<u>आयकर अपीलीय अधिकरण, कटक न्यायपीठ,कटक</u>

IN THE INCOME TAX APPELLATE TRIBUNAL CUTTACK BENCH CUTTACK

श्री जार्ज माथन, न्यायिक सदस्य **एवं** श्री अरुण खोड़पिया लेखा सदस्य के समक्ष ।

BEFORE SHRI GEORGE MATHAN, JUDICIAL MEMBER
AND
SHRI ARUN KHODPIA, ACCOUNTANT MEMBER

आयकर अपील **सं/ITA No.125&317/CTK/2018 & 220/CTK/2020**

(**निर्धारण वर्ष /** Assessment Year :2011-2012, 2013-2014 & 2014-2015)

M/s Western Electricity Supply Company of Orissa Ltd., Corporate Office, Burla, Sambalpur	Vs	ACIT, Circle-1(2), Bhubaneswar
PAN No. :**AAACW 3510 C**		
(**अपीलार्थी /Appellant**)	..	(**प्रत्यर्थी / Respondent**)

AND

आयकर अपील **सं/ITA Nos.16 to 18/CTK/2019**

(**निर्धारण वर्ष /** Assessment Year :2011-2012, 2013-2014 & 2014-2015)

M/s North Eastern Electricity Supply Company of Orissa Ltd., Regd. Office at Kalyani Market Complex, 1st Floor, Unit-8, Bhubaneswar-751012	Vs	ACIT, Circle-1(2), Bhubaneswar
PAN No. :**AABCN 3921 H**		
(**अपीलार्थी /Appellant**)	..	(**प्रत्यर्थी / Respondent**)

निर्धारिती की ओर से /Assessee by	:	Shri P.V.Rao/Sidharth Ranjan, CAs
राजस्व की ओर से /Revenue by	:	Shri M.K.Gautam, CIT-DR
सुनवाई की तारीख **/ Date of Hearing**	:	01/02/2023
घोषणा की तारीख**/Date of Pronouncement**	:	01/02/2023

<u>आदेश / O R D E R</u>

<u>Per Bench</u> :

These are the appeals filed by the two difference assessees against the separate orders of the ld. CIT(A)-1, Bhubaneswar, dated 20.12.2017, 01.03.2018, 22.05.2018, 27.03.2018, 11.01.2018 & 27.03.2018, respectively for the assessment years 2011-2012, 2013-2014 & 2014-2015, respectively.

2. Out of the above six appeals filed by two different assessees, appeals in the case of M/s North Eastern Electricity Supply Co. Ltd. in ITA

Nos.16 &18/CTK/2019 for the assessment years 2011-2012 & 2014-2015, there is a delay of 250 days. Further there is a delay of 325 day in filing the appeal for A.Y.2013-2014. In this regard, an affidavit has been filed stating sufficient reasons to condone the abovesaid delay. Ld. CIT-DR also did not object to condone the delay in the said cases. Looking to the facts and circumstances of the case as well as the affidavit filed by the assessee, we condone the delay of respective days in respective appeals of the assessee being M/s North Eastern Electricity Supply Co. Ltd. and appeals are heard along with other assessee i.e. M/s Western Electricity Supply Co. Ltd. finally.

3. It was submitted by the ld. AR that the main issue in both the assessee's appeals is against the action of the ld. CIT(A) in confirming the regulatory income to be recovered from future tariff determination which has been credited to the profit and loss account but claimed as deduction in the computation of the total income on the ground that it was merely a hypothetical and notional income. It was the submission that admittedly the assessee had credited the entire income to the profit and loss account. In the computation of the total income the assessee had reduced the regulatory income to be recovered from the future tariff determination on the ground that OERC had not permitted the assessee to sell power at the required rates to the customers. It was the submission that as the OERC has barred the assessee from selling the requisite powers at the requisite rates, the said income was not a real income but a notional income in respect of which the assessee hoped it to be recovered in the

subsequent years. It was specifically submitted by the ld. AR that the OERC vide their order dated 04.03.2015 had also subsequently revoked the license of the assessee companies being the distribution companies u/s.19 of the Electricity Act, 2003. It was the submission that in view of the revocation of the license of the assessee in respect of its license of distribution by invoking provisions of Section 19 of the Electricity Act, 2003, any hope that the assessee had of even recovering this amount was entirely lost. It was the submission that the income being not real income, the same is not liable to be taxed in view of the decision of the Hon'ble Supreme Court in the case of Godhra Electricity Company Ltd., reported in 225 ITR 746 (SC), wherein the Hon'ble Supreme Court has categorically held as follows :-

> *"The question whether there was real accrual of income to the assessee-company in respect of the enhanced charges for supply of electricity has to be considers by taking the probability or improbability of realisation in a realistic manner. If the matter is considered in this light it is not possible to hold that there was real accrual of income to the assessee-company in respect of the enhanced charges for supply of electricity which were added by the income tax officer while passing the assessment orders in respect of the assessment years under consideration. The Appellate Assistant commissioner was right in deleting the said addition made by the income tax officer and the tribunal had rightly held that the claim at the increased rates as made by the assessee-company on the basis of which necessary entries were made represented only hypothetical income."*

4. It was also submitted by the ld. AR that the Hon'ble Supreme Court has held a similar view in the case of Poona Electric Supply Co. Ltd., reported in 1965 SCR (3) 818, wherein it has been held as follows :-

> *"As a business concern the real profit of the appellant had to be ascertained on the principles of commercial accountancy. As a licensee governed by the statute its "clear profit" was ascertained in*

terms of the statute and the schedule annexed thereto. The two profits are for different purposes-one for commercial and tax purposes and the other for statutory purposes in order to maintain a reasonable level of rates."

5. It was the submission that though the amount was reduced in the computation of the total income, the same has been shown as regulatory asset in the balance sheet of the assessee. It was the submission that thus this amount was to be recognized as income only when there is a right to receive those income in the relevant future years and till such time the same was liable to be treated as contingent income only. It was the prayer that the addition as made by the AO and as confirmed by the ld. CIT(A) may be deleted.

6. In reply, ld. CIT-DR has filed written submission as follows :-

The assessee company is engaged in the business of power in the North-Eastern Part of Odisha. In the A.Y. 2011-12, the assessee company has credited total income of Rs.286,34,65,000/- to the profit & loss account. However in the computation of income, an amount of Rs.86,41,42,982/- has been reduced on account of regulatory income. It has been alleged that OERC has to decide the "quantum of energy to be sold" and the "rate per unit of energy". It was alleged that opportunity to sell power may be curtailed under the interference of regulators, unforeseen govt. regulations & policies, unforeseen obstacles like unavailability of power in the state, load shedding, natural calamities etc. Since the tariff would be determined subject to these unforeseen circumstances, therefore income to the extent of Rs.86,41,42,982/- was not real income but an hypothetical income. The arguments of the assessee company are not tenable for the following reasons:

i) The assessee company is following mercantile system accounting. If an income has accrued or deemed to accrue to an assessee then it is liable to be taxed. It can't be taxed in the subsequent years on the basis of receipt.

ii.) The Concept of real income should not be applied so as to defeat the provisions of Income Tax Act.

iii.) The assessee company has reduced the accrued income on account of unforeseen circumstances which are in the nature of contingent liability.

iv.) In finding out whether an income is real or notional, the conduct of the assessee and other factors are important. It is not in dispute that the assessee has itself credited the income of Rs.86,41,42,982/- to the profit & loss account. Once the income has accrued then it can't be turned into "no income" on account of future happenings. The order of OERC determining or reducing tariff in current year or future years has not been produced before the A.O. or CIT (Appeals).

v.) Creation of a Regulatory Asset is a mechanism to carry forward a portion of the revenue requirement for a particular year that has not been included while designing the tariffs for that year. The amount equivalent to the Regulatory Assets is thus effectively removed from the revenue requirement for the year in question. Such a situation generally arises when the projected revenues are significantly lower than the revenue requirement and it is not feasible to recover the entire amount either through increase in tariffs or through other means such as Government subsidy during that year. In such situations, the Regulator may choose to create a Regulatory Asset equivalent to the uncovered expenses and allow the licensee to amortise the same over a period of time. The Regulatory Asset mechanism is resorted to mainly to avoid tariff shocks to the consumers in a given year, while at the same time allowing the utility to recover the costs in a reasonable manner so as to protect its interests as well as those of the consumers.
vi.) The Regulatory Commission being a statutory authority exercising statutory powers is required to act in the manner the statutory provisions of the Act and statutory regulations prescribe. When the Regulatory Commission, a statutory authority is required to determine tariff fixation in the particular manner and in terms of statutory regulations as well as the provisions of the Act, it shall be done only in that manner or not at all. This is the settled legal position.

vii.) Regulatory Commission is not conferred with such power by Regulations or in law to issue a direction to create Regulatory Asset. Such a direction, it is pointed outruns counter to the provisions of The Electricity Act, 2003 at any rate, it is against the binding Policy Directions dated 22.11.2001 and 31.05.2002 as well as the Normative Tariff Order. No regulation has been framed under the Electricity Act, 2003 in this respect by the Regulatory Commission providing for such a course. Neither Sections 86,61 & 62, 108 of the Electricity Act has conferred such a power on the Regulator.

viii.) The Regulatory Commission, as already pointed out has to act within the four corners of the powers or authority conferred under

the Electricity Act 2003 or Procedure Prescribed there under. It is also settled law that assuming that equity is in favour of consumers, which is not factually so in the cases on hand, the same cannot be pressed into service nor could it operate to annul the statutory provisions or defeat the accrued rights of the DISCOMs.

ix.) The judgment of Bombay High Court in Maharashtra State Electricity Board vs. Maharashtra State Electricity Regulatory Commission is very pertinent, wherein it has been held that the regulatory asset could be created only in an extra ordinary event or un-expected occurrence and even such creation, when permitted by High Court, will not constitute a precedent in the future.

The said case before the Bombay High Court arose under the Electricity Regulatory Commissions Act 1998. While considering the scope of Section 29 of the said 1998 Act, on the facts of the said case the High Court while disposing of an appeal preferred by the Maharashtra State Electricity Board, held that it would not be unreasonable to require the consumers to pay for the energy at a higher rate because if a higher rate is announced the consumers could have had an opportunity of not consuming the power or at least reduce the consumption on being aware that the rate would be higher. The High Court also pointed out that denial of tariff revision leaves a revenue gap in the revenues of DISCOMs and tariff should be so fixed as to leave no tariff gap. While referring to the creation of a regulatory asset the High Court referred to the Commission's order under appeal before it which reads thus:

"The Commission is of the view that the regulatory asset can only be considered in exceptional cases wherein the recovery of entire revenue requirement during a single year might lead to a tariff shock and so a part of the required revenue is deferred for future recovery. A mere delay in tariff award due to late submission of the tariff revision proposal cannot be considered sufficient ground for creation of a Regulatory Asset as the MSEB could have approached the Commission for Tariff Revision that earlier.

Accordingly, the Commission has disallowed the creation of Regulatory Asset.

The High Court taking note of the extra ordinary situation being a very special circumstance arising out of the differences purely between The Board and the Dabhol Power Company ordered for creation of Regulatory Asset as a one-time measure while carefully adding that the same shall not be taken as a precedent for future years. Therefore, resorting to creation of Regulatory Asset is not warranted nor it is a proper course warranted on the facts of the case.

x.) The entire amount kept as a Regulatory Asset has to be amortized in the following years. In other words what has been ordered to be retained as a Regulatory Asset stands amortized. Hence, the entire exercise is just academic.

xi.) In the case of CIT Vs. Shoorji Vallabhdas & Co. 46 ITR 144 (SC), the Hon'ble Supreme Court was dealing with a case relating to AY 1948-49 corresponding to the previous year ending 31.3.1948. The assessee was managing agent of two shipping companies and was entitled to receive commission at 10% of the freight received as commission. For the relevant previous year, the books of accounts were credited with the commission receivable from the two shipping companies. In 1947, the assessee floated two private limited companies. These two companies were appointed as the Managing Agents for the two shipping companies for which the assessee acted as Managing Agents on the same terms on which the assessee acted as Managing Agents. The shareholders of the two companies for which the assessee was acting as Managing Agents agreed to two private limited companies floated by the Assessee but at a reduced Agency commission of 2.50% of the freight received. On 30.12.1947 the two companies for which the assessee acted as managing agents agreed to the two private limited companies floated by the assessee to act as managing agents at 2.50% commission on freight received. As a result, the assessee- firm gave up 75 percent of its earnings during the relevant years of account. In the assessment which followed, the ITO and the AAC came to the conclusion that the amount of larger commission had already accrued during the previous year ending 31 st March, 1948, and was thus assessable. The assessee made an alternate claim that the amount given up was also claimed by the assessee- firm as an expenditure under s. lO(2)(xv) of the Indian IT Act, but was disallowed. Thus it was rendered on different facts & circumstances.

7. It was submitted by the ld. CIT-DR that the assessee itself has credited the amounts to the profit and loss account and once the assessee has credited the amount to the profit and loss account there is no question of reducing any amount therefrom. It is only when the amount is income, it showed up in the profit and loss account. It was further submitted that admittedly OERC fixes the quantity and the rate of power that a distribution company can sell but then what needs to be understood is that no regulation has been framed under the Electricity Act of 2003 in respect of this issue whereby the regulatory commission could do put fetters. It was the submission that neither the Sections 86, 61 & 62 nor

Section 108 of the Electricity Act, 2003 confers a power on regulator being the OERC. It was the submission that the decision of the Hon'ble Supreme Court relied upon by the ld. AR were on the facts of those cases and cannot be treated as binding precedence in the case of the assessee. It was further submitted that the quantification of the regulatory income has also not been specifically shown before the AO nor the ld. CIT(A) nor before the Tribunal. It was the submission that the order of the ld. CIT(A) is liable to be upheld.

8. We have considered rival submissions. Admittedly, the assessee has credited the profit and loss account with the amounts which include the said regulatory income. In the computation the assessee has reduced the regulatory income and has created an asset in the balance sheet of the assessee for an equal amount. This regulatory income admittedly is on the basis of the computation and the rates as claimed by the assessee before OERC. The rate fixed by the OERC is obviously lower than the rates as proposed by the assessee. This has obviously caused the fall in the accepted income which has been shown as the regulatory income. The assessee in the hope of recovery the same has kept the amount alive by creating a regulatory asset in the balance sheet of the assessee. It is also an admitted fact that the hope of the assessee no more exists in view of the revocation of their license by the regulatory authority. In any case, the amounts representing the regulatory income have not been received by the assessee, it is nothing but a notional more specifically hypothetical income in the hands of the assessee. This being so, whether the

regulatory commission has the authority to regulate such rates is not an issue which this Tribunal cannot look into. That is an issue between the assessee and the regulatory authority to be adjudicated before the appropriate forum. It cannot be an issue which can be looked into by this Tribunal. As the amounts are admittedly notional, the principle laid down by the Hon'ble Supreme Court in the case of Godhra Electricity Co. Ltd.(supra) as also in the case of Poona Electric Supply Co. Ltd. (supra) would be applicable and as per the said principle it is only clear profit which is required to be brought to tax. We are of the view that the regulatory income is not required to be taxed in the hands of the assessee for the impugned assessment years. It shall be offered and brought to tax in the years in which they are received by the assessee. Thus, clearly the principle of real income is applicable to the said regulatory income. The revenue would not be at a loss insofar as the said regulatory income is admittedly shown as a regulatory asset in the balance sheet and as and when the income is received by the assessee, the said asset would get reduced. Accordingly, the AO is directed to exclude the regulatory income while computing the total income of both the assessees. Thus, this issue is held in favour of both the assessees.

9. Other issues have also been raised by both the assessees in their respective grounds of appeal but such issues have not been argued and consequently, the same are dismissed as not argued.

10. In the result, appeals of both the assessees stand partly allowed.

Order dictated and pronounced in the open court on 01/02/2023.

Sd/-	**Sd/-**
(जार्ज माथन)	**(**अरुण खोड़पिया**)**
(GEORGE MATHAN)	**(ARUN KHODPIA)**
न्यायिक सदस्य / JUDICIAL MEMBER	लेखा सदस्य/ **ACCOUNTANT MEMBER**

कटक Cuttack; दिनांक Dated 01/02/2023

Prakash Kumar Mishra, Sr.P.S.

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant-
2. प्रत्यर्थी / The Respondent-
3. आयकर आयुक्त(अपील) / The CIT(A),
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, **कटक** / DR, ITAT, Cuttack
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

(**Assistant Registrar**)
आयकर अपीलीय अधिकरण, कटक/ITAT, Cuttack