

आयकर अपीलीयअधिकरण, विशाखापटणम पीठ, विशाखापटणम

IN THE INCOME TAX APPELLATE TRIBUNAL,
VISAKHAPATNAM BENCH, VISAKHAPATNAM

श्री दुव्वूरु आर एल रेड्डी, न्यायिक सदस्य एवं श्री एस बालाकृष्णन, लेखा सदस्य के समक्ष

BEFORE SHRI DUVVURU RL REDDY, HON'BLE JUDICIAL MEMBER &
SHRI S BALAKRISHNAN, HON'BLE ACCOUNTANT MEMBER

आयकर अपील सं./ I.T.A. No.252/Viz/2019

(निर्धारण वर्ष / Assessment Year : 2014-15)

Andhra Pradesh Power
Generation Corporation Limited,
Vijayawada.
PAN: AACCA 2734 J
(अपीलार्थी/ Appellant)

Vs. Assistant Commissioner of
Income Tax,
Circle-3(1),
Vijayawada.
(प्रत्यर्थी/ Respondent)

अपीलार्थी की ओर से/ Appellant by

: Sri M. Chandramouleswara
Rao, CA

प्रत्यर्थी की ओर से / Respondent by

: Sri MN Murthy Naik, CIT-DR

सुनवाई की तारीख / Date of Hearing

: 27/10/2022

घोषणा की तारीख/Date of

: 15/12/2022

Pronouncement

ORDER

PER S. BALAKRISHNAN, Accountant Member :

This appeal filed by the assessee against the order of the Learned Principal Commissioner of Income Tax, Vijayawada [Pr. CIT] passed U/s. 263, dated 28/03/2019 arising out of the order passed U/s. 143(3) of the Income Tax Act, 1961 [the Act] for the AY 2014-15.

2. Brief facts of the case are that the assessee-company is engaged in generation of power filed its return of income on 26/09/2014 for the AY 2014-15 admitting total income of Rs. NIL after set off of brought forward losses and declared a book profit of Rs. 912,25,66,330/-. The case was selected for scrutiny and statutory notices U/s. 143(2) and 142(1) of the Act were issued and served on the assessee. Based on the submissions made by the assessee's Accounts Officer and Junior Accounts Officer, the Ld. AO framed the assessment by disallowing Rs. 19,07,83,746/- U/s. 14A of the Act and also disallowed a sum of Rs. 83,00,000/- as obsolescence stores. However, since the assessee has declared loss and adjusted the brought forward losses, the Ld. AO computed the book profit U/s. 115JB of the Act and assessed the book profit at Rs. 912,25,66,330/-. Thereafter, the Ld. Pr. CIT exercising his powers U/s. 263 of the Act considered the order of the Ld. AO erroneous and prejudicial to the interest of the Revenue on the fact that the Ld. AO has not disallowed the Provident Fund which was paid beyond the due date prescribed under the respective Act and has also not considered the liquidated damages recovered from various contractors due to delay in execution of work which was to be considered as revenue income. The Ld. Pr. CIT also found that the Ld. AO wrongly

disallowed the deduction U/s. 14A of the Act and therefore considered the order of the Ld. AO as erroneous insofar as it is prejudicial to the interest of the Revenue. The Ld. Pr. CIT issued a show cause notice to the assessee 20/03/2019. The Ld. AR of the assessee submitted replies as requested in the show cause notice. The Ld. Pr. CIT considered the replies of the assessee's Representative and set-aside the assessment order and directed the Ld. AO to re-do the assessment covering the issues in the order passed U/s. 263 of the Act after providing the assessee a reasonable opportunity of being heard. The Ld. AO passed a consequential order U/s. 143(3) r.w.s 263 on 31/12/2019 confirming the directions of the Ld. Pr. CIT. Aggrieved by the order of the Ld. Pr. CIT, the assessee carried the matter in appeal to the Tribunal.

3. The assessee has raised the following grounds of appeal:

"1. The Revisionary Order made by Pr. CIT, Vijayawada is bad, unlawful and erroneous both on facts and in law.

2. On the facts and in the circumstances of the case, the Ld. Pr. CIT has erred in assuming the jurisdiction U/s. 263 on issues which were raised by the AO during the assessment proceedings and due examination was made in passing the assessment order. He ought to have desisted from treating the assessment order as erroneous as prejudicial to the interest of the Revenue on issues above to which the AO having examined has taken a possible view which is as per the law.

3. *On the facts and in the circumstances of the case, the Ld. Pr. CIT has erred in passing revisionary order U/s. 263 of the Act on the following issues.*

v. *The Ld. AO has failed to treat the amount of employees contribution towards Provident Fund and ESI in the hands of the employer in a case where the said sums were not credited to the employees account in the relevant fund on or before the due date as per sec 36(1)(va) for an amount of Rs. 32,91,782/-.*

vi. *Not treating the amount of liquidated damages recovered and placed under current liabilities as revenue receipt in the hands of assessee alleging that the AO has failed to enquire into liquidated damages collected for an amount of Rs. 286.26 Crs has resulted in making the assessment order as erroneous and prejudicial to the interest of the Revenue.*

vii. *Short computation of disallowance u/s. 14A of Rs. 55,01,50,092/- has caused prejudice to the revenue and the order is erroneous. The AO in calculating disallowance U/s 14A has considered a) interest expenditure at Rs. 14,04,36,00,000/- instead of Rs. 19,80,75,00,000/- and b) investments as Rs. 323,49,00,000/- instead of Rs. 923,49,00,000/-.*

4. *Such other ground/grounds that may be urged with the leave of the Hon'ble Tribunal during the appeal proceedings."*

The assessee has also raised Additional Ground of appeal which reads as under:

"On the facts and the circumstances of the case and in law, the Ld. Pr. Commissioner of Income Tax has erred in ordering revision U/s. 263 of the Income Tax Act, 1961, in the case of issues dealt in and decided by the Commissioner of Income Tax (Appeals)-1, in the appellate Order. The Ld. Pr. Commissioner of Income Tax ought to have considered the fact that the issue of disallowance U/s. 14A was decided in the appellate order and the issues were got merged and the merged issues cannot be a subject matter of revisions again U/s. 263."

4. The Ld. Authorized Representative [the Ld. AR] argued that as per the notices issued U/s. 143(2) of the Act, the Ld. AO has verified all the details with respect to liquidated damages which were submitted to the Ld. AO during the assessment proceedings.

The Ld. AR also relied on the decision of the Hon'ble Supreme Court in the case of CIT vs. G.M. Mittal Stainless Steel (P) Ltd., wherein the Hon'ble Apex Court held that where the decision of the jurisdictional High Court was operative at the material time, the Ld. AO could not be said to have erred in law. The Hon'ble Supreme Court further held that since the decision of the Hon'ble High Court which was subsequently reversed would not justify the decision of the Ld. AO as erroneous. The Ld. AR therefore argued that during the relevant assessment year various High Courts and the Tribunal have held that delayed payment of employees contribution to PF which was paid on or before the due date u/s. 139(1) shall be allowed. The Ld. AO also further submitted that during the AY 2013-14 in the assessee's own case, the Ld. CIT(A) relying on the decision of the Hon'ble Supreme Court in the case of CIT vs. Saurashtra Cements Ltd reported in 325 ITR 422 (SC) directed the Assessing Officer to verify the nature of the liquidated damages collected from the contractors is of capital or revenue in nature and also whether it has been reduced from the project cost. The Ld. AR did not press the disallowance U/s. 14A of the Act raised in the grounds of appeal.

Per contra, the Ld. DR relied on the orders of the Ld. Revenue Authorities.

5. We have heard both the sides and perused the material available on record and the orders of the Ld. Revenue Authorities. We find that the Ld. Pr. CIT while exercising his powers U/s. 263 of the Act considered the order of the Ld. AO as erroneous and prejudicial to the interest of the Revenue since the Ld. AO has not verified the nature of liquidated damages and has also not considered the disallowance with respect to delayed payment of employees contribution of PF. Therefore, we are of the considered view that the twin conditions mentioned in section 263 of the Act are satisfied and therefore we uphold the order of the Ld. Pr. CIT. Accordingly, Grounds No.1 & 2 raised by the assessee are dismissed.

6. With respect to Ground No.3(v) regarding the disallowance of employees contribution of PF u/s. 36(1)(va) of the Act for Rs. 32,91,782/-, in a recent decision, the Hon'ble Supreme Court in Checkmate Services Private Limited has clearly held that non-payment of employees contribution of PF & ESI within the due dates specified in the respective Acts cannot be held as an expenditure and it will be treated as income U/s. 2(24) of the Act.

Judicially following the decision of the Hon'ble Supreme Court decision (supra), we are inclined to dismiss this ground raised by the assessee.

7. With respect to Ground No.3(vi) regarding liquidated damages collected from the contractors for Rs. 286.26 Crs, we find from the submissions of the Ld. AR that during the previous assessment year i.e., 2013-14, the Ld. CIT(A) has remitted back the matter with respect to the treatment of the liquidated damages as capital or revenue to the file of the Ld. AO. During the impugned assessment year also the Ld AR submitted that the liquidated damages is like a running current account and collected from various contractors if there is a delay in the execution of the projects on behalf of the assessee. The submission of the Ld. AR is that these liquidated damages may either become refundable to the contractors at a subsequent date as per the terms of the contract subject to the conditions laid down by the assessee. Accordingly, the Ld. AR in paper book pages 249 to 254 has provided the details of Liquidated damages withheld from various parties. The Ld. AR also submitted in the paper book that these liquidated damages were refunded in a subsequent period as given in page 255 to 299 of the paper book.

The arguments of the Ld. AR that these cannot be treated as a revenue receipt is one way as the assessee deducts the liquidated damages from the cost payable to the contractors and thereby reducing the project cost. Therefore, considering these submissions of the Ld. AR, we are inclined to remit the matter back to the file of the Ld. AO to verify whether liquidated damages have been reduced from the cost of the project in the relevant assessment year or in the subsequent assessment years and pass necessary orders in accordance with law after providing a reasonable opportunity of being heard to the assessee.

8. With respect to Ground No. 3(vii) regarding disallowance U/s. 14A, the Ld. AR did not press the ground and hence needs no adjudication.

9. With respect to additional ground raised by the assessee regarding the disallowance u/s. 14A, we are of the view that since in the regular grounds of appeal vide Ground No.3(vii) the assessee has raised the same issue but did not press the same at the time of hearing of the appeal before us, therefore the adjudication of the Additional Ground of Appeal raised by the assessee becomes infructuous. Accordingly, the additional ground raised by the assessee is dismissed as infructuous.

10. In the result, appeal filed by the assessee is partly allowed for statistical purposes.

Pronounced in the open Court on the 15th December, 2022.

Sd/- (दुव्वूरु आर.एल रेड्डी) (DUVVURU RL REDDY) न्यायिकसदस्य/JUDICIAL MEMBER	Sd/- (एस बालाकृष्णन) (S.BALAKRISHNAN) लेखा सदस्य/ACCOUNTANT MEMBER
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Dated : 15.12.2022

OKK - SPS

आदेश की प्रतिलिपि अग्रेषित/Copy of the order forwarded to:-

1. निर्धारिती/ The Assessee – Andhra Pradesh Power Generation Corporation Limited, C/o. M. Chandra Mouleswara Rao, Chartered Accountant, C-3, Skylark Apartments, Near Skyline Theatre, Basheerbagh, Hyderabad – 500 029.
2. राजस्व/The Revenue – Assistant Commissioner of Income Tax, Circle-3(1), 2nd Floor, Central Revenue Buildings, MG Road, Vijayawada – 520002.
3. The Principal Commissioner of Income Tax, Vijayawada.
4. आयकर आयुक्त (अपील)/ The Commissioner of Income Tax
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, विशाखापटणम/ DR, ITAT, Visakhapatnam
6. गार्ड फ़ाईल / Guard file

आदेशानुसार / BY ORDER

Sr. Private Secretary
ITAT, Visakhapatnam