

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'E', NEW DELHI**

**Before Dr. B. R. R. Kumar, Accountant Member
Sh. Yogesh Kumar US, Judicial Member**

ITA No. 145/Del/2020 : Asstt. Year: 2015-16

NTPC Vidyut Vyapar Nigam Ltd., Core-7, Scope Complex, Institutional Area, Lodhi Road, New Delhi-110003	Vs.	PCIT-06, New Delhi-110002
(APPELLANT)		(RESPONDENT)
PAN No. AABCN7433J		

**Assessee by : Sh. Ved Jain, Adv.
Revenue by : Ms. Sarita Kumari, CIT DR**

Date of Hearing: 06.06.2023	Date of Pronouncement: 31.07.2023
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ORDER

Per Dr. B. R. R. Kumar, Accountant Member:

The present appeal has been filed by the assessee against the order of Id. PCIT-6, New Delhi dated 18.11.2019.

2. For the sake of ready reference and completeness, the entire order of the Id. PCIT passed u/s 263 is reproduced as under:

"2. The assessment record of assessee was called for and on examination of the same; it was noticed that in the Note-18 (Revenue and Operation) of the audited Balance Sheet, the assessee has shown Sale of 'Fly Ash / Fly Ash Product' amounting to Rs. 87,42,34,784/- and transferred the total amount to the Fly Ash Utilization Fund without considering the same as income. A perusal of Balance Sheet shows that assessee is maintaining a Fly Ash Utilization Fund (Note-4 of audited B/Sheet), which had a Net Fly Ash Utilization Fund' of Rs. 3,89,16,24,122/- as on 31.03.2015

including the above referred sale amount of Rs.87,42,34,784/-, but the said net fund of R. 3,89,16,24,122/- was transferred to NTPC Ltd.

3. In the year under consideration, the assessee has earned revenue of Rs. 87,42,34,784/- from the sale of fly ash, cenosphere and the assessee incurred expenditure of Rs. 45,26,29,998/- on account of fly ash products. Hence an amount of Rs. 42,16,04,786/- has remained under assessed.

4. The Assessing officer failed to verify these facts in his assessment order dated 23.12.2017 passed u/s 143(3) of I.T. Act, 1961 for A.Y. 2015-16. By not considering the matter during assessment proceedings and by not adding back Rs. 42,16,04,786/- on account of net receipt on fly ash and cenosphere to the income, the scrutiny assessment order apparently has become erroneous in so far as it is prejudicial to the interest of revenue, in terms of explanation 2 of section 263 of the Income Tax Act, 1961, which is reiterated an under:

"Explanation 2: For the purposes of this section, it is declared that order passed by the Assessing Officer shall be deemed to be erroneous in so as it is prejudicial to the interests of the revenue, if in the opinion of the Principal Commissioner or Commissioner (a) the order is passed without making inquiries or verification which should have been made; (b) the order is passed allowing any relief without inquiring into the claim; (c) the order has not been made in accordance with any order, direction or instruction issued by the Board under section 119: of (d) the order has not been passed in accordance with any decision which is prejudicial to the assessee, rendered by the jurisdictional High Court or Supreme Court in the case of the assessee or any other person."

In view of the facts of the instant case and provisions of the Income Tax Act, 1961, as discussed above, a detail show cause notice dated 20.9.2019, u/s 263 of the Income Tax Act was issued to the assessee, directed them to show cause as to why the provision of section 263 of the Income Tax Act shall not be invoked for A.Y. 2015-16 and the order passed u/s 143(3) of the Act should not be revised and the case should not be set aside to the Assessing Officer, for identification of taxable income on a/c of sale of fly ash and cenosphere, after examination of all the material facts. The said notice was duly served on the assessee.

Submission on behalf of the Assessee:

The assessee company filed their reply to the show cause notice on 01.10.2019. The relevant gist of the submission is as follows-

"NVVN is a public sector company, a 100% subsidiary of NTPC Ltd, engaged in the business of trading of Energy and fly ash and it's related products.

For the year under consideration NVVN duly filed it's revised return of income of 15.6.2016 declaring profit of Rs. 98,84,52,500/- Thereafter, the case was selected under CASS for complete scrutiny wherein the income of the NVVN was assessed u/s 143(3) at Rs. 1,36,14,76,500/- as against the returned income of Rs. 98,84,52,500/- and a demand of Rs. 25,49,58,670/- was raised on NVVN vide order u/s 143(3) and notice of demand u/s 156 dated 23.12.2017.

Against above Assessment Order, NVVN filed an appeal with CIT (Appeals)-06, which was decided in NVVN's favour and the additions made by Assessing Officer was deleted vide CIT (Appeals)- 06's order dated 23.04.2019.

To NVVN's surprise, your good self has now invoked the provision of section 263 of the Act and proposed a further addition of Rs. 42,16,04,786/- presuming the original assessment to be prejudicial to the interest of the revenue on account of sale of fly ash and cenosphere.

It is pertinent to mention that a notification dated 3rd November, 2009 has been issued by the Ministry of Environment and Forests (MOEF) on utilization of fly ash. The said notification is very specific so far transfer of proceeds of the fly ash is concerned. For which it may be relevant to refer to para 6 of the said notification which reads as under:-

"(6) The amount collected from sale of fly ash and fly ash based products by coal and/or lignite based thermal power stations or their subsidiary or sister concern units, as applicable should be kept in a separate account head and shall be utilized only for development of infrastructure or facilities, promotion and facilitation activities for use of fly ash until 100 percent fly ash utilization level is achieved; thereafter as long as 100% fly ash utilization levels are maintained, the thermal power station would be free to utilize the amount collected for other development programmes also and in case, there is a reduction in the fly ash utilization levels in the subsequent year(s), the use of financial return from fly ash shall get restricted to development of infrastructure or facilities and promotion or facilitation activities for fly ash utilization until 100 percent fly ash utilization level is again achieved and maintained."

From the above it is clear that the amount collected from sale of fly ash and fly ash based products by coal and/or lignite based thermal power stations or their subsidiary or sister concern unit is required to be kept in a separate account and it may be utilized only for development of infrastructure or facilities, promotion and facilitation

activities for use of fly ash until 100 percent fly ash utilization level is achieved.

It is submitted that as long as 100 percent fly ash utilization is not achieved, the assessee is bound to utilize the said amount for aforesaid development programmes and is not free to use as per its discretion. It is only after achievement of 100% utilization level of fly ash, when, the thermal power station would be free to utilize the amount collected for other development programmes also and in case there is a reduction in the fly ash utilization levels in subsequent years, the use of financial return from fly ash will again get restricted to development of infrastructure or facilities and promotion or facilitation activities for fly ash utilization until 100 percent fly ash utilization level is again achieved and maintained.

The notification has been issued by Government of India, Ministry of Environment and Forests (MoEF) under Environment (Protection) Act, 1986 by virtue of the powers vested in it under section 3(1) & 3(2)(v) of the Environment (Protection) Act, 1986 read with clause (d) of sub-rule (3) of rule 5 of the Environment (Protection) Rules, 1986. These powers are to be exercised for the purpose of protecting and improving the quality of the environment and preventing controlling and abating environmental pollution. Further, if the Central Government is satisfied that it is necessary or expedient to do so, it is empowered to determine the policy and give directions to all. Accordingly, wide and vast powers have been given by the Legislature to the Central Government to govern a specified matter i.e., protection and improvement of environment, whose functioning is monitored by the Central Government.

The powers vested with the Central Government is by the Legislature for determining policy by the experts to provide for the protection and improvement of environment and for matters connected with it. This is a conscious and deliberate decision of the Legislature and,

thus, when in clear and articulate language they have specifically enumerated in The Environment (Protection) Act, then the overriding mandate of the section cannot be ignored. Accordingly, based on the provisions of the said Act and the prudential norms issued by it from time to time in exercise of the power vested in it no adverse inference should be drawn in the name of the NVVN.

In view of the said notification, it can be concluded that so far proceeds of the fly ash are concerned it gets transferred by overriding effect. Therefore sale proceeds are not chargeable to Income tax as the same do not belong to NVVN because it has to be used for the purposes specified thereunder. The purposes specified are not being owned by NVVN and the fund will be used in making contribution to development of infrastructure or facilities and promotion or facilitation activities for fly ash utilization or such other facility not owned by it.

Moreover the amount collected is a liability being collected as a trustee in its behalf and there will be no tax liability. Accordingly, being a statutory obligation under overriding effect, the amount collected from sale of fly ash and cenosphere after setting off cost related to it w.e.f. 03.11.2009, are being kept by NVVN in a separate account named 'Fly Ash Utilization Fund' which is to be spent on the specific purposes as directed by the Ministry of Environment and Forests vide its notification dated 03.11.2009 issued under Environment Protection) Act, 1986

In view of the above submission, it is very much evident that the amount received by NVVN on account of sale of fly ash is not its income and income tax is payable on income earned by any person as per provisions of Income Tax. However, as the amount received by NVVN in itself does not represents income, therefore, no income tax is applicable on the same. Accordingly, it is requested to kindly

drop the proceeding w/s 263 of the Act and no adverse inference be drawn in this regard.

Determination:

I have carefully considered and examined the case records and assessment order of the AO u/s 143(3) dated 23.12 2017. Reply of the assessee company is examined and is not acceptable on merit, in view of the discussion made in the following para:

The Note-4 of the audited Balance Sheet refers to the Gazette notification dated 3 November, 2009, issued by the Ministry of Environment and Forest (MoEF), Govt. of India. In the said notification it was mentioned that the amounts collected from sale of fly ash and fly ash based products shall be kept in a separate account head and be utilized only for development of infrastructure or facilities, promotion and facilitation activities for use of fly ash.

On examination of the gazette notification dated 3rd November, 2009 issued by MoEF, it is seen that the said notification is only about utilization of receipts from fly ash sale and it does not infringe upon the taxation issue related to income from sale of fly ash. Further, the above gazette notification cannot prevail over the express provisions of the Income Tax Act, 1961. Further, merely making a separate fund and transferring it in liabilities on Balance Sheet, does not necessitate an income not to be recognized and to have no tax implication on it.

45,26,29,998/- on a/c of said products. Hence, an amount of Rs. 42,16,04,786/- (Rs. 87,42,34,784/- minus Rs. 45,26,29,995/-) earned as income from sale of fly ash, cenosphere which was not shown as taxable income. The AO, while framing the assessment order, should have properly verified the issue and the net amount as mentioned above should have been brought within the tax net."

3. In view of the above, the Id. PCIT held that the assessment order passed by the ACIT is erroneous and prejudicial to the interest of the revenue and hence directed the AO to make proper verification of the issue.

4. Aggrieved, the order of the Id. PCIT, the assessee filed appeal before us.

5. Heard the arguments of both the parties and perused the material available on record.

6. It is important to understand that the nature of business and source of income of the assessee which is as under:

NTPC Vidyut Vyapar Nigam Ltd.
(A wholly owned subsidiary of NTPC)

NVVN'S NATURE OF BUSINESS AND SOURCES OF INCOME

NTPC Vidyut Vyapar Nigam Limited (NVVN) was incorporated on 1 November 2002 as a Government Company and the Certificate for Commencement of Business was received on 26th November 2002.

Since, there is a gap in between demand and supply of electricity, a new concept of trading of power started in the market to bridge this gap. It became an important tool for utilizing the short/ medium term surpluses of the existing capacity more efficiently and became an independent activity in the power sector. Since there is progressive strengthening of the regional and inter- regional transmission grids, it further made the trading of power as an important activity. The Electricity Act, 2003 also recognized trading in power as a distinct business activity.

Under this scenario NTPC Limited (A Government of India Enterprise), to reap the benefits of the vast potential of power trading in the country, formed NTPC Vidyut Vyapar Nigam Limited (NVVN), as wholly owned subsidiary. NVVN is the only Government Company in the business of power trading in the country today NTPC, with stations spread across the country, is the largest power generator of India Trading of power by its wholly owned subsidiary shall pave the way for improving capacity utilization and thereby reducing the overall cost of power. In this direction, the Company visualizes to evolve itself as a facilitator for developing a flexible power market.

As per the Presidential directive dated 22.12.2009 issued by Ministry of Power (MoP), Government of India (GoI), NVVN was appointed the Nodal Agency under Phase-I of Jawaharlal Nehru National Solar Mission (JNNSM) to enter into Power Purchase Agreements (PPAs) for upto 1,000 MW with Solar Power Developers (SPDs) and the sale after bundling of an equivalent MW capacity from the NTPC's coal power stations. During the year NVVN bought solar power from SPDs and bundled it with thermal power of NTPC and sold it to various Discoms.

NTPC generates electricity through coal gas, naphtha etc. While using coal for electricity generation, fly ash is produced in large quantities its disposal in an environment friendly manner causes major worry for NTPC. So, it entrusted this job also to NVVN. NVVN made beginning in its utilization and started marketing/trading of fly ash from the financial year 2006-07 onwards. However, as per MoEF notification dated 03.11.2009 the earning from Fly Ash trading has been credited by NVVN to a separate Fly Ash Utilization Fund and hence does not form part of NVVN's income.

7. Further, we have gone through the page no. 14 of the paper book depicting the details of fly ash utilization fund which is as under:

NTPC VIDYUT VYAPAR NIGAM LTD.

4. Fly Ash Utilization Fund

(Amount in Rs.)

<i>As at</i>	<i>31.03.2015</i>	<i>31.03.2014</i>
<i>Ay per last financial statements</i>	<i>3,26,23,01,631</i>	<i>2,34,93,34,677</i>
<i>Add: Transfer from sales (Note 18)</i>	<i>87,42,34,784</i>	<i>1,22,55,13,224</i>
<i>Add: Transfer from other Income (Note 19) (Net of tax)</i>	<i>20,77,17,705</i>	<i>-</i>
<i>Transfer from reserve and surplus (Note 3)(Net of tax)</i>	<i>-</i>	<i>17,01,18,785</i>
<i>Less: Utilized during the year</i>		
<i>Capital expenditure (Note 10)</i>	<i>-</i>	<i>49,15,087</i>
<i>Cost of fly ash/ash products (Note 21)</i>	<i>2,23,11,593</i>	<i>2,89,05,770</i>
<i>Employee benefits expense (Note 22)</i>	<i>4,02,19,471</i>	<i>5,73,27,339</i>
<i>Administration & other expenses (Note 24)</i>	<i>4,28,91,315</i>	<i>5,13,13,853</i>
<i>Fly ash utilization expenses incurred by holding company</i>	<i>34,72,07,619</i>	<i>34,02,03,007</i>
	<i>45,26,29,998</i>	<i>48,26,65,056</i>
<i>Net Fly ash utilization fund</i>	<i>3,89,16,24,122</i>	<i>3,26,23,01,631</i>
<i>Less: Fly Ash Fund Transferred to NTPC Limited</i>	<i>3,89,16,24,122</i>	<i>-</i>
<i>Total</i>	<i>-</i>	<i>3,25,23,01,631</i>

a. The Company sells fly ash and cenosphere given free of cost by its holding company NTPC Limited. As per the gazette notification dated 3rd November 2009 issued by Ministry of Environment and Forests (MoEF), Government of India, the amounts collected from sale of fly ash and fly ash based products shall be kept in a separate account head and be utilized only for development of infrastructure or facilities, promotion and facilitation activities for use of fly ash until 100% fly ash utilization level is achieved. In compliance with the said notification, the company has created a fly ash utilization fund

in its books of accounts to which the entire sale proceeds of fly ash and cenosphere for the year amounting to Rs.787,42,34,784/- (previous year Rs.1,22,55,13,224/-) has been transferred.

b) Further, during the year, interest earned on the fund amounting to Rs.20,77,17,705/- (net of income tax) Gross Rs.31,46,76,117/) has been transferred from "Other Income" (Note 19) (previous year Rs.17,01,18,786/- (net of income tax)] from "Reserve and surplus"(Note 3).

c) During the financial year 2013-14 the holding company framed a policy guideline for utilization of Ash Fund created from sale of fly ash/ fly ash products, in reference to the above notification dated 03.11.2009, including employee cost and other administrative expenditure incurred at its various coal based generating stations/ offices. These expenses mainly pertain to the development of infrastructure or facilities, promotion and facilitation activities so as to increase the utilization of fly ash. Therefore, during the current year company has charged an amount of Rs.45,26,29,998/- (previous year Rs.48,26,65,056/-) to the fund as fly ash utilization expenses, which includes Rs.34,72,07,619/- (previous year Rs.34,02,03,007/-) incurred and certified by holding company.

d) The Indirect expenses incurred by the company amounting to Rs.4,27,52,797/- on account of employee benefits and administration & other expenses have been allocated in the ratio of gross margin on sale of power and fly ash & its products

e) As per the management decision (note dated 12.09.2014), all the activities related to sale of fly ash & closing balance of fly ash utilization fund has been transferred to NTPC Limited (holding company) w.e.f. 1st Jan 2015."

8. We have also gone through the notification dated 03.11.2009, Ministry of Environment & Forest and utilization of fly ash. As per the notification *"The amount collected from sale of fly ash and fly ash based products by coal and/or lignite based thermal power stations or their subsidiary or sister concern unit, as applicable should be kept in a separate account head and shall be utilized only for development of infrastructure or facilities, promotion and facilitation activities for use of fly ash until 100 percent fly ash utilization level is achieved; thereafter as long as 100% fly ash utilization levels are maintained, the thermal power station would be free to utilize the amount collected for other development programmes also and in case, there is a reduction in the fly ash utilization levels in the subsequent years, the use of financial return from fly ash shall get restricted to development of infrastructure or facilities and promotion or facilitation activities for fly ash utilization until 100 percent fly ash utilization level is again achieved and maintained."*

9. On going through the entire facts, we find that the amount collected from sale of fly ash and fly ash based products by coal and/or lignite based thermal power stations or their subsidiary or sister concern units, as applicable should be kept in a separate account head and shall be utilized only for development of infrastructure or facilities, promotion and facilitation activities for use of fly ash until 100 percent fly ash utilization level is achieved; thereafter as long as 100% fly ash utilization levels are maintained, the thermal power station would be free to utilize the amount collected for other development programmes also and in case, there is a reduction in the fly ash utilization levels in the subsequent year(s), the use of financial return from fly ash shall get restricted to

development of infrastructure or facilities and promotion or facilitation activities for fly ash utilization until 100 percent fly ash utilization level is again achieved and maintained. In view of the notification of the Government and the fly ash fund transferred to NTPC Ltd., we hold that no addition is called for on this account. Hence, the order of the Id. PCIT passed u/s 263 cannot be upheld.

10. In the result, the appeal of the assessee is allowed.
Order Pronounced in the Open Court on 31/07/2023.

Sd/-

(Yogesh Kumar US)
Judicial Member

Sd/-

(Dr. B. R. R. Kumar)
Accountant Member

Dated: 31/07/2023

Subodh Kumar, Sr. PS

Copy forwarded to:

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2. Respondent
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4. CIT(Appeals)
5. DR: ITAT

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