project was to be treated in the nature of Service Concession Agreements. Upon perusal of assessment order and queries raised therein, we find that this aspect of revenue recognition was never touched upon by Ld. AO. In fact, except for raising an initial enquiry, no further enquiries were made by Ld. AO to understand the impact of new

accounting treatment on revenue recognition and the assessee's explanation was accepted as such. The assessee may have responded elaborately to such query, but the same should have been subjected to further enquiries since it would significantly impact the revenue recognition for the assessee under the contracts. We find that this element of enquiry is missing in the present case. Upon perusal of assessee's replies as made during the course of assessment proceedings, we arrive at a conclusion that though the initial query was raised by the Ld. AO and elaborate replies were furnished by the assessee, however, the element of application of mind by Ld. AO, on the issue, is missing.

9. Another argument of Ld. AR is that in the show-cause notice, the provisions of Sec.43AA were invoked by Ld. Pr. CIT but the same was ultimately held to be not applicable. In such a case, Ld. Pr. CIT was obligated to issue fresh notice before proceedings further in the matter. However, this plea does not impress us in view of the fact that invocation of Sec.43AA was only one of the facets of the issue and the sole issue leading to revision of order was forex gain / losses as adjusted in the normal income. The Ld. Pr. CIT, in para-5, has merely deleted the reference to Sec.43AA in the show-cause notice but has remained confined to this issue only. Therefore, we are unable to accept this plea.

10. We are of the considered opinion that as per the provisions of Section 263, the appropriate revisional authority is vested with the supervisory powers of suo-moto revision of any order passed by Ld. AO. For the said purpose, the appropriate authority may call for and examine the record of any proceedings under the Act and may proceed to revise the same provided two conditions are satisfied-(i) the order of the

assessing officer sought to be revised is erroneous; and (ii) it is prejudicial to the interest of the revenue. If one of the conditions is absent i.e. if the order of the Income-tax Officer is erroneous but is not prejudicial to the revenue or if it is not erroneous but it is prejudicial to the revenue - recourse cannot be had to Section 263 of the Act as held by Hon'ble Supreme Court in **Malabar Industrial Co. Ltd. V/s CIT [243 ITR 83 10/02/2000]** & noted by Hon'ble Delhi High Court in **CIT V/s Vikas Polymers [194 Taxman 57 16/08/2010]**. After going through the facts of the present case, we find that both these twin conditions were duly satisfied since non-consideration of a pertinent issue with due application of mind would make the order erroneous and the same would prejudice the interest of the revenue. The case would fall under the category of lack of requisite enquiry on the part of Ld. AO.

11. Proceeding further, we find that a n Explanation-2 has been inserted by Finance Act 2015 in Section 263 with effect from 01/06/2015 to declare that order shall be deemed to be erroneous in so far as it is prejudicial to the interest of the revenue, if in the opinion of appropriate authority-(a) the order was passed without making inquiries or verifications which should have been made; (b) the order is passed allowing any relief without inquiring into the claim; (c) the order is not in accordance with any direction or instructions etc. issued by the Board u/s 119; or (d) the order was not in accordance with binding judicial precedent. In the impugned order, Ld. Pr. CIT has rightly pointed out that the case would fall under Clause (a) as well as under Clause (d) of this explanation and we concur with these findings of Ld. Pr. CIT.

12. The Hon'ble Supreme Court in **CIT V/s Amitabh Bachchan (69 Taxmann.com 170 11/05/2016)** held that the power of appeal and

revision is contained in Chapter XX of the Act which includes section 263 that confers *suo-motu* power of revision in the Commissioner. The different shades of power conferred on different authorities under the Act has to be exercised within the areas specifically delineated by the Act and the exercise of power under one provision cannot trench upon the powers available under another provision of the Act. In this regard, it must be specifically noticed that against an order of assessment, so far as the revenue is concerned, the power conferred under the Act is to reopen the concluded assessment under section 147 and/or to revise the assessment order under section 263. The scope of the power/jurisdiction under the different provisions of the Act would naturally be different. The power and jurisdiction of the revenue to deal with a concluded assessment, therefore, must be understood in the context of the provisions of the relevant sections. While doing so, it must also be borne in mind that the legislature had not vested in the revenue any specific power to question an order of assessment by means of an appeal. Regarding applicability of Section 263, what has to be seen is that a satisfaction that an order passed by the Authority under the Act is erroneous and prejudicial to the interest of the revenue is the basic precondition for exercise of jurisdiction under section 263. Both are twin conditions that have to be conjointly present. Once such satisfaction is reached, jurisdiction to exercise the power would be available subject to observance of the principles of natural justice which is implicit in the requirement cast by the section to give the assessee an opportunity of being heard. Further, there could be no doubt that so long as the view taken by the Assessing Officer is a possible view, the same ought not to be interfered with by the Commissioner under Section 263 merely on the

ground that there is another possible view of the matter. Permitting exercise of revisional power in a situation where two views are possible would really amount to conferring some kind of an appellate power in the revisional authority. This is a course of action that must be desisted from. However, in the present case, we find that no such view has been formed by Ld. AO during the course of regular assessment proceedings. Regarding show-cause notice, Hon'ble Court further held that the requirement is that a notice proposing the revisional exercise is to be given to the assessee indicating therein broadly or even specifically the grounds on which the exercise is felt necessary. But there is nothing in the Section 263 to raise the said notice to the status of a mandatory show-cause notice affecting the initiation of the exercise in the absence thereof or to require the Commissioner to confine himself to the terms of the notice and foreclosing consideration of any other issue or question of fact. This is not the purport of Section 263. Of course, there can be no dispute that while the Commissioner is free to exercise his jurisdiction on consideration of all relevant facts, a full opportunity to controvert the same and to explain the circumstances surrounding such facts, as may be considered relevant by the assessee, must be afforded to him by the Commissioner prior to the finalization of the decision. We find that this requirement has duly been fulfilled by the revisional authority in the present case and adequate opportunity has been granted to the assessee to state its case.

13. The decision of Hon'ble High Court of Madras in **Shri Ravi Kannan V/s ACIT (TCA No.316 of 2018 dated 29.07.2020)**, as referred to by Ld. AR, is a case wherein it was a finding by Hon'ble Court that the notice was a vague statement. The PCIT agrees that the verifications were

done, however, it was stated that proper verification was not done. In such a case, PCIT was bound to disclose in the show-cause notice as to why he considers the verification to be not proper. However, the case before us falls under the category wherein Ld. AO has not applied his mind to the issue. Further, the notice clearly states the reasons as to why the order is being subjected to revision u/s 263. In the replies to show-cause notice, it was nowhere the case of the assessee that the notice was vague or the same did not disclose the reasons for revision.

The case law of **CIT V/s PVP Ventures Ltd. (23 Taxmann.com 286)** is factually distinguishable since in para-26 of the decision, it is a fact that there was no proper initiation of proceedings u/s 263 and there was no ground for shifting in stand by the Commissioner which were different from the one which prompted him to initiate proceedings u/s 263. Therefore, this case law is also distinguishable.

The decision of Mumbai Tribunal in **M/s Tata Motors Ltd. V/s DCIT (ITA No.3425/Mum/2019 dated 05.03.2021)** is a case wherein the view formed by Ld. AO was one of the possible views while framing the assessment based on the laws prevailing at that relevant point of time (para 3.13) and therefore, revision was held to be unjustified. This is not the case here.

14. Finally, considering the entirety of facts and circumstances of the case, the revisional jurisdiction u/s 263 as exercised by Ld. Pr. CIT could not be faulted with and the same could not be held to be bad-in-law as urged by Ld. AR. We order so. However, our aforesaid view would not be construed as any expression on the merits of the case, in any manner, which is left open for consideration of lower authorities. In this appeal, we have only examined the validity of revisional proceedings.

15. The appeal stands dismissed.

Order pronounced on 23rd May, 2022.

Sd/-
(V. DURGA RAO)
न्यायिक सदस्य / JUDICIAL MEMBER

Sd/-
(MANOJ KUMAR AGGARWAL)
लेखक सदस्य / ACCOUNTANT MEMBER

चेन्नई/ Chennai; दिनांक/ Dated : 23-05-2022
JPV

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकरआयुक्त (अपील)/CIT(A)
4. आयकरआयुक्त/CIT
5. विभागीयप्रतिनिधि/DR6. गार्डफाईल/GF