

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

**BEFORE,
DR. B.R.R. KUMAR, ACCOUNTANT MEMBER
AND
SHRI YOGESH KUMAR U.S., JUDICIAL MEMBER**

**ITA No.6816/Del/2019
(ASSESSMENT YEAR 2013-14)**

M/s NTPC Vidyut Vyapar Nigam Ltd. NTPC Bhawan Core-7 Scope Complex-7 Institutional Area Lodi Road New Delhi-110 003 PAN-AABCN 7433J	Vs.	PCIT-06 New Delhi-110 002
(Appellant)		(Respondent)

Appellant by	Sh. Ved Jain, Advocate Sh. Aman Garg, CA
Respondent by	Sh. Subhra Jyoti Chakraborty, CIT-DR

Date of Hearing	31/10/2023
Date of Pronouncement	03/11/2023

ORDER

PER YOGESH KUMAR U.S., JM:

This appeal by Assessee is filed against the order of Learned Principal Commissioner of Income Tax-06, New Delhi ["Ld. PCIT", for short], dated 27/03/2019 for Assessment Year 2013-14.

Grounds taken in this appeal are as under:

“1. On the facts and circumstances of the case, the order passed by the learned Principal Commissioner of Income Tax (Pr. CIT) under Section 263 of the Act is bad, both in the eye of law and on facts.

2. On the facts and circumstances of the case, the order passed by the learned Pr. CIT cancelling the assessment order passed by the AO is untenable in the absence of order of the AO being erroneous as well as prejudicial to the interest of the Revenue.

3. On the facts and circumstances of the case, the learned Pr. CIT has erred both on facts and in law in ignoring the fact that all the issues raised by him in notice under Section 263 were before the A.O. and as such the jurisdiction on this issue under Section 263 cannot be assumed.

4. On the facts and circumstances of the case, the learned Pr. CIT has erred both on facts and in law in ignoring the contention of the appellant that the proceeding under Section 263 cannot be used for substituting option of the A.O. by that of the PR. CIT.

5. On the facts and circumstances of the case, the learned Pr CIT has erred both on facts and in law in invoking revisionary power under Section 263 of the Act despite the fact that even after thorough examination, no specific findings have been given on the issue how the order is erroneous and prejudicial to the interest of Revenue.

6. On the facts and circumstances of the case, the learned Pr. CIT has erred both on facts and in law in rejecting the contention of the appellant that the issue of recognition of income from sale of fly ash and cenosphere was before the AO in proceedings under Section 143(3) and was allowed after application of mind by him as such the same cannot be the matter for reassessment under Section 263 of the Act.

. On the facts and circumstances of the case, the learned Pr. CIT has erred both on facts and in law in rejecting the contention of the appellant that the income being not chargeable to tax there is no prejudicial to the interest of the revenue.

8. That the appellant craves leave to add, amend or alter any of the grounds of appeal.”

2. The brief facts of the case are that the assessee filed its return declaring total income at NIL and current year loss to be carry forward of Rs.52,82,33,949/-. The case was selected for complete

scrutiny through CASS. The assessment in the case of assessee for AY 2013-14 was completed on 26/12/2016 u/s 143(3) of the Act. The Ld. PCIT initiated proceedings u/s 263 of the Act and considered the assessment order passed u/s 143(3) of the Act dated 26/12/2016 and held that the same is erroneous so far as it is prejudicial to the interest of the Revenue owing to the failure of the Assessing Officer to at Rs.88,26,37,126/- on account of the income from sale of fly ash and cenosphere.

3. Aggrieved by the order of the Ld. PCIT, dated 27/03/2019, the assessee preferred the present appeal on the ground mentioned above.

4. During the hearing, the Ld. AR submitted that the similar order u/s 263 of the Act has been passed by the Ld. PCIT for the AY 2015-16 and the Co-ordinate Bench of the Tribunal vide order dated 06/06/2023 set aside the order of the PCIT and decided the issue in favour of the assessee, therefore, sought for following the principle of law consistency and also prayed for allowing the appeal.

5. Per contra, the Ld. DR though relied on the order of the Ld. PCIT, but could not dispute the above fact that the similar issue has been decided in favour of the assessee in Assessee's own case for AY 2015-16 by the Co-ordinate in ITA No.145/Del/2020.

6. We have heard both the parties and perused the materials available on record. The similar issue has been considered by the Co-ordinate Bench of the Tribunal for the Assessment Year 2015-16 in ITA No.145/Del/2020, wherein the order passed by the Ld. PCIT u/s 263 of the Act has been set aside in following manner:

"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-1 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.)

As at	31,03,2015	31.03.2014
As per last financial statements	3,26,23,01,631	2,34,93,34,677
Add: Transfer from sales (Note 18)	87,42,34,784	1,22,55,13,224
Add: Transfer from other Income (Note 19) (Net of tax)	20,77,17,705	
Transfer from reserve and surplus (Note 3)(Net of tax)	-	17,01,18,785
Less: Utilized during the year		
Capital expenditure (Note 10)	-	49,15,087
Cost of fly ash/ash products (Note 21)	2,23,11,593	2,89,05,770
Employee benefits expense (Note 22)	4,02,19,471	5, 73,2 7,339
Administration & other expenses (Note 24)	4,28,91,315	5,13,13,853
Fly ash utilization expenses incurred by holding company	34,72,07,619	34,02,03,007
	45,26,29,998	48,26,65,056
Net Fly ash utilization fund	3,89,16,24,122	3,26,23,01,631

Less: Fly Ash Fund Transferred to NTPC Limited	3,89,16,24,122	-
Total	-	3,25,23,01,631

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. 17,01,18,7867 (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. 1" 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 Hy 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."

7. By respectfully following the order of the Co-ordinate Bench of the Tribunal in assessee's own case for AY 2015-16 and in the absence of any change of the circumstances, we hold that no addition is called for on account of income from fly ash and cenosphere. Accordingly, the impugned order passed u/s 263 of the Act by the PCIT is hereby set aside.

8. In the result, the appeal filed by the assessee is allowed.

Order Pronounced in the Open Court on 3rd November, 2023.

Sd/-

(DR. B.R.R. KUMAR)
ACCOUNTANT MEMBER

Dated: 03/11/2023

Sd/-

(YOGESH KUMAR U.S.)
JUDICIAL MEMBER

Pk/ sps

Copy forwarded to:

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

ASSISTANT REGISTRAR
ITAT, NEW DELHI