

**IN THE INCOME TAX APPELLATE TRIBUNAL  
COCHIN BENCH, COCHIN**

**BEFORE SMT. BEENA PILLAI, JUDICIAL MEMBER  
AND  
SHRI WASEEM AHMED, ACCOUNTANT MEMBER**

<b>ITA Nos. 133 to 137 /Coch/2023</b>
<b>Assessment Years : 2014-15 to 2018-19</b>

M/s. Kerala State Electricity Board Ltd., Vydyuthi Bhavanam, Pattom, Pattom P O, Thiruvananthapuram, Kerala – 695 004. <b>PAN: AAECK2277N</b>	<b>Vs.</b>	The Assistant Commissioner of Income Tax, Circle – 1(1), Trivandrum.
<b>APPELLANT</b>		<b>RESPONDENT</b>

Assessee by	:	Shri R Rajeev, CA
Revenue by	:	Shri Sanjit Kumar Das, CIT-DR

Date of Hearing	:	20-06-2024
Date of Pronouncement	:	12-07-2024

**ORDER**

**PER BENCH**

Present appeals filed by the assessee arises out of separate orders passed by NFAC, Delhi dated 23.12.2022 for A.Ys. 2014-15, 2015-16, 2016-17 & separate orders passed by NFAC, Delhi dated 09.01.2023 for A.Y. 2017-18, 2018-19.

**2.** At the outset, the Ld.AR submitted that, in this group of appeals, common issues that arises for consideration, is on the following facts. For the sake of consideration, facts pertaining to AY 2014-15 are reproduced as under:

**2.1** The Ld.AO passed an order dt.19.09.2018 for A.Y.2014-15 giving effect to the order of Ld.PCIT u/s.263 dt.07.08.2018 by disallowing of Electricity Duty paid/ payable u/s.40(a)(iib) of the Income-tax Act, 1961 amounting to Rs.43,87,44,000 on the ground that such Electricity Duty is an exclusive levy on the assessee. The facts of the case are as under.

**2.2** The assessee submitted that the Ld.AO erred on facts of the case, since electricity duty is levied u/s.3(1) of the Kerala Electricity Duty Act, 1963 on all the registered licensees in the State of Kerala as per the provisions of the Act and is not therefore an exclusive levy on the assessee alone as envisaged in terms of Section 40(a)(iib) of the Act. He further submitted that licence fee, service fee, privilege fee, service charge or any other fee or charge, by whatever name called, which is levied exclusively on or which is appropriated, directly or indirectly, from a State Government undertaking by the State Government is only to be disallowed u/S.40(a)(iib) of the IT Act in the computation of income from business.

**2.3** The Ld.AR submitted that the Electricity Duty under 3(1) of the Kerala Electricity Duty Act, 1963 is payable by every licensee in the State of Kerala and term licensee as defined in Section to

2(d) of Kerala Electricity Duty Act, 1963 is to mean, Kerala State Electricity Board constituted u/s.5 of the Electricity (Supply) Act, 1948, and also any person licensed under Part ii of the Indian Electricity Act, 1910 (Central Act 9 of 1910), to supply energy and includes any person who is deemed to have been so licensed any other person who has obtained the sanction of the Government u/S.28 of the said Act. A copy of the extract of Part II of Indian Electricity Act 1910 was relied by the Ld.AR to show that license for distribution of power is granted for various licensees by the respective state government after consulting Kerala State Electricity Board.

**2.4** The Ld.AR submitted that there are ten licensees in the State of Kerala, who are liable to pay Electricity duty under the said Act whose names are disclosed in the website of Kerala State Electricity Regulatory Commission (KSERC) and copy of the details of licensees downloaded from the website of KSERC is furnished during the course of hearing. From the same, it is submitted that, the licensees as per the list have been made liable to pay electricity duty under 3(1) of the Act. He further submitted that this undoubtedly goes to prove that, the assessee is not an exclusive licensee under the Act and also that Electricity duty u/s.3(1) is not an exclusive levy on the assessee, being a duty levied under an Act/ enactment passed by State government applicable to all licensees in the State of Kerala. It is submitted that the exclusive levies on a particular State government undertaking is never done through a State enactment or Act, but it is imposed or levied through a

government order or a letter of the government only and this fact has not been understood or appreciated by the learned assessing officer. The Ld.AR thus submitted that the Ld.AO without verifying the facts disallowed the claim u/s. 40(a)(iib).

**3.** Aggrieved by the order of the Ld.AO, assessee preferred appeals before the Ld.CIT(A).

**4.** The Ld.CIT(A) commonly held that the electricity duty paid during the years under consideration claimed by the assessee deserves to be disallowed u/s. 40(a)(ii).

**5.** Aggrieved by the orders of Ld.CIT(A), the assessee has preferred appeals before this *Tribunal*.

**6.** The Ld.AR at the outset submitted that for assessment years 2014-15 to 2016-17, the Ld.CIT(A) dismissed the appeals by holding it to be infructuous. He submitted that for these years, the Ld.CIT(A) was of the opinion that, the order passed u/s. 143(3)r.w.s 263 and subsequent order u/s. 147 merged with the original assessment orders passed u/s. 143(3) of the act.

**7.** He submitted that the issues that was considered in the reassessment proceedings as well as the 263 proceedings for these years were on different issues and therefore the doctrine of merger will not apply. He thus submitted that the decisions

relied by the Ld.CIT(A) would come in support to assessee on this issue.

**8.** The Ld.AR further submitted that for A.Ys. 2017-18 and 2018-19, the Ld.CIT(A) did not consider the submissions of the assessee in the light of various decisions of *Hon'ble Supreme Court* in case of *Kerala State Beverages Manufacturing and Marketing Corporation Ltd. vs. ACIT* reported in (2022) 134 *taxmann.com* 11 and the relevant provisions of Kerala Electricity Duty Act, 1963.

**9.** The Ld.AR thus vehemently argued that the Electricity Duty paid by the assessee for the years under consideration is not an exclusive levy as per section 3(1) of the Kerala Electricity Duty Act, 1963. He submitted that all the licensees registered with the State of Kerala as defined u/s. 2(d) of the said Act, constituted u/s. 5 of the said act for supply of energy has it liable to pay the Electricity Duty to the State of Kerala.

**10.** The Ld.AR has relied on the list of 10 such licensees amongst which assessee is one of license holder who are liable to pay the electricity duty. He thus prayed that disallowance could not be made u/s. 40(a)(iib) of the Income Tax Act as it is not an exclusive levy as envisaged under the said section.

**11.** The Ld.AR submitted that the ratio laid down by *Hon'ble Kerala High Court* in case of *Kerala State Beverages Manufacturing and Marketing Corporation Ltd. vs. ACIT (supra)*

deals with a similar kind of payment which is not exclusive in nature and the Hon'ble High Court has held that such payment which does not satisfy the criteria of exclusivity as required u/s. 40(a)(iib) of the act cannot be disallowed under the said provision.

**12.** On the contrary, the Ld.DR submitted that the authorities below has not verified the exclusivity nature of the payment as submitted by the assessee. He submitted that whether the payment has actually been made by the assessee is also not ascertainable. He thus submitted that the issue may be remanded for a detailed investigation.

**13.** We have perused the submissions advanced by both sides in the light of records placed before us.

**14.** At the outset, we note that the appeals for A.Ys. 2014-15 to 2016-17 will not fall within the doctrine of merger as observed by Ld.CIT(A) since the issue considered under 263 proceedings as well as 147 proceedings are different. The issue that is raised by the assessee regarding the disallowance u/s. 40(a)(iib) paid by the assessee to the State of Kerala before the Ld.CIT(A) arises out of original assessment order u/s. 143(3) for A.Ys. 2015-16 to 2018-19. It is also noted that only for A.Y. 2014-15, 263 proceedings were initiated as the issues under consideration did not form part of addition during regular assessment.

As the issues are common in all the years under consideration and the arguments raised by both sides are identical, these appeals are disposed of as commonly:

**15.** As per the facts of the case there are 10 licensees in the state of Kerala who are liable to pay Electricity duty u/s.3(1) on sale effected to consumers and this basic fact has not been looked into properly and appreciated by the assessing officer. The levy u/s.3(1) of KED Act under such circumstances cannot be treated as an exclusive levy on the assessee and the conclusion made without verification cannot be accepted.

**16.** We note that admittedly, as submitted by Ld.DR, the issue has not been verified in the light of the provisions of the Kerala State Electricity Act, 1963. The assessee has filed a list of 10 licensees who are submitted to have been paid similar duty to the State of Kerala. The Ld.AO is therefore directed to verify the licensees as per the list provided by the assessee to identify the nature of payment. We also note that there are various types of payments which cannot be disallowed u/s. 40(a)(iib) of the act considering the nature of payment so made. There are various decisions of this Tribunal as well as Hon'ble High Courts bringing out the distinction between a duty / penalty. Unless the Ld.AO makes out from the facts that the payment made by the assessee is exclusive and ingredients of section 40(a)(iib) is satisfied, no disallowance could be made u/s. 40(a)(iib) of the act. In the interest of justice, we remit this issue back to the Ld.AO to carry out a *de novo* assessment. The Ld.AO is directed to carry out

necessary verification by issuing 133(6) notice to parties concerned in order to identify the correct nature of the payment made by assessee.

**Accordingly, the grounds raised by assessee stands allowed for statistical purposes.**

**In the result, all the appeals filed by the assessee stands allowed for statistical purposes.**

**Order pronounced in the open court on 12<sup>th</sup> July, 2024.**

Sd/-  
(WASEEM AHMED)  
Accountant Member

Sd/-  
(BEENA PILLAI)  
Judicial Member

Bangalore,  
Dated, the 12<sup>th</sup> July, 2024.  
/MS /

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|---------------|------------------------|
| 1. Appellant  | 2. Respondent          |
| 3. CIT        | 4. DR, ITAT, Bangalore |
| 5. Guard file | 6. CIT(A)              |

By order

Assistant Registrar,  
ITAT, Bangalore