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

BEFORE SHRI SATBEER SINGH GODARA, JUDICIAL MEMBER, AND
SHRI NAVEEN CHANDRA, ACCOUNTANT MEMBER

ITA No. 9105/DEL/2019 [A.Y 2016-17]
ITA No. 2560/DEL/2024 [A.Y 2017-18]
ITA No. 4603/DEL/2024 [A.Y 2018-19]
ITA No. 4604/DEL/2024 [A.Y 2019-20]
ITA No. 2561/DEL/2024 [A.Y 2020-21]

M/s Aravali Power Company Pvt Ltd, NTPC Bhawan Core – 7, Scope Complex -7 7, Institutional Area, Lodhi Road, New Delhi	Vs.	The Dy. C.I.T Circle – 3(1) Delhi
PAN: AAGCA 2437 E		
(Appellant)		(Respondent)

Assessee By : Shri Ved Jain, Adv
Shri Ayush Garg, CA

Department By : Shri Jitender Singh, CIT-DR

Date of Hearing : 22.05.2025
Date of Pronouncement : 23.06.2025

ORDER

PER NAVEEN CHANDRA, AM :-

The above captioned five appeals by the assessee are directed against five separate orders of the ld. CIT(A)-I, Delhi dated 29.09.2016

for A.Y 2016-17, NFAC, Delhi dated 26.03.2024 for A.Y 2017-18, NFAC, Delhi dated 09.08.2024 for A.Y 2018-19 and A.Y 2019-20 and NFAC, Delhi dated 26.03.2024 for A.Y 2020-21 respectively.

2. Since all these five appeals pertaining to same assessee were heard together and involve common issues, they are disposed of by this common order for the sake of convenience and brevity.

ITA No. 9105/DEL/2019 [A.Y 2016-17]

3. The grounds raised by the assessee in this appeal read as under:

> ***1.On the facts and circumstances of the case, the order passed by the learned CIT(A) is bad both in the eye of law and on facts.***
> ***Under the Normal Provisions of Income Tax Act***
> ***2. (i) On the facts and circumstances of the case the learned CIT(A) has erred both on facts and in law in confirming the addition of Rs. 22,34,60,522/- made by the AO treating the sale proceeds of fly ash as income of the assessee while computing business income under the normal provisions of the Income Tax Act.***
> ***(ii) That the abovesaid addition has been confirmed rejecting the contention of the assessee that the amount received is in the nature of obligation, which cannot be considered as income of the assessee.***
> ***(iii) That the said addition has been confirmed rejecting the detailed submissions, explanations, and various judicial pronouncements' cited by the assessee in this regard.***
> ***3. (i) On the facts and circumstances of the case the learned CIT(A) has erred both on facts and in law in confirming the addition of Rs. 1,04,71,362 / made by the AO treating the interest received on fly ash utilization reserve as income of the assessee while computing business income under the normal provisions of the Income Tax Act.***

(ii) That the abovesaid addition has been confirmed rejecting the contention of the assessee that the amount received is in the nature of obligation, which cannot be considered as income of the assessee.
(iii) That the said addition has been confirmed rejecting the detailed submissions, explanations, and various judicial pronouncements' cited by the assessee in this regard.
Under the Provision of section 115JB of Income Tax Act
4. (i) On the facts and circumstances of the case the learned CIT(A) has erred both on facts and in law in confirming the addition of Rs. 22,34,60,522/- made by the AO treating the sale proceeds of fly ash as income of the assessee while computing book profits under the provisions of section 115JB of the Income Tax Act.
(ii) That the abovesaid addition has been confirmed rejecting the contention of the assessee that the amount received is in the nature of obligation, which cannot be said to be the part of the income of the assessee.
(iii) That the said addition has been confirmed rejecting the detailed submissions, explanations, and various judicial pronouncements' cited by the assessee in this regard.
5. (i) On the facts and circumstances of the case the learned CIT(A) has erred both on facts and in law in confirming the addition of Rs. 1,04,71,362 /- made by the AO treating the interest received on fly ash utilization reserve as income of the assessee under the provisions of section 115JB of the Income Tax Act.
(ii) That the said addition has been confirmed rejecting the contention of the assessee that the assessee was under a statutory obligation to set aside the said amount in a separate fund and interest earned on the same cannot be considered as income under section 28 of the Income Tax Act.
(iii) That the said addition has been confirmed rejecting the detailed submissions, explanations, and various judicial pronouncements' cited by the assessee in this regard.
6. On the facts and circumstances of the case, the learned CIT(A) has grossly erred both on facts and in law in rejecting the contention of the assessee that the AO has made the addition ignoring the doctrine of diversion of income by the reason of overriding title in terms of Gazette Notification Dtd. 03/11/2009 issued by the Ministry of Environment and Forest (MOEF), Government of India.
7. On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in ignoring the contention of the

assessee that the rule of consistency be applied as there was no change of facts during the year.
8. On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in confirming the above additions by indulging in surmises and conjectures, only on the basis of presumption and assumption without considering the facts of the case in an appropriate manner.
9. The appellant craves leave to add, amend or alter any of the grounds of appeal., the assessee went in appeal before the ld. CIT(A) and reiterated what has been stated before the Assessing Officer.

4. In addition to the above, the assessee has filed an application praying for admission of additional ground of appeal which reads as under:

"10. Without prejudice to the above, the learned CIT(A) has erred both on facts and in law in ignoring the fact that the addition made by the AO is otherwise eligible for deduction under section 80-IA of the Act and ought to have been allowed to the assessee."

5. Representatives of both the sides were heard at length. Case records carefully perused. Relevant documentary evidence brought on record duly considered in light of Rule 18(6) of the ITAT Rules.

6. Briefly stated, the facts of the case are that the assessee is a power generation and transmission company jointly owned by NTPC. The assessee electronically filed its Return of Income on 26.11.2016 declaring an income of Rs. 9,79,64,880/-. Return was selected for

scrutiny assessment through CASS and accordingly, assessment was completed on 23.12.2018 on the assessed income of Rs. 33,18,96,760/ under normal provision of Act and at income of Rs 929,78,75,790/- u/s 115JB. The assessee had paid taxed u/s 115JB of the Income-tax Act, 1961 [the Act, for short] and the return was accompanied by audited accounts, tax audit report.

7. During the course of assessment proceedings, the Assessing Officer observed that on going through Note 22 of the Audited Accounts, it is found that an amount of Rs. 22,34,60,522/- credited to the P& L Account on account of sale of fly ash has been reduced from the total sales by transferring the amount to fly ash utilization reserve. Similarly, the Assessing Officer noticed from Note 23 that an amount of Rs. 1,04,71,362/- has been reduced from interest income account of transfer to fly ash utilization reserve. The assessee was show caused to reply as to why this amount should not be added back to the net profit of the assessee.

8. Not satisfied with the reply of the assessee, the Assessing Officer added the sum of Rs. 23,39,31,884/- relating to sale of fly ash and interest earned on deposits made out of the same to the net profit figure

adopted by the assessee for the purpose of computing its income under normal provision as well as MAT liability.

9. Aggrieved, the assessee appealed before the CIT(A) who confirmed the additions made by the AO. Further aggrieved, the assessee is before us.

10. Before us, the ld. counsel for the assessee made a submission for ground 2 to 8 as follows:

> 1. These are five appeals pertaining to AY 2016-17 to 2020-21. The issue in all these appeals by the appellant is common that is the amount received by the Appellant on the sale of fly ash which the AO has taxed as income of the assessee.
> 2. In this regard, it is relevant to provide the background of the issue. Fly-ash is generated by various thermal power plants producing electricity by burning coal. Fly-ash was a major environmental hazard, similar to the burning of '*parali*' in Northern States of India post harvesting.
> 3. Accordingly, a Public Interest Litigation was filed before the Hon'ble Delhi High Court. The hon'ble Delhi High Court took cognizance of the issue of disposal of fly-ash, which had become hazardous and was causing serious environmental issues, and directed the Central Government to come out with a policy on how it intended to handle the large-scale generation of fly-ash by various thermal plants.

4. Pursuant to the direction of the Hon'ble Delhi High Court, the Government of India issued notification SO 763(E) dated 14.09.1999 in exercise of its power conferred under the Environment Act 1996. The notification is placed at PB page 297 of AY 2018-19. As per this notification, directions were issued to all manufacturer of clay bricks, tiles and blocks operating within a radius of 50 kilometers, from coal or lignite-based thermal power plants to use at least 25% fly ash by weight in the manufacture of clay bricks, tiles, or blocks. Further, in order to ensure compliance with the above, the Pollution Control Board and Pollution Control Committee were empowered to cancel the permissions granted for establishing a brick kilns and mining leases. Additionally, a committee was constituted comprising representatives from thermal power plants and brick manufacturers foundation to ensure unhindered loading and transportation of fly-ash. Directions were issued to thermal power plants to make fly ash available to all such manufacturers. (Para 2(1) on PB pg. 295 of AY 2018-19).

5. Not being satisfied with the progress in the utilization of fly-ash and considering the environmental concerns, Hon'ble Delhi High Court passed an order dated 23.08.2002 (placed at PB Page 257 of AY 2018-19) and order dated 14.07.2003 (placed at Page 258 of AY 2018-19). Consequently, the Ministry of Environment and Forest amended the earlier notification by issuing another notification dated 27.08.2003, placed at PB Pages 298-304 of AY 2018-19, whereby applicable area, time, and block manufacturing was extended from 50 kilometers to 100 kilometers. Furthermore,

every construction agency was also directed to use fly-ash. In case of non-compliance, the District Administration was empowered to cancel the mining lease. All agencies undertaking construction of roads and flyovers, such as NHAI, CPWD, etc., were directed to make provisions in their tender documents to ensure the use of fly-ash.

6. The progress continued to be monitored by the Delhi High Court, which expressed its anguish over the slow progress in the disposal of fly ash, despite the above notifications, as can be seen from the order dated 14.02.2006, placed at PB Pages 277 – 278 of AY 2018-19.

7. Thereafter another notification was issued on 03.11.2009, placed at PB Pages 305-314 of AY 2018-19, and the rationale for the same is stated at PB Pages 305-306. A target was fixed for achieving 100% fly-ash utilisation. In order to achieve this target directions were issued allowing thermal power plants to collect amounts from the sale of fly ash and to keep the same in a separate account to be utilized only for development, infrastructure, or facilities for the use of fly-ash until 100% fly ash utilisation is achieved. It was on the basis of this notification that the appellant company was empowered to collect the amount from the sale of fly ash and keep it in a separate account, to be utilized only for the purpose of facilitating and achieving 100% fly ash utilisation.

8. Thus the onus is on the appellant company to address environmental concerns arising from the generation of fly ash by its thermal plants. Therefore the amount received from the sale of fly-ash was not a source of income for Appellant. On the

contrary, it was an obligation imposed on the appellant company due to the fact that it generates fly-ash, which is hazardous and pollutes the environment. The appellant company was under an obligation, as per the notification, to submit regular reports to the Ministry of environment regarding the steps taken by the company to achieve fly-ash utilization and progress of as is evident from the report placed at PB Pages 144-150 of AY 2018-19.

9. Accordingly, the Assessing Officer and CIT(A) have erred in not appreciating the facts of the case and assuming that assessee is earning income from the sale of fly-ash. On the contrary, the Delhi High Court and the government of India have taken cognizance of the fact that thermal power plants are dumping fly-ash generated from thermal plants which is causing grave environmental concerns. Therefore, directions were issued to facilitate the disposal of this fly-ash. The process is still ongoing and it is evident that the utilisation of fly–ash has still not reached the level committed by the Appellant company from time to time to the Ministry of Environment.

10. It may be relevant to point out that this issue has come up before the Hon'ble Delhi High Court in the case of its sister company ***NTPC Vidyut Vyapar Nigam Ltd***. ITA 260/2024 whereby vide order dated 23.04.2025, Hon’ble Delhi High Court decided the case in favour of the assessee.

11. The ld AR also relied on the decision of ITAT Delhi in the case of ***NTPC Vidyut Vyapar Nigam Ltd***. bearing ITA No. 145/Del/2020 for AY

2015-16 is as under: (PB Pg. 161-173 of AY 2018- 19) and ***NTPC Vidyut Vyapar Nigam Ltd***. bearing ITA No. 6816/Del/2019 for AY 2013-14.

12. The ld AR argued vehemently that the amount set apart towards Fly-Ash Utilization Reserve Fund constitutes diversion of income by overriding title and thus should be excluded from its total income. The ld AR submitted that the creation of sale is by the Government and the Government has regulated the sale proceeds. The ld AR relied on the following decisions:

i) CIT Vs. Salem Co-Operative Sugar Mills Limited,[1998] 229 ITR 285 (Mad)
ii) CIT V New Horizon Sugar Mills Pvt. Ltd., [2000] 244 ITR 738(Mad)
SLP dismissed in the case of CIT V. New Horizon Sugar Mills P. Ltd. [2004] 269 ITR 397, relying upon the dismissal of SLP in the case of CIT V. Ambur Co-op. Sugar Mills Ltd., [2004] 269 ITR 398 (SC)
iii) DCM Ltd. V. CIT, (2004) 192 CTR Del 408
iv) CIT V. Pandavapura Sahakara Sakkare Karkhane Limited, [1992] 198 ITR 69(SC)
v) CIT V. M/s Modipon Ltd., [2018] 400 ITR 1 (SC)

13. The ld AR distinguished case laws relied upon in the case of ***Associated Power Co. Limited V. CIT***. [1996] 218 ITR 195 (SC) and ***SREI Infrastructure Finance Ltd V ACIT***, 2015 (2) TMI 545 (Del). The AR submitted that the judgement of Supreme court in the case of Associated Power Co. Limited V. CIT, [1996] 218 ITR 195 (SC) deals with the amount credited to the contingencies reserve created under the provisions of the Electricity (Supply) Act, 1948, and the Sixth Schedule

thereto. Clause III of the Sixth Schedule states that "There shall be created from existing reserves or from the revenues of the undertaking a reserve to be called 'contingencies reserve." The Supreme Court held that funds appropriated as a contingency reserve under the Electricity (Supply) Act did not qualify as "diverted" income. The Court explained that even though the company was required to set aside a portion of its revenue, these funds still reached the electricity company and remained within its control. As the Court stated, "the monies in the contingencies reserve belonged to the electricity company," meaning that the reserve was merely an appropriation of profits rather than a diversion by overriding title. The said judgement has also been distinguished in the Madras High Court in the case of CIT Vs. Salem Co-Operative Sugar Mills Limited, [1998] 229 ITR 285.

14. Similarly, the case of ***SREI Infrastructure Finance Ltd V ACIT***, 2015 (2) TMI 545 deals with the amount transferred to the special reserve pursuant to the provisions of section 45-IC of the Reserve Bank of India Act, 1934, Section 45-IC mandates that - "Every non-banking financial company shall create a reserve fund and transfer therein a sum not less than twenty per cent of its net profit every year as disclosed in the profit and loss account and before any dividend is declared." The

Delhi High Court observed that because these reserves were calculated on the basis of net profit, they represented an allocation of profit after it had been determined. Consequently, even though a fixed percentage was earmarked, the resultant funds were not "diverted" at source; they remained a part of the company's income for the purposes of computing book profit. The Court clarified that "the reserve created under Section 45-IC... is not a diversion of income at source" because it is derived from the net profit and is merely an appropriation of earnings. By contrast, in the present case the fly ash sale proceeds are not computed as a percentage of net profit but are the actual funds.

15. Per contra, the ld DR submitted that the assessee is free to sale the fly ash and there is no restriction upon the assessee for sale of fly ash. On the issue of claim under section 80IA(4), the ld. DR submitted that the sale of fly ashes not eligible business hence the assessee is not eligible for any deduction under section 80 IA(4). The ld. DR relied upon the decisions of Supreme Court in the case of ***Associated Power Co. Limited V. CIT***. [1996] 218 ITR 195 (SC) and Delhi High Court decision in the case of ***SREI Infrastructure Finance Ltd V ACIT***. The ld. DR strongly relied upon the orders of the CIT(A).

16. We have heard the rival submissions and have carefully perused the documents on record. We find that the utilization of fly-ash, a by-product generated by coal and lignite-based thermal power plants of the assessee, has been subject to strict government regulation under the Environment (Protection) Act, 1986. Recognizing the environmental hazards associated with improper disposal of fly ash, the Ministry of Environment and Forests (MOEF) issued a series of binding notifications to control and regulate its usage. The Gazette Notification dated 03.11.2009 issued by the Ministry of Environment and Forests (MOEF), Government of India, directed that:

> ***"(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 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 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".***

17. Furthermore, we find that initially, the government imposed restriction on thermal power plants to make available fly-ash free of

cost to manufacturers of fly ash-based products for a period of ten years. Later, the Government of India allowed thermal power plants to sell fly ash through the Gazette Notification dated 03.11.2009, issued under the Environment (Protection) Act, 1986. However, the permission to sell fly ash was not an unrestricted commercial right of the power plants-it was a conditional, government-created right subject to strict statutory controls. We therefore are inclined to agree with the submissions of the assessee that fly ash disposal and sale were entirely government-regulated activities, with both the sale and the utilization of proceeds being regulated by the central government. In view of the restrictions placed by the Government, we are of the opinion that the assessee never had absolute ownership or control over the receipts from sale of fly-ash.

18. We are therefore of the considered view that in the factual matrix of the instant case, there is a statutory mandate which creates an overriding title over Fly Ash Sale proceeds which divest the assessee from the absolute control and discretion over the sale proceeds of the fly-ash and when the legal obligation diverts income from the source itself, therefore such income is no longer remains taxable in the hands of the assessee.

19. We further find that the decision relied upon by the assessee in the case of the Hon'ble Delhi High Court in the case of its sister company ***NTPC Vidyut Vyapar Nigam Ltd.*** (supra) squarely applies to the facts of the instant case whereby the Hon'ble Delhi High Court has held that assessee was not free to utilize the sale proceed of fly-ash as the same is required for specified purpose and the sale consideration out of Fly-ash is not income of the assessee. Relevant paragraph 22 and 24 reads as under:-

> ***"22. In the given facts, we do not find any infirmity with the decision of the ld ITAT that the assessee had not any income on account of sale of fly ash, which was provided by NTPC. In CIT V New Horizon Sugar Mills Pvt. Ltd.: (2000) 244 ITR 738, the Madras High Court had upheld the decisions ld ITAT holding that the amount set apart towards Molasses Storage Reserve Fund is required to excluded from the total income of the assessee. The said decision was rendered bearing in mind the Molasses control(Amendment) order dated 6.02.1972 which required that the amount for construction of molasses storage tank was to be kept separately. The assessee had no power to spend the said amount, the same was required to be spent only in accordance with the directions issued by the government. The appeal preferred against the said order was also dismissed by the Supreme Court, in view of order is passed in similar matter permitting the Revenue to withdraw the appeals".***
>
> ***23. In the facts of the present case as well, the Assessee was not free to utilize the sale proceeds of fly ash as the same was required to be used for specified purposes, which as stated above, did not result in the Assessee acquiring any asset"***

Respectfully following the decision of the jurisdictional High Court, we hold that the revenue garnered through sale of the fly-ash can not be considered as income of the assessee under the normal provisions of Act. We further hold that as the sale proceeds of fly ash and interest thereon has not been debited to the profit and loss account, therefore, the question of adding back the same by invoking the provisions of clause (b) of Explanation 1 to section 115JB of the Act does not arise. We accordingly set aside the order of the CIT(A) and direct the AO to delete the said addition. The grounds 2 to 8 is allowed.

20. As the appeal on merit has been allowed, the additional ground raised by the assessee regarding eligibility for deduction u/s 80-IA of the Act becomes infructuous and is accordingly dismissed.

ITA No. 2560/DEL/2024 [A.Y 2017-18]
ITA No. 4603/DEL/2024 [A.Y 2018-19]
ITA No. 4604/DEL/2024 [A.Y 2019-20]
ITA No. 2561/DEL/2024 [A.Y 2020-21]

21. The decision in the instant case for AY 2016-17 as discussed above, shall apply mutatis mutandis in the above four appeals for AY 2017-18 to 2020-21 as the facts are pari-materia in all these years.

In the result, all the five appeals of the assessee in

ITA No. 9105/DEL/2019 [A.Y 2016-17]	-	partly Allowed
ITA No. 2560/DEL/2024 [A.Y 2017-18]	-	partly Allowed
ITA No. 4603/DEL/2024 [A.Y 2018-19]	-	partly Allowed
ITA No. 4604/DEL/2024 [A.Y 2019-20]	-	partly Allowed
ITA No. 2561/DEL/2024 [A.Y 2020-21]	-	partly Allowed

Order pronounced in open court on 23.06.2025.

Sd/- **Sd/-**

[SATBEER SINGH GODARA**]** **[NAVEEN CHANDRA]**
JUDICIAL MEMBER **ACCOUNTANT MEMBER**

Dated : 23rd June, 2025.

VL/

Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi

Sl No.	PARTICULARS	DATES
1.	*Date of dictation of Tribunal Order*	
2.	*Date on which the typed draft Tribunal Order is placed before the Dictation Member*	
3.	*Date on which the typed draft Tribunal Order is placed before the other Member*	
4.	*Date on which the approved draft Tribunal Order comes to the Sr. P.S./P.S.*	
5.	*Date on which the fair Tribunal Order is placed before the Dictating Member for pronouncement*	
6.	*Date on which the signed order comes back to the Sr. P.S./P.S*	
7.	*Date on which the final Tribunal Order is uploaded by the Sr. P.S./P.S. on official website*	
8.	*Date on which the file goes to the Bench Clerk alongwith Tribunal Order*	
9.	*Date of killing off the disposed of files on the judiSIS portal of ITAT by the Bench Clerks*	
10.	*Date on which the file goes to the Supervisor (Judicial)*	
11.	*The date on which the file goes for xerox*	
12.	*The date on which the file goes for endorsement*	
13.	*The date on which the file goes to the Superintendent for checking*	
14.	*The date on which the file goes to the Assistant Registrar for signature on the Tribunal order*	
15.	*Date on which the file goes to the dispatch section*	
16.	*Date of Dispatch of the Order*	