

**IN THE INCOME TAX APPELLATE TRIBUNAL
GUWAHATI 'DB' BENCH AT KOLKATA**

[Virtual Court]

Before

**SRI MANISH BORAD, ACCOUNTANT MEMBER
&
SRI SONJOY SARMA, JUDICIAL MEMBER**

**I.T.A. No.: 256/Gau/2019
Assessment Year: 2012-13**

ACIT, Circle-2, Guwahati.....Appellant

Vs.

***M/s. Assam Power Distribution Company Ltd.....Respondent
[PAN: AABCL 1354 J]***

**C.O. No.: 13/Gau/2019
In I.T.A. No.: 256/Gau/2019
Assessment Year: 2012-13**

***M/s. Assam Power Distribution Company Ltd.....Respondent
[PAN: AABCL 1354 J]***

Vs.

ACIT, Circle-2, Guwahati.....Appellant

Appearances by:

Sh. N.T. Sherpa, JCIT, appeared on behalf of the Revenue.

Sh. Uttam Kumar Borthakur, Adv., appeared on behalf of the Assessee.

Date of concluding the hearing : July 25th, 2022

Date of pronouncing the order : August 30th, 2022

ORDER

Per Manish Borad, Accountant Member:

This appeal filed by the Revenue and the Cross Objection filed by the assessee pertaining to the Assessment Year (in short "AY") 2012-13 are directed against the order passed u/s 250 of the

Income Tax Act, 1961 (in short the “Act”) by ld. Commissioner of Income-tax (Appeals)-1, Guwahati [in short ld. “CIT(A)”] dated 07.02.2019.

2. First, we take up the Revenue’s appeal wherein the following grounds have been raised:

“1. On the facts and circumstances of the case, the ld. CIT(A) erred in holding that Electricity Duty payable to State Government is not to be disallowed under section 43B of Income Tax Act, 1961.

2. That a plain reading of section 43B implies that any duty or cess payable but not actually paid is to be disallowed and no exception is made in this provision when such payment is to be made as agent to the principal.

3. That, in the alternative, such duty or collected by the assessee but not paid to State Government is chargeable to tax as the assessee becomes beneficiary of such amount.”

3. Brief facts of the case are that the assessee is a State-owned limited company engaged in the business of power supply. NIL income was declared in the return of income filed on 12.03.2014. Case selected for scrutiny through CASS followed by serving of notices u/s 143(2) & 142(1) of the Act. After considering the submissions by the assessee on the information called for u/s 142(1) of the Act, certain disallowances/additions were made which included disallowance u/s 43B of the Act at Rs. 44 Cr. for non-payment of the said sum on or before the due date of filing return of income, disallowance of interest paid on consumer security deposit of Rs. 16.62 Cr for non-deduction of tax at source, thus, calling for disallowance u/s 40(a)(ia) of the Act.

4. When the additions were challenged by the assessee before ld. CIT(A), it partly succeeded as ld. CIT(A) deleted the disallowance made u/s 43B of the Act but as regards the disallowance u/s 40(a)(ia) of the Act for non-deduction of tax at source, the assessee failed to get any relief from ld. CIT(A) even though the assessee claimed that out of all the alleged sum of Rs. 16.62 Cr. only a sum of Rs. 48,60,850/- was subject to deduction of tax at source being the amount exceeding the prescribed limit.

5. Aggrieved, the Revenue is now in appeal before this Tribunal challenging the finding of ld. CIT(A) deleting the disallowance u/s 43B of the Act at Rs. 44 Cr. and the assessee has raised Cross Objection challenging the disallowance u/s 40(a)(ia) of the Act at Rs. 16.62 Cr and also supporting the finding of ld. CIT(A) deleting the disallowance u/s 43B of the Act at Rs. 44 Cr. on account of outstanding electricity duty payable to State Govt.

6. We first take up the Revenue's appeal.

6.1. The sole issue raised in three grounds raised by the Revenue are against the finding of ld. CIT(A) holding that electricity duty payable to State Govt. is not to be disallowed u/s 43B of the Act. ld. D/R vehemently argued supporting the order of ld. Assessing Officer (in short ld. "AO") and ld. Counsel for the assessee vehemently argued supporting the order of ld. CIT(A) and also stated that the alleged amount has not been claimed as an expenditure in the profit & loss account.

7. We have heard rival contentions and perused the records placed before us. The Revenue has challenged the finding of ld.

CIT(A) disallowing the disallowance u/s 43B of the Act made by the Id. AO on account of non-payment of electricity duty before the due date of filing return of income. We observe that Id. AO while examining the financial statement, noticed that on the liability side, electricity duty is payable at Rs. 43,99,81,071/- and, further, observed that the said amount has not been deposited before the due date of filing return of income u/s 139(1) of the Act and thus, made a disallowance u/s 43B of the Act at Rs. 44 Cr. We, further, find that Id. CIT(A) adjudicated the said issue in light of the judgment of Hon'ble Jurisdictional High Court in the case of *CESC Ltd. vs. CIT [ITA No. 82 of 2004 dated 14.05.2015]* observing as follows:

“Decision as regards addition of Rs. 44,00,00,000 under Section 43B on account of non-payment of Electricity Duty Payable to the Government, on or before the due date of filing the ITR.

The AO added back the rounded amount of Rs.44,00,00,000/- on account of outstanding electricity duty payable to the government by invoking Section 43(B). The amount is reflected in item 2.8 of the Notes on Account of the 9th Annual Report and Accounts 2011-12. However, the actual amount, as per submission of the detailed working by the appellant before the AO bearing no. APDCL/CGM (F&A)/INCOME TAX/2011-12/38/25 dated 27/02/2015 was Rs.43,99,81,071/-. The workings were as under:

<i>Particulars</i>	<i>Amount (in Rs.)</i>
<i>Electricity Duty Payable</i>	<i>39,01,45,428</i>
<i>Add:- Addition during the year</i>	<i>34,44,06,102</i>
<i>Total:-</i>	<i>73,45.51.530</i>
<i>Less: Electricity duty adjusted</i>	<i>29,45,70,459</i>
<i>Total Electricity Duty Payable as per audited accounts (**)</i>	<i>43,99,81,071</i>
<i>(**) (Electricity Duty collected during the year adjusted and transferred to Pension Trust as per GOA notification)</i>	

Be that as it may, I have not found any adverse comments of the CAG in this behalf. In item 2.8 of the Notes on Account of the 9th Annual Report and Accounts 2011-12 it is evident that the opening liability was Rs.3901 lakh, which conforms to the figure furnished by the appellant to the AO in his workings. The amount that became payable during the year was Rs.34,44,06,102/- and amount that was adjusted against it was Rs.29,45,70,459/-. No amount in respect of Electricity Duty was reflected in the details of incomes and the expenses of the Profit and Loss Account Statement incorporated in the aforesaid Annual Accounts in the Schedules 2.18, 2.19, 2.20, 2.21 and 2.29 in the Profit and Loss Account Statement. Therefore, it follows that neither the amount of Rs.44,00,00,000/- nor the figure of Rs.34,44,06,102/- were claimed as expenses on account of Electricity Duty payable. Whether the Electricity Duty was paid or adjusted as per government directive is besides the point here. The only issue to be decided is whether electricity duty was at all claimed by the appellant as permissible deduction under the Act while disclosing its income. The AO has not given any finding or material that the amount of Rs.4400 lakhs was claimed as permissible expenses or deduction.

In CESC Ltd. vs. CIT [ITA No. 82 of 2004 dated 14/05/2015], it was held, by the Hon'ble Calcutta High Court, as follows:

"Section 43B(a) provides that notwithstanding anything contained in any other provision of the Act, a deduction otherwise allowable under the Act in respect of any sum payable by the assessee by way of tax, duty, cess or fee, by whatever name called, under any law for the time being in force, shall be allowed (irrespective of the previous year in which the liability to pay such sum was incurred by the assessee according to the method of accounting regularly employed by him) only in computing the income referred to in Section 28 of the previous year in which such sum is actually paid by him.

The object of Section 43B was to curb the malpractice exercised by some taxpayers who did not discharge their statutory liabilities even though they claimed those liabilities as a deduction on the ground that they maintain accounts on mercantile or accrual basis. The Section was intended to apply to cases where the statutory liability remained un discharged though the assessee in such a case claimed deduction on the

ground that he maintained those accounts on mercantile business.

The question that falls for determination by us is whether Section 43B applies to the electricity duty collected by the assessee company from the consumers of electricity in terms of provisions of the Bengal Electricity Act, 1935. On a reading of the provisions of the Bengal Electricity Duty Act, it is quite clear that the primary liability to pay electricity duty to the State Government is that of the consumers of energy. The licensee/assessee merely acts as a collecting agent for the State Government. The licensee is obliged to collect the electricity duty from the consumers and pay the same to the State Government. The licensee merely acts as a conduit. The electricity duty is not chargeable to the licensee. If the intention of the legislature was to impose primary and absolute liability for electricity duty on the licensee, the proviso to Section 5(1) of the Act would not have been there. The said proviso exempts the licensee from paying any duty in respect of any energy supplied by the licensee for which it has been unable to recover its dues. In our view, the first charge created by Section 5(1) of the Act on the amount recoverable by the licensee for the energy supplied by him in respect of duty payable to the Government, is to induce the licensee to make every effort to recover the electricity duty from the consumers for payment to the Government. If the licensee recovers only the price of energy supplied from the consumers but not the electricity duty, then a secondary liability arises on the part of the licensee to make payment of the duty to the Government. However, if the licensee is unable to recover the energy charges as well as the electricity duty, there is no liability on the part of the licensee to pay any duty to the Government.

The electricity duty, not being a sum payable by the assessee as a primary liability by way of tax, duty, cess or fee, Section 43B is not attracted to the licensee/assessee in respect of electricity duty collected by it for being passed on the State Government. We are in disagreement with the decision of the Gujarat High Court in the case of Commissioner of Income Tax vs. Ahmedabad Electricity Co. Ltd. (2003) 262 ITR 97 and we are in agreement with the decision of the Kerala High Court in

the case of Kerala State Electricity Board- vs. Deputy Commissioner of Income Tax (2010) 329 ITR 91.

From another angle, the electricity duty collected by the licensee from the consumers is so done by the licensee as an agent of the State and, hence, the same cannot be considered to a trading receipt in the hands of the licensee. It does not constitute income of the licensee and cannot be included in the licensee's income for the purpose of computation of income tax. It is not a business receipt of the licensee which the licensee collects on its own behalf in connection with its business of generating and supplying electricity. The licensee does not collect the electricity duty for its own consumption or utilization. If the licensee collects the duty but does not pay the same to the Government, the statute provides mechanism for the Government to recover the same from the licensee. Even in a case where the licensee is unable to recover the duty but recovers the energy charges, the statutes still provides a procedure for the Government to recover the duty either from the consumer or from the licensee. This view of ours finds support from the decision of the Andhra Pradesh High Court in the case of Commissioner of Income Tax vs. Devatha Chandraiah (1985) 154 ITR 893. Though this said case deals with sales tax, the principle laid down in that case supports our view. The mischief that Section 43B of the Income Tax Act intended to present, is taken care of by the provisions of the Bengal Electricity Duty Act itself."

8. The above finding of Id. CIT(A) placing reliance on the decision of Hon'ble Jurisdictional High Court in the case of *CESC Ltd. (supra)* stands uncontroverted by the Id. D/R and we, therefore, respectfully following the ratio laid down by the Hon'ble Court, are of the considered view that since the alleged amount is not a sum payable by the assessee as a primary liability by way of tax, duty, cess or fee but the said amount i.e. the electricity duty is collected by the assessee company from the consumers to be passed on to the State Govt. and the said amount is not claimed as an expenditure in the profit and loss account. We, therefore, fail to

find any infirmity in the finding of the ld. CIT(A) and, therefore, dismiss ground nos. 1, 2 & 3 raised by the Revenue.

9. Now, we take up the Cross Objection filed by the assessee. As far as ground no. 2 is concerned, the same has been filed by the assessee in support of the finding of ld. CIT(A) deleting the disallowance of Rs. 44 Cr. made u/s 43B of the Act on account of outstanding electricity duty payable to the State Govt. Since we have already adjudicated this ground in the Revenue's appeal and confirmed the finding of ld. CIT(A), this ground no. 2 raised in the Cross Objection becomes infructuous.

10. As regards ground No. 1 is concerned the same relates to disallowance of 16.62 Cr. on account of non-deduction of tax at source on the interest paid to consumers on security deposit.

11. Brief facts relating to the issue are that the assessee company claimed expenditure of Rs. 16.62 Cr. on account of interest paid to the consumers on the security deposits held by it. During the assessment proceedings, ld. AO called for the details about the interest payment and the applicability of provisions of Section 40(a)(ia) of the Act in case tax is not deducted at source on such payments which are above the prescribed limit provided in Section 194A of the Act. The assessee failed to file any details and, therefore, ld. AO made the alleged disallowance. When the matter travelled to ld. CIT(A) the assessee filed details stating that only the interest sum of Rs. 48,60,850/- is subject to deduction of tax at source and the assessee company has paid the due TDS and for the remaining amount it was stated that there are approx 20 lakh

customers and accounts are not maintained on computer system and it is practically not possible to call for the details of each and every customer. However, ld. CIT(A) was not satisfied and since the additional evidences submitted before him were not conclusive and verifiable on merit, the said disallowance was sustained.

12. Aggrieved, the assessee is now in appeal before this Tribunal. ld. Counsel for the assessee reiterated the submissions before the ld. CIT(A) and again asserted that if the alleged amount is divided by the 20 lakh customers, then the average interest to each consumer would be approx Rs. 84/-. He also stated that records were maintained manually and it is not possible to call for details of each and every consumer which are spread geographically over a large area.

13. Per contra, ld. D/R vehemently argued supporting the orders of both the lower authorities.

14. We have heard rival contentions and perused the records placed before us. Ground no. 2 raised by the assessee in the Cross Objection relates to the disallowance u/s 40(a)(ia) of the Act at Rs. 16.62 Cr. confirmed by the ld. CIT(A) which was made by the ld. AO for non-deduction of tax at source on the said amount. We notice that the assessee is a State-owned power distribution company. Undisputedly it has around 20 lakh customers spread across the vast area including Guwahati and adjoining areas. Security deposits are taken from the customers at the time of giving electricity connection and interest on such deposits is paid by the company. During the year expenditure of Rs. 16.62 Cr. is

claimed on account of interest paid on such consumer security deposits. Id. AO while examining the records found these transactions and noticed that the said amount can call for a disallowance u/s 40(a)(ia) of the Act if tax deductible on such interest payment is not deducted by the assessee. Before the Id. AO such details could not be filed and this resulted in the said the disallowance. Before the Id. CIT(A) the assessee filed certain details showing that out of the said the disallowance a sum of Rs. 48,60,850/- was eligible for deduction of tax at source and a list showing such details of the consumers' names and PAN and the amount of interest paid was filed and it was also stated that TDS of Rs. 48,60,850/- has been deposited on 03.11.2014 but still the assessee failed to convince the Id. CIT(A).

15. On perusal of the submissions before the lower authorities and as contended by the Id. Counsel for the assessee, the assessee company being a State-owned company and having large consumer base, of around 20 lakh customers and interest on security deposits has been paid to them. If the alleged sum of interest of Rs. 16.62 Cr. is divided by the number of consumers i.e. 20 lakh, the interest payment per consumer would be only around Rs. 84/-. It is also not in dispute that the assessee company was not maintaining the details of consumer deposits on a computer system and it was only on the basis of manual records maintained at each of the offices having the data of the consumers and at the year-end such details were compiled which becomes part of the audited financial statements.

16. We also find that the assessee made necessary efforts by collecting the requisite details to the extent possible and found that interest of only Rs. 48,60,850/- was subject to TDS and paid the TDS on such amount. Id. CIT(A) has ignored this aspect and denied the benefit only for want of verification.

17. On overall examination of the facts, discussions before the lower authorities, we note that there are large number of consumers and it is difficult to collect data of each and every consumer (20 lakh) which are maintained manually in the registers at each of the locations of the company and also the average interest amount is not exceeding Rs. 84/-, necessary efforts have already been made by the assessee company filing complete details of the consumers to which interest was paid above the prescribed limit and due tax deducted at source, restoring the issue to the Id. AO for again calling for the records of each and every consumer and then find out the correct amount eligible for deduction of tax at source will unnecessarily stretch the long drawn proceedings which pertains to AY 2012-13 and even after carrying out such exercises it is not certain that the necessary results would be obtained. We, therefore, under the given facts and circumstances of the case hold that the disallowance u/s 40(a)(ia) of the Act is not called for on the alleged amount as the assessee has filed the details which it could possibly gather and the Revenue authorities have no material with them to make the disallowance except for non-filing of details by the assessee and ignoring the fact that average interest is merely Rs. 84/- per consumer and there will be large number of cases where interest amount paid on the

security deposit may have been much below the prescribed limit for non-deduction of tax at source. However, since the interest amount of Rs. 48,60,850/- has already been subjected to TDS, the remaining amount of alleged disallowance will only be Rs. 16,13,39,150/- and we allow the said amount as an interest expenditure not calling for disallowance u/s 40(a)(ia) of the Act. We, further, make it clear that our this decision in the case of the assessee is only for the year under appeal and the same should not be taken as a precedence in any of the other years in case the assessee is in appeal or in case of any other assessee as the decision in the instant appeal is purely on the basis of facts of the instant case. Thus, ground no. 1 raised by the assessee is allowed.

18. Ground no. 3 is general in nature which needs no adjudication.

19. In the result, the appeal filed by the Revenue is dismissed and the Cross Objection filed by the assessee is partly allowed.

Kolkata, the 30th August, 2022.

Sd/-
[Sonjoy Sarma]
Judicial Member

Sd/-
[Manish Borad]
Accountant Member

Dated: 30.08.2022

Bidhan (P.S.)

Copy of the order forwarded to:

- 1. ACIT, Circle-2, Guwahati.**
- 2. M/s. Assam Power Distribution Company Ltd., 5th Floor,
Bijulee Bhawan, A.T. Road, Paltan Bazar, Guwahati-781
001.**
3. CIT(A)-1, Guwahati.
4. CIT-
5. CIT(DR), Guwahati Bench, Guwahati.

True copy

By order

Assistant Registrar
ITAT, Kolkata Benches
Kolkata