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

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND SHRI KUL BHARAT, JUDICIAL MEMBER

ITA No. 1810/DEL/2023 [A.Y. 2011-12]
ITA No. 1811/DEL/2023 [A.Y. 2012-13]

M/s NTPC Ltd Core – 7, Scope Complex Lodhi Road, New Delhi	Vs.	The A.C.I.T Special Range - 06 Delhi
PAN – AAACN 0255 D		
(Applicant)		(Respondent)

Assessee By	:	Shri Ved Jain, Adv Ms. Supriya Mehta, CA
Department By	:	Shri Subhra Jyoti Chakroborty, CIT-DR

Date of Hearing	**:**	**15.02.2024**
Date of Pronouncement	**:**	**16.02.2024**

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER:-

The above captioned two separate appeals by the assessee are preferred against two separate orders dated 18.04.2023 pertaining to A.Ys 2011-12 and 2012-13.

2. Both these appeals were heard together and are disposed of by this common order for the sake of convenience and brevity as in both the appeals, the assessee has challenged the reopening of the assessment u/s 147 of the Income-tax Act, 1961 [the Act, for short].

3. We will first address to the facts of A.Y 2011-12.

4. Briefly stated, the facts of the case are that return of income filed by the assessee was taken up for scrutiny assessment and assessment was completed u/s 143(3) of the Act on 07.02.2014. Subsequently, notice u/s 148 of the Act was issued to the assessee dated 07.10.2016 after recording reasons for reopening assessment.

5. Reasons recorded for reopening the assessment are as under:

Reasons for issue of Notice u/s 148 for A.Y.2011-12 in the case of M/s NTPC Ltd.

Background

1. NTPC Limited is a Public Sector Undertaking, engaged in the business of generation of electricity and allied activities. It is a company incorporated under the Companies Act 1956 and a "Government Company" within the meaning of the act. The company had 14 power generating units which were eligible for deduction under section 80-IA of the Income-tax Act, 1961 which provides 100 per cent deduction of the profits and gains derived from eligible business i.e., generation/distribution of power or transmission/distribution of power etc., for 10 consecutive years subject to fulfilment of certain conditions. The deduction is to be allowed on the income worked out for income tax purpose.

2. The company filed its original return of income on 27-09-2011 for the assessment year 2011-12 declaring income at Rs 7249,77,25,730/- which was processed u/s 14391) on 07-03-2013. Thereafter, the assessee e-filed a revised return on 26-03-2013 showing a total income of Rs 7248,78,43,800/-. The case was selected for scrutiny assessment for which notices u/s 143(2)/142(1) of the Act were issued on 16-08-2013. Assessment u/s 143(3) was completed on 07-02-2014 at an income of Rs 9154,64,43,910/-.

Post scrutiny assessment developments:

3. Subsequent to the scrutiny assessment u/s 143(3) of the Act on 07-02-2014, during the course of audit it is seen that excess deduction u/s 80-IA of an amount of Rs. 15,908.51 lakhs was claimed by the assessee company resulting in under-assessment of income by same amount as follows.

4. During the course of scrutiny assessment, the assessee was allowed deduction of Rs. 2,034.90 crore u/s 80-IA(4(i) for generating power from 14 eligible units. Post scrutiny assessment, audit of separate accounts of eligible units, to which the deduction u/s 80-IA was allowed revealed that the assessee debited 'corporate expenses' in the P&L account of the 14 eligible units totalling Rs. 15,908.51 lakhs. However, all the expenses were added back as 'Apportionment of corporate expenses' in the computation of these eligible units while working out the unit-wise amount of deduction u/s 80IA. As the expenses were the proportionate corporate expenses relating to the business eligible for deduction, the expenses charged in the P&L accounts of the eligible units should not have been added back in the computation of eligible units for claiming deduction. These expenses were not added back in the consolidated computation while deriving the total taxable income of the assessee. By adding these

corporate expenses in the computation for deduction purpose only, the amount of deduction u/s 80-IA increased by Rs. 15,908.51 lakhs resulting in under assessment of the same amount having tax impact of Rs. 5,284.40 lakhs.

Analysis of excess claim of deduction under section 80-IA

5. It was submitted that corporate expenses (revenue) are allocated to various operating units of the assessee company in accordance with the accounting principles. The 'corporate expenses' represent expenditure on salary and other expenses of employees and other administrative overheads. These expenses are allocated to power generating undertakings on the basis of weighted average installed commercial capacity in MW. For the AY 2011-12, total commercial generating capacity as at 31.03.2011 was 30830 MW and commercial generating capacity of undertakings for which deduction u/s 80-IA claimed was 5705 MW. Accordingly total amount of Corporate expenses allocated to all generating undertakings was Rs. 818 crores, out of which an amount of Rs. 159 crores has been allocated to the undertakings for which 80-IA deduction claimed and the balance amount of Rs. 659 crores has been allocated to other undertakings.

6. To appreciate how adding back 'corporate expenses' to the profit of 80-IA eligible unit increases the deduction u/s 80-IA, computation of 80-IA deduction of one unit is given as under:

Talcher Super Thermal Power Station Unit-3

(Rs. In lakhs)

(A) Income		86,410.49
(B) Expenses – (i) normal	70,326.11	
(ii) corporate expenses	1,394.19	71,720.30
(C) Gross Taxable Profit (A-B)		14,690.19
(D) add back corporate expenses		1,394.19
(E) Deduction u/s 80-IA (C+D)		16,084.38

By above computation, the deduction u/s 80-IA which should have been Rs. 14,690.19 lakhs has been increased to Rs. 16,084.38 lakhs by adding back corporate expenses to the profits of the unit of Rs. 1,394.19 lakhs. Similarly, by adding back corporate expenses amount to the profit of the unit, deduction u/s 80-IA was claimed of a higher amount for all the 14 eligible units as under:

	80-IA Eligible Units	Corporate Taxes added back (Rs. In lakhs)
1.	Talcher Super Thermal Unit -3	1394.19
2.	Talcher Super Thermal Unit -4	1394.19
3.	Talcher Super Thermal Unit -5	1394.19
4.	Talcher Super Thermal Unit-6	1394.19
5.	Vindhyachal Unit-7	1394.05
6.	Vindhyachal Unit-8	1394.05
7.	Unchahar Unit-3	585.22

8.	Unchahar Unit-4	585.22
9.	Faridabad Gas Power Unit-3	434.80
10.	Rajiv Gandhi Combined Gas Power Unit-3	360.73
11.	Simhadri Unit-1	1394.60
12.	Simhadri Unit-2	1394.60
13.	Ramagundam Unit-7	1394.41
14.	Rihand Unit-3	1394.07
	Total	**15908.51**

From the above table it is seen that a total amount of Rs. 15,908.51 lakhs of corporate expenses was added back to the profits of 14 eligible units thereby increasing the deduction claimed under section 80-IA.

Reason for formation of belief:

7. I have carefully perused and considered the return of income of the assessee company, scrutiny assessment and the subsequent audit. This is a case of factual error in computation of deduction u/s 80-IA made by the assessee company which was not detected during the scrutiny assessment. Therefore, I have reason to believe that income chargeable to tax has escaped assessment for AY 2011-12 at least to the extent of excess claim of deduction u/s 80-IA.

Income Chargeable to tax escaping assessment

8. In view of the foregoing, I have reason to believe that an amount at least of Rs 15,908.51 lakhs has escaped assessment in case the of M/s NTPC Ltd for the A.Y 2011-12 within the meaning of Section 147/148 of Income-tax Act, 1961. In terms of first proviso to section 147, the assessee company has failed to disclose fully and truly all material facts necessary for its assessment as can be seen from the incorrect claim of deduction u/s 80-IA. A time period of four years (but less than six years) has elapsed from the end of AY 2011-12. The income escaping assessment is also more than one lakh rupees in terms of provisions of section 149(1)(b).

9. Further, as the case pertains to a period beyond four years from the end of relevant assessment year at the time of issue of notice, necessary sanction has to be obtained from Pr. Chief Commissioner of Income Tax or Pr. Commissioner of Income Tax or Commissioner of Income Tax, in view of the amended provision of section 151(1). The necessary sanction in this regard is being obtained separately from Pr. Commissioner of Income Tax-06, Delhi before the issue of notice u/s 148.

23/9/2016
(A.Sreenivasa Rao)
Additional Commissioner of Income-tax
Special Range-6, Delhi

6. A perusal of the reasons shows that the Assessing Officer wanted to reassess the completed assessment for the reason that the assessee has claimed excess deduction u/s 80IA of the Act.

7. Having heard the rival representatives, we have carefully perused the orders of the authorities below.

8. During the course of scrutiny assessment, vide notice dated 09.05.2013, the Assessing Officer sought clarification from the assessee in respect of deduction claimed under Chapter VIA of the Act and the assessee has filed detailed replies which are placed at pages 78 to 144 of the Paper Book explaining in detail the claim of deduction u/s 80IA of the Act. The details are exhibited at pages 143 and 144 of the Paper Book.

9. While framing the assessment u/s 143(3) of the Act, after thoroughly scrutinizing the claim, the Assessing Officer addressed the issue at para 6 of the assessment order and continued the discussion from pages 10 to 24 of the assessment order.

10. These undisputed facts clearly show that the Assessing Officer has thoroughly examined the claim while framing the assessment order dated 07.02.2104 u/s 143(3) of the Act and, therefore, assuming jurisdiction by issuing notice u/s 148 of the Act to reassess the completed assessment is nothing but change of opinion which has not

been accepted by the Hon'ble Supreme Court in the case of Kelvinator of India 320 ITR 561 wherein the Hon'ble court has held as under:

> **"When a regular order of assessment is passed in terms of section 143 (3) of the Act, a presumption can be raised that such an order has been passed on application of mind. An order which has been passed purportedly without application of mind would itself confer jurisdiction upon the Assessing Officer to reopen the proceeding without anything further, the same would amount to giving premium to an authority exercising quasi-judicial function to take benefit of its own wrong. Section 147 of the Act does not postulate conferment of power upon the Assessing Officer to initiate reassessment proceedings upon a mere change of opinion."**

11. Similar view was taken by the Hon'ble Jurisdictional Delhi High Court in the case of Usha international 3 48ITR 485 wherein it has been held as under:

> "11. **Accordingly, we hold that the following observations in Consolidated Photo and Finvest Limited (supra) do not reflect the correct legal position:**
>
> > **"In the light of the authoritative pronouncements of the Supreme Court referred to above, which are binding upon us and the observations made by the High Court of Gujarat with which we find ourselves in respectful**

agreement, the action initiated by the Assessing Officer for reopening the assessment cannot be said to be either incompetent or otherwise improper to call for interference by a writ court. The Assessing Officer has in the reasoned order passed by him indicated the basis on which income exigible to tax had in his opinion escaped assessment. The argument that the proposed reopening of assessment was based only upon a change of opinion has not impressed us. The assessment order did not admittedly address itself to the question which the Assessing Officer proposes to examine in the course of reassessment proceedings. The submission of Mr. Vohra that even when the order of assessment did not record any explicit opinion on the aspects now sought to be examined, it must be presumed that those aspects were present to the mind of the Assessing Officer and had been held in favour of the assessee is too far-fetched a proposition to merit acceptance. There may indeed be a presumption that the assessment proceedings have been regularly conducted, but there can be no presumption that even when the order of assessment is silent, all possible angles and aspects of a controversy had been examined and determined by the Assessing Officer. It is trite that a matter in issue can be validly determined only upon application of mind by the authority determining the same. Application of mind is, in turn, best demonstrated by disclosure of mind, which is best done by giving reasons for the view which the authority is taking. In cases where the order passed by a statutory authority is silent as to the reasons for the conclusion it has drawn, it can well be said that the authority has not applied its mind to the issue before it nor formed any opinion. The principle that a mere change of opinion cannot be a basis for reopening completed assessments would be applicable only to situations where the Assessing Officer has applied his mind and taken a conscious decision on a particular matter in issue. It will have no application where the order of assessment does not address itself to the aspect which is the basis for reopening of the assessment, as is the position in the present case. It is in that view inconsequential whether or not the material necessary for taking a decision was available to the Assessing Officer either generally or in the form of a reply to the questionnaire served upon the assessee. What is important is whether the Assessing Officer had based on the material available to him taken a view. If he had not done so, the proposed reopening cannot be assailed on the ground that the same is based only on a change of opinion."

12. The said observations have been rightly held to be contrary to the Full Bench decision of the Delhi High Court in Kelvinator of India Limited (supra) in Eicher Limited (supra). The said decision in Eicher Limited (supra) makes reference to the decision of KLM Royal Dutch Airlines vs. Assistant Commissioner of Income Tax [2007] 292 ITR 49 (Delhi). KLM Royal case (supra) deals with some other issues on which we do not express or make any

> **observation approving or disapproving. Some of these aspects have been considered and explained in other decisions in light of the judgment of the Supreme Court in the case of Rajesh Jhaveri Stock Brokers Pvt. Ltd. 291 ITR 500".**

12. Considering the facts of the case in totality, in light of the judicial decisions discussed hereinabove, we are of the considered view that the assumption of jurisdiction is bad in law and, therefore, the assessment order dated 29.12.2017 framed u/s 143(3) r,w,s 147 of the Act is liable to be quashed.

13. Since we have quashed the assessment order, we do not find it necessary to dwell into the merits of the case.

14. Coming to ITA No. 1811/DEL/2023 pertaining to A.Y 2012-13, we find that the underlying facts are mutatis mutandis same. Reasons for reopening the assessment are as under:

0399

Background

1. NTPC Limited is a Public Sector Undertaking, engaged in the business of generation of electricity and allied activities. It is a company incorporated under the Companies Act 1956 and a "Government Company" within the meaning of the act. The company had 14 power generating units which were eligible for deduction under section 80-IA of the Income-tax Act, 1961 which provides 100 per cent deduction of the profits and gains derived from eligible business i.e., generation/distribution of power or transmission/distribution of power etc., for 10 consecutive years subject to fulfilment of certain conditions. The deduction is to be allowed on the income worked out for Income tax purpose.

2. The company filed its original return of income on 27-09-2012 for the assessment year 2012-13 declaring income at Rs 7567,97,02,880/-. Thereafter, the assessee e-filed a revised return on 23-01-2014 showing a total income of Rs 7502,97,79,350/- which was processed u/s 143(1) on 10-02-2014. The case was selected for scrutiny assessment for which notices u/s 143(2)/142(1) of the Act were issued on 07-08-2013. Assessment u/s 143(3) was completed on 21-02-2014 at an income of Rs 9075,45,68,408/-.

Post scrutiny assessment developments:

3. Subsequent to the scrutiny assessment u/s 143(3) of the Act on 10-12-2015, during the course of audit it is seen that excess deduction u/s 80-IA of an amount of Rs. 17,908.15 lakhs was claimed by the assessee company resulting in under-assessment of income by same amount as follows.

4. During the course of scrutiny assessment, the assessee was allowed deduction of Rs. 2,680.74 crore u/s 80-IA(4(i) for generating power from 17 eligible units. Post scrutiny assessment, audit of separate accounts of eligible units, to which the deduction u/s 80-IA was allowed revealed that the assessee debited 'corporate expenses' in the P&L account of the 17 eligible units totalling Rs. 17,908.15 lakhs. However, all the expenses were added back as 'Apportionment of corporate expenses' in the computation of these eligible units while working out the unit-wise amount of deduction u/s 80IA. As the expenses were the proportionate corporate expenses relating to the business eligible for deduction, the expenses charged in the P&L accounts of the eligible units should not have been added back in the computation of eligible units for claiming deduction. These expenses were not added back in the consolidated computation while deriving the total taxable income of the assessee. By adding these corporate expenses in the computation for deduction purpose only, the amount of deduction u/s 80-IA increased by Rs. 17,908.15 lakhs resulting in under assessment of the same amount having tax impact of Rs 5,810.30 lakhs.

417

Analysis of excess claim of deduction under section 80-IA

5. It was submitted that corporate expenses (revenue) are allocated to various operating units of the assessee company in accordance with the accounting principles. The 'corporate expenses' represent expenditure on salary and other expenses of employees and other administrative overheads. These expenses are allocated to power generating undertakings on the basis of weighted average installed commercial capacity in MW. For the AY 2012-13, total commercial generating capacity as at 31.03.2012 was 32,812 MW and commercial generating capacity of undertakings for which deduction u/s 80-IA claimed was 6,915 MW. Accordingly total amount of Corporate expenses allocated to all generating undertakings was Rs. 796 crores, out of which an amount of Rs. 179 crores has been allocated to the undertakings for which 80-IA deduction claimed and the balance amount of Rs. 617 crores has been allocated to other undertakings.

6. By adding back corporate expenses amount to the profit of the unit, deduction u/s 80-IA was claimed of a higher amount for all the 14 eligible units as under:

	80-IA Eligible Units	Corporate Taxes added back (Rs. In lakhs)
1.	Talcher Super Unit -3	1,315.32
2.	Talcher Super Unit -4	1,315.32
3.	Talcher Super Unit -5	1,315.32
4.	Talcher Super Unit-6	1,315.32
5.	Vindhyachal Unit-7	1,314.70
6.	Vindhyachal Unit-8	1,314.70
7.	Vindhyachal Unit-9	1,314.70
8.	Unchahar Unit-3	551.65
9.	Unchahar Unit-4	551.65
10.	Unchahar Unit-5	551.65
11.	Faridabad Gas Power Unit-3	410.30
12.	Rajiv Gandhi Combined Gas Power Unit-3	339.88
13.	Simhadri Unit-1	1,177.27
14.	Simhadri Unit-2	1,177.27
15.	Ramagundam Unit-7	1,314.78
16.	Rihand Unit-3	1,314.16
17.	Rihand Unit-4	1,314.16
	Total	17,908.15

From the above table it is seen that a total amount of Rs. 17,908.15 lakhs of corporate expenses was added back to the profits of 17 eligible units thereby increasing the deduction claimed under section 80-IA.

Reason for formation of belief:

7. I have carefully perused and considered the return of income of the assessee company, scrutiny assessment and the subsequent audit. This is a case of factual error in computation of deduction u/s 80-IA made by the assessee company which was not detected during the scrutiny assessment. Therefore, I have reason to believe that income chargeable

to tax has escaped assessment for AY 2012-13 at least to the extent of excess claim of deduction u/s 80-IA.

Income Chargeable to tax escaping assessment

0311

8. In view of the foregoing, I have reason to believe that an amount at least of Rs 17,908.15 lakhs has escaped assessment in case the of M/s NTPC Ltd for the A.Y 2012-13 within the meaning of Section 147/148 of Income-tax Act, 1961. Further, as the case pertains to a period less than four years from the end of relevant assessment year at the time of issue of notice, sanction is not necessary under section 151(1) or 151(2).

27/10/2015

(A.Sreenivasa Rao)
Additional Commissioner of Income-tax
Special Range-6, Delhi

15. Statement of section 80IA deduction filed during the course of original assessment proceedings are exhibited at page 120 of the paper book. Specific replies are exhibited at pages 81 to 119 of the paper book. The Assessing Officer has discussed the claim of deduction u/s 80IA of the Act in his assessment order dated 21.0.22014 from pages 7 to 24 of the assessment order.

16. On similar facts, we have annulled the assessment order for A.Y 2011-12 [supra]. For our detailed discussion therein, assessment for A.Y 2012-13 is also annulled.

17. In the result, both the appeals of the assessee in ITA Nos. 1810/DEL/2023 and 1811/DEL/2023 are allowed.

The order is pronounced in the open court on 16.02.2024.

Sd/-	**Sd/-**
[KUL BHARAT] **JUDICIAL MEMBER**	**[N.K. BILLAIYA]** **ACCOUNTANT MEMBER**

Dated: 16th FEBRUARY, 2024

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	