IN THE INCOME TAX APPELLATE TRIBUNAL MUMBAI BENCHES "B", MUMBAI

BEFORE SHRI D.KARUNAKARA RAO,AM AND SHRI RAVISH SOOD,JM

ITA No. 302/MUM/2010
Assessment Year: 2006-07

MAHARASHTRA STATE POWER GENERATION CO.LTD. PLOT NO. G-9 PRAKASHGAD,2ND FLOOR, ANANT KANEKAR MARG, STATION RD, BANDRA(E) MUMBAI-400051. (PAN: AAECM2935R)	**Vs.**	THE ASST. COMM OF INCOME-TAX, CIRCLE 10(1), AAYAKAR BHAVAN, M.K ROAD, MUMBAI- 400 02O
(Appellant)		**(Respondent)**

&

ITA No. 418/MUM/2010
Assessment Year: 2006-07

THE ASST.COMM OF INCOME-TAX, CIRCLE 10(1), AAYAKAR BHAVAN, M.K ROAD, MUMBAI- 400 02O	**Vs.**	MAHARASHTRA STATE POWER GENERATION CO.LTD. PLOT NO. C-19 PRAKASHGANGA, ANANT KANEKAR MARG, STATION RD, BANDRA (E) MUMBAI-400 051 PAN: AAECM2935R
(Appellant)		**(Respondent)**

अपीलार्थी की ओर से / **Assessee by**	:	S/Shri S.E.Dastur & Niraj Sheth
प्रत्यर्थी की ओर से/**Revenue by**	:	Shri N.P. Singh, CIT D.R.

सुनवाई की तारीख / **Date of Hearing**	:	06/12/2016
घोषणा की तारीख / **Date of Pronouncement**	:	03/03/2017

O R D E R

PER RAVISH SOOD, JM

The present appeals filed by the assessee company and the department are directed against the order passed by the CIT(A)-21, Mumbai, dated 13.11.2009, which in itself arises from the order passed by the A.O under Sec. 143(3)(ii) of the Income Tax Act 1961 (for short 'Act'), dated 31.12.2008. We herein first advert to the appeal filed by the assessee company. The assessee assailing the order of the CIT(A), had therein raised the following grounds of appeal:-

"GROUNDS OF APPEAL

*"**1:0 Re: Addition of Rs. 320,72,82,510/- to the returned income on account of non considering the reversal of excess billing**.*

1:1 The Commissioner of' Income-tax (Appeals) had erred in confirming the action of the Assessing Officer of making an addition of Rs. 320,72,82,510/- to the Appellant's total income for the year by ignoring the reversa1 of excess billing made by the Appellant in its books of accounts following the order passed by the Maharashtra Electricity Regulatory Commission.

1:2 The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject the total billing of the Appellant for the year was only Rs.5,361.70 crores and not Rs. 5,692.56 crores as considered by the Assessing Officer and the Commissioner of Income-tax (Appeals) ought to have held as such.

1:3 The Appellant submits that the Assessing Officer be directed to delete the addition of Rs. 320,72,82,510/- made by him and to recompute the Appellant's total income accordingly.

2:0 Re: Addition of Rs. 2,41,00,000/- to the closing stock:

2:1 The Commissioner of Income-tax (Appeals) has erred in confirming the action of the Assessing Officer of making an addition of Rs. 2,41,00,000/- to the closing stock of the Appellant for the year under consideration.

2:2 The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject the addition of Rs. 2,41,00,000/- made by the Assessing Officer is erroneous and the Commissioner Of Income-tax (Appeals) ought to have held as such.

2:3 The Appellant submits that the Assessing Officer be directed to delete the addition so made by him and to recompute the Appellant's total income accordingly.

3:0 Re : General :

3:1 The Appellant craves leave to add, alter, amend, substitute and/or modify in any manner whatsoever all or any of the foregoing grounds of appeal at or before the hearing of the appeal."

The revenue on the other hand in its appeal marked as 418/Mum/2010, had therein assailed the order of the CIT(A) by raising the following grounds of appeal:-

"1. On the facts and in the circumstances of the case, the ld. CIT(A) erred in admitting the additional evidences without appreciating that the appropriate and sufficient opportunities were given to the assessee to explain the reduction of income in revised return, which the assessee failed to explain and prove.

2. On the facts and in the circumstances of the case, the ld. CIT(A) erred in allowing relief in respect of the interest payable to Power Finance Corporation u/s 43B without verification of the relevant records.

3. On the facts and in the circumstances of the case, the ld. CIT(A) erred in accepting the claim of the assessee that wherever required, interest was capitalized without calling for and examining the relevant details and evidences of such capitalization.

4. On the facts and in the circumstances of the case, the ld. CIT(A) erred in allowing the claim of prior period expenses made in the revised return by the assessee company without appreciating that the said expenses pertained to the period prior to existence of the assessee company and hence were not allowable.

5. On the facts and in the circumstances of the case, the ld. CIT(A) erred in allowing claim of reduction of Rs. 4.27 lacs on account of prior period billing without appreciating that vide letter dt. 20.05.2009 submitted during the course of the appellate proceedings, the assessee itself had stated that the said amount is taxable in the year under consideration.

6. *On the facts and in the circumstances of the case, the ld. CIT(A) erred in allowing the claim of set off of b/f loss/unabsorbed depreciation without appreciating that in the case of MSEB, no loss or unabsorbed depreciation was allowed to be carried forward in the final order for A.Y. 2006-07 and hence, there cannot be any eligibility for set-off or allowance of loss or unabsorbed depreciation in the case of assessee under any provisions.*
7. *The appellant prays that the order of CIT(A) on the above ground be set aside and that of the A.O be restored.*
8. *The appellant craves leave to amend or alter any grounds or add a new ground which may be necessary."*

2. Briefly stated, the facts of the case are that the assessee company had started functioning from 06.06.2005 after the erstwhile Maharashtra State Electricity Board (for short 'MSEB') trifurcated into 3 companies, viz Maharashtra State Power Generation Co. Ltd. (i.e. the assessee), Maharashtra State Electricity Distribution Co. Ltd. and Maharashtra State Electricity Transmission Co. Ltd. That each of the aforesaid companies were to look into one of the three aspects of the erstwhile MSEB, i.e. generation, distribution and transmission of electricity, respectively, as a result whereof the assessee company was engaged in the business of electricity generation, and the year under consideration was the first year of its operation.

3. The assessee company filed its return of income for A.Y. 2006-07 on 30.11.2006, declaring Nil income after claiming the set off of brought forward losses and unabsorbed depreciation aggregating to Rs. 623,47,43,689/-. The assessee company thereafter revised it

return of income on 02.08.2007, wherein it declared Nil income after claiming set off of brought forward losses amounting to Rs. 288,90,26,701/-. The assessee company in its revised return of income had appended a 'Note' below the statement of its computation of income, therein elaborating that while for the original return of income was based on unaudited accounts, the revised return of income on the other hand was compiled on the basis of the audited accounts, which thus explained the difference in the total income shown in the said respective returns, as well as the reasons which had prompted the revision of the return of income, and read as under:-

> *"The return of income is being revised as the original return of income for the AY 2006-07 was filed on the basis of unaudited accounts as the accounts were not audited till the due date of filing of return of income. This is as per the letter dtd. 14.02.2007 bearing reference No. GM/CA/Rev.return/ MSPGCL/2007."*

4. The case of the assessee company was thereafter taken up for scrutiny assessment u/s 143(2) of the 'Act'. The A.O during the course of the assessment proceedings on a perusal of the audit report furnished by the assessee u/s 44AB of the 'Act', therein observed that the said tax audit of the assessee company was completed on 12.02.2007, when the report u/s 44AB was signed and issued by the auditors in 'Form No.3CA/3CD'. The A.O further on perusing the revised return of income of the assessee, as against its 'Original' return of income, therein noticed that the total income before set off of business losses was reduced from Rs.623,47,43,689/- as per the original return of income to Rs. 288,90,26,701/- in the revised return of income, which therein

revealed a difference of Rs. 334,57,16,989/- in the respective incomes (prior to set off of B/forwarded losses). The A.O being of the view that the difference in the income of Rs. 334,57,16,988/- (supra) in the aforesaid original and revised returns of income had not been reconciled, and the assessee company despite being afforded sufficient opportunity to explain along with supporting evidence the reason for the reduction of its income in the revised return of income, as against that as shown in the original return of income, had however failed to put forth an explanation as regards the same. The A.O further being of the view that though the revised return of income was filed by the assessee company within the stipulated period contemplated u/s 139(5), but however in the backdrop of the fact that no omission or wrong statement was discovered by the assessee in its original return of income, therefore the assessee company was divested of its right of filing a revised return of income. The A.O thus in the backdrop of his aforesaid observations, therein holding a conviction that the reduction in the total income was both irregular and unsubstantiated, made an addition of Rs. 334,57,16,988/- in the hands of the assessee company.

5. That the assessee company in its return of income had claimed setting off of the carried forward losses of erstwhile MSEB in its hands, on the basis that as MSEB was demerged into three companies, therefore the said three companies were entitled to carry forward the loss of the erstwhile MSEB. That during the course of the assessment proceedings the assessee company placed on record a chart showing B/forward losses and unabsorbed depreciation of the erstwhile MSEB from 1990-1999 onwards, and therein claimed that in light of the mandate of Sec. 72A(4) of the

'Act', the business loss and unabsorbed depreciation of MSEB was as per law apportioned to the assessee company, which therein had claimed the set off of part of the same against its total income for the year under consideration, while for the balance was carried forward to be set off against its income for the subsequent years. The A.O after deliberating on the contention of the assessee company, therein declined to allow the claim of such set off of the B/forward business loss and unabsorbed depreciation, for multiple reasons, viz (i) the basis of apportionment of the losses amongst the three trifurcated entities of MSEB was not explained; (ii) though the losses in the hands of MSEB was based on its returns of income, but the assessed losses were not reported by the assessee company; (iii) the petition claimed by the assessee company before the CBDT for allowing the set off of the carried forward losses had not crystallized into an approval; (iv) the claim of demerger of the assessee company from the original entity, i.e. MSEB was unsubstantiated; (v) the eligibility of the assessee company to claim set off and carry forward of the B/forward losses of the MSEB was not established; (vi) the information relating to trifurcation of carried forward assessed losses was not given, and (vii) assessment order for A.Y 2006-07 had been passed in the case of MSEB, wherein the total income was computed at Nil after set off of B/forward losses/unabsorbed depreciation to the extent of the income available, i.e. Rs. 838,65,23,129/-, but however neither any details of the balance loss allowed to be carried forward, nor any chart of apportionment of the said loss to the trifurcated entities was found mentioned therein. Thus on the basis of his aforesaid observations, the A.O rejected the claim for set off of B/forward losses in the hands of the assessee company.

6. The A.O thereafter deliberating on certain other additions/disallowances, therein assessed the income of the assessee company under the normal provisions at Rs. 625,88,43,689/-, while for the 'Book profit' u/s 115JB was computed at Rs. 170,23,99,832/-.

7. That the assessee company being aggrieved with the assessment framed by the A.O therein assailed the same before the CIT(A). The CIT(A) duly appreciating the facts of the case in the backdrop of the contentions of the Ld. A.R., therein deliberated on the different issues as were assailed by the assessee, as under:-

(i) The CIT(A) adverting to the validity of the revised return of income filed by the assessee company as on 02.08.2007, at the very outset held that the same had been filed within time period contemplated u/s 139(5) of the 'Act'. The CIT(A) thereafter dealing with the observations of the A.O that as no omission or wrong statement was discovered by the assessee in its original return of income, therefore the assessee company was not entitled to file a revised return of income, therein taking cognizance of the fact that as the original return of income was filed by the assessee on the basis of unaudited accounts which in itself was based on the report of an auditor K.B. Kasliwal, chartered accountant, who in his report dated 28.11.2006 filed in 'Form No. 3CD' had categorically reported that the report was prepared on the basis of copy of unaudited Profit & Loss A/c/Income & Expenditure A/c and Unaudited Balance Sheet. The CIT(A) duly appreciating that the

assessee company which had came into existence as on 06.06.2005 on the trifurcation of MSEB, which was a very large/big company, had thus inherited part of huge/voluminous records/accounts/other problems of the erstwhile company. The CIT(A) thus duly appreciating that in the backdrop of the aforesaid facts, there could have been valid and justifiable reasons for which the accounts of the assessee company could not be compiled till the 'due date' of filing of its return of income, i.e. 30.11.2006, therefore it could safely be held that there might have been compelling reasons for filing of the return of income by the assessee company within the statutory period contemplated u/s 139(1) of the 'Act', though on the risk of unaudited accounts. The CIT(A) thus duly appreciating that in light of the aforesaid circumstances, now when the assessee company had thereafter received the statutory audit report u/s 44AB from its auditor, therefore on the basis of the same the 'Revised return' would have been filed. Thus in the backdrop of the aforesaid factual matrix, the CIT(A) duly appreciating that now when as per the mandate of law an assessee stands vested with the statutory right to revise his return of income if he discovers any omission or wrong statement in the original return of income so filed by him, therefore the assessee company finding that its income as per the audited accounts was Rs. 288,90,26,607/-, as against the income of Rs. 623,47,43,689/- shown in the original return of income which was filed on the basis of the unaudited accounts, therefore finding that a huge difference of Rs. 334,57,16,988/- which had emerged on

account of material changes in various items, such as revenue from sale of power, other income, and various other items of income and expenditure, therefore it was a clear case of discovery of an omission or a wrong statement by the assessee in its original return of income, which therein had led to the aforesaid huge discrepancy in the income shown in the original return of income. The CIT(A) further not finding himself as being in agreement with the observation of the A.O that the assessee had during the course of the assessment proceedings failed to place on record any supporting submissions and evidences which therein would explain the aforesaid substantial variance, as a result whereof the difference between the income shown in the revised return as against that in the original return had remained unreconciled, thus concluded that it was a conceded fact that the assessee company in its revised return had given a 'Note' therein pointing out that the reason for revising the return of income was that the original return was filed on the basis of unaudited accounts, as the accounts could not be got audited till the 'due date' of filing of the return of income, while for the revised return was filed on the basis of the audited accounts. Thus in the backdrop of the aforesaid facts which were duly conveyed by the assessee company in its revised return of income, therein prima facie explained the reasons for difference in the original and revised return, which could have easily been gathered by the A.O by perusing and comparing the different figures of the Profit & Loss account and Balance sheet, etc., which were duly enclosed by the

assessee company with the original as well as revised return. The CIT(A) thereafter specifically referring to the primary reason leading to the substantial variance in the respective returns, therein observed that in the order dated 07.09.2006 of Maharashtra Electricity Regulatory Commission (for short 'MERC'), it was mentioned in detail as regards the power cost fixed by MERC, on the basis of which the excess billing of Rs. 320.73 crores (approx.) had been reversed in the balance sheet. Thus in light of the aforesaid facts, the CIT(A) therein concluded that it was incorrect on the part of the A.O to observe that the assessee company had failed to explain the difference in the income during the course of the assessment proceedings. The CIT(A) further stretching the issue therein observed that even if it was to be presumed that the assessee had failed to put forth an explanation as regards the difference of the income of Rs. 334,57,16,988/-(supra) in the revised return, the same merely for the said reason could not be added to the total income of the assessee company without affording the latter a sufficient opportunity for explaining the same. The CIT(A) finally concluding that the allegation of the A.O that despite affording sufficient opportunities to the assessee for explaining the difference in the income, the latter had failed to put forth an explanation, therein called for the assessment record and after perusing the same therein observed that the A.O had vide his queries only raised a general question and had asked the assessee to furnish a copy of the revised return along with the reasons leading to filing of the same. The CIT(A) observed that not

only the assessee had duly complied with the query so raised by the A.O and had furnished its reply, but rather interestingly, the A.O as a matter of fact was not even aware of the filing of the revised return, though the same had been processed u/s 143(1) and an intimation dated 23.11.2007 was available on record, as per which a huge refund had been allowed to the assessee company. That the assessee company thereafter during the course of the appellate proceedings, in order to remove any scope of doubt, therein filed exact details of difference/reconciliation between the original and revised return by way of an additional evidence U/Rule 46A of the Income tax rules, 1962, which was admitted by the CIT(A).

(ii) The CIT(A) further adverting to the objection of the A.O that the reconciliation of the income between the original and revised return also deserved to be rejected on merits, for the reason that the claim of the assessee company of reversal of excess billing of Rs. 330.82 crores (Rs. 320.73 crore (+) Rs. 10.09 crore), as per MERC order was not acceptable, as the MERC order dated 07.09.2006 was issued after end of the year under consideration, while for the books of accounts of the assessee company were closed on 31.03.2006. The A.O had further averred that since the MERC order was issued and received in the subsequent year, therefore effect to the same was required to be given in the books of subsequent year, as a result whereof the assessee company could have made necessary adjustment in the account of the said latter year only. The CIT(A) finding himself as not being an agreement with the view of the A.O, and rather observing

that prior to demerger MSEB's tariff structure including other aspects, were being controlled by the statutory body, viz. MERC, and the orders of MERC were statutorily binding on MSEB, and after trifurcation of MSEB, the assessee along with other two companies came into existence, and the said trifurcated companies also remained under the statutory control of MERC in respect of tariff structure of power and other items, and as such the orders of MERC were statutorily binding on the assessee company. That in the backdrop of the aforesaid facts it was observed by the CIT(A) that though the MERC order was dated 07.09.2006, while for the previous year of the assessee had ended as on 31.03.2006, but as on the said date, viz. 07.09.2006, the books of accounts of the assessee company were not closed. Thus the CIT(A) duly appreciating that now when the income tax act itself had given a period of six months for finalizing the accounts and making necessary adjustments, therefore the averment of the A.O that on the basis of MERC order dated 07.09.2006, necessary adjustments could not have been made in the books of accounts of the assessee for the previous year ending on 31.03.2006, was not acceptable. It was thus observed by the CIT(A) that the assessee company had justifiably made adjustments in its accounts on the basis of MERC order dated 07.09.2006. The CIT(A) further fortifying his aforesaid observations that now when it remained as a matter of fact that the assessee company had omitted to give effect to the MERC order dated 07.09.2006 in its original return of income, therefore when the said

defect/error was pointed out by the statutory auditor, the assessee company thus realizing the aforesaid omission therein gave effect to the said order by filing a revised return of income. The CIT(A) referring to Accounting Standard No. 4 (AS 4) issued by ICAI, as well Electricity (Supply) (Annual accounts) Rules, 1985 applicable to the assessee company, which permitted adjustments to assets and liabilities which were required on the basis of events occurring after the balance sheet date that provide additional information materially affecting the determination of amounts. Thus in the backdrop of the aforesaid observations the CIT(A) held that the assessee company was duly justified in revising its return of income to give effect to the reversal of the excess billing.

(iii) The CIT(A) further observed that the assessee company generated electricity and sold to another company, viz. Maharashtra State Electricity distribution Co. Ltd. (MSEDCL). That the rate of electricity supplied was at the nascent stage fixed as per mutual consent of management of both the companies. That both of the aforesaid companies were under the statutory control of MERC in respect of fixation of tariff and other items. The CIT(A) observed that MERC had ultimately decided vide its order dated 07.09.2006 that the assessee company should charge lower tariff, as a result whereof the revenue from sale of electricity shown in the accounts (as per the mutual consent of both companies) was thus found to be recorded in excess. Thus in the backdrop of the MERC order the assessee company had correctly reversed the excess

revenue of 320,72,82,510/- in its revised return of income. The CIT(A) adverting to the last limb of the contention of the A.O that since the MERC order was received on 26.09.2006, therefore the effect of the same was required to be given in the next assessment year, therein duly appreciating that the adjustment of the excess revenue of Rs. 320,72,82,510/- pertaining to the year under consideration was not possible in the next assessment year, since there was no such provision in the income tax act for claiming reversal of revenue in the next year, therefore the revenue and expenditure relatable to the year under consideration could only be recorded in the hands of the assessee company in the relevant year only.

(iv) The CIT(A) further observed that the revenue (sale/billing of electricity) of the assessee company was the expenditure (purchase of electricity) of MSEDCL, wherein the latter was also being assessed with the same A.O, i.e. ACIT-10(1), Mumbai. It was observed by the CIT(A) that the excess revenue (billing) of Rs. 320,72,82,510/- by the assessee company was also claimed by the MSEDCL as expenditure, as the latter had recorded/recognized the expenditure on the basis of mutual consent. That interestingly though on receipt of MERC order the assessee company revised its revenue, but MSEDCL did not revise its expenditure and thus continued to claim higher expenditure, which thereafter was disallowed in the assessment framed in the case of MSEDCL, and the same was thereafter sustained as such in appeal. It was further concluded by the CIT(A) that the acceptance of the claim of the assessee company would

in no way lead to any loss to the revenue, for the reason that as the tax rate for the year under consideration as well as the subsequent year in the case of the assessee company were the same, therefore whether the reversal of excess billing is allowed in the hands of the assessee company during the year under consideration, or in the next year, the same would be tax neutral.

8. The CIT(A) thereafter adverting to the reversal of 12 hours excess billing of Rs. 10,09,28,973/-, which was the second limb of the reconciliation of the difference of income of Rs. 334,57,16,988/- ,therein observed that while compiling the original return of income, as the billing revenue was calculated upto afternoon 12:00 clock of 01.04.2006, instead of restricting the same to the midnight of 31.03.2006, therefore on realization of the said mistake, the assessee had rectified the same in its revised return of income. The CIT(A) being in agreement with the claim of the assessee and finding no infirmity as regards the eligibility and entitlement of the assessee company to rectify the aforesaid mistake of excess billing by way of filing a revised return of income, therein dislodged the observations and the consequential adverse inferences so drawn by the A.O on the said count.

9. That as regards the claim raised by the assessee company towards allowability of prior period expenses during the year under consideration, it was observed by the CIT(A) that as the assessee company had in itself came into existence during the year, and as such it was its first year, therefore there could not have been any prior period expenses. Thus on the aforesaid basis the CIT(A) declined to allow the aforesaid claim of the assessee.

10. That as regards the disallowance by the A.O of various other items of disallowance forming part of the difference of income of Rs. 334,57,16,988/-, therein dealt with the said respective issues ,as under:-

(i) Provision of Service Tax of Rs. 33.52 lac: The CIT(A) observed that the aforesaid amount was payable by the assessee company to GAIL for supply of gas, which was included by the latter in the gas supply bills. Thus in the backdrop of the aforesaid facts, the CIT(A) concluded that as the amount which was payable to GAIL was as part of cost of gas and not as a tax to Government, thus the same did not call for any disallowance u/s 43B of the 'Act'.

(ii). Provision of difference in oil stock of Rs. 20.04 lac: The CIT(A) adverting to the provision of difference in oil stock of Rs. 20.04 lac, therein held that the same was allowable since the physical inventory of oil stock was carried out in the month of September/October,2005, and not during September/October, 2006 as had been misconceived by the A.O.

(iii). ROC tax paid at Rs. 199.88 lac : The CIT(A) adverting to the disallowance of ROC tax paid at Rs. 199.88 lac, therein observed that as the same was not pressed by the assessee company vide its submission dated 09.11.2009, thus confirmed the said disallowance.

(iv). Provision for doubtful debts and Capital expenditure written off at Rs. 75.12 lac : The CIT(A) finding that as the

same was not pressed by the assessee company vide its submission dated 09.11.2009, thus confirmed the said disallowance

(v). Deferred revenue expenses of Rs. 1121.62 lac : The CIT(A) observed that deferred revenue expenses of Rs. 1121.62 lac in fact pertained to reduction in expenses, i.e. retransferred from expenses to deferred revenue expenses. The CIT(A) further observed that expenses of Rs. 71.24 lac pertaining to other successor companies, had thus to the said extent been reduced/claimed less. It was further observed by the CIT(A) that depreciation of Rs. 35.70 lac on capital asset – Pophali had not been claimed.

(vi). Interest on Power Finance Corporation : The CIT(A) observed that the assessee company had explained that interest on Power Finance Corporation was allowable u/s 43B. It was further observed by the CIT(A) that the other interest and finance charges were allowable u/s. 36(1)(iii) r.w.s. 43(1) of the 'Act', and the interest wherever required, was already capitalized.

(vii). Steel value difference of Rs. 22.93 lac :The CIT(A) observed that the steel value difference of Rs. 22.93 lac was also allowable, since initially the value was booked by respective stores which was subject to approval/ reconciliation by head office.

(viii). Coal cost freight issued – Bhusaval Rs. 1631.85 lac That as regards Coal cost freight issued – Bhusaval, it was observed by the CIT(A) that as the same was reported by the A.O to be

disallowed, against which the assessee had not commented upon in its written submissions dated. 09.11.2009, therefore the same was required to be disallowed.

11. The CIT(A) after upholding the validity of the revised return filed by the assessee company u/s 139(5), therein rejected the contention of the A.O that the assessee company had failed to put forth an explanation and consequent thereto could not reconcile the difference of income in the original and the revised return of income, disagreed with the A.O that the recourse available to the assessee company was to give effect to the difference of income in the subsequent year and not during the year under consideration, further took due cognizance of the fact that now when the excess purchase value of electricity, which was claimed as an expenditure by MSEDCL(i.e the company which had purchased the electricity from the assessee company) was disallowed in the latters assessment, which disallowance had thereafter been upheld in appeal, coupled with the fact that irrespective of the year in which effect to the difference in the income was to be given in the hands of the assessee company, viz. the year under consideration A.Y. 2006-07 (as claimed by the assessee) or the immediately succeeding year, i.e A.Y. 2007-08 (as averred by the department), keeping in view the fact that the respective tax rates for both the years was same, therefore no loss of revenue was suffered by the department. However, the CIT(A) thereafter referring to the order dated: 07.09.2006 of MERC, therein observed that MERC vide its aforesaid order had categorically directed that the tariff order was to be effective prospectively from the month of September, 2006 for all billing purposes. The CIT(A) thus observing that as the entire order of MERC was in respect of determination of tariff for F.Y.2006-07,

though at some places the Annual Revenue requirement of F.Y. 2005-06 also stood mentioned. The CIT(A) thus being of the view that the order of the MERC was not effective for the F.Y 2005-06, therefore called upon the assessee to put forth an explanation as regards the same. The assessee in order to fortify the fact that the the tariff order of MERC dated. 07.09.2006 was for all purposes applicable to the year under consideration, viz. F.Y. 2005-06, therein vide his submission dated. 09.11.2009 placed on record of the CIT(A) a **letter dated. 16.07.2009 of MERC** signed by Director (Tariff) of MERC, which therein explained that the tariff chargeable by the assessee company from MSEDCL for F.Y. 2005-06 was as approved by the Commission vide its order dated.07.09.2006 in Section III – Chapter 4. The aforesaid submissions of the assessee however did not find favor with the CIT(A), who thus being of the view that Section III – Chapter IV of MERC order dealt with the topic/subject "Annual Revenue Requirement for F.Y. 2005-06", and holding a conviction that "Annual Revenue Requirement" and "Determination of Tariff" were two different items, therefore concluded that it could safely be held that MERC vide its order dated. 07.09.2006 had not directed the assessee company to charge lower Tariff from its client, viz. MSEDCL for F.Y. 2005-06. Thus the CIT(A) holding a conviction that the material acted upon by the assessee company to justify the lowering of the tariff, which therein had led to difference of income of Rs. 320,72,82,510/- (out of total Rs. 334,57,16,988/-) in the revised return of income of the assessee company, as in comparison to the latters original return, was misconceived on the part of the assessee company, and could not be acted upon and accepted as such, therefore concluded that the assessee company was not entitled for reversal of excess billing of

Rs. 320,72,82,510/- on the basis of MERC order dated. 07.09.2006, as claimed in the revised return of income, and thus confirmed the addition of Rs. 320,72,82,510/- on the said count in the hands of the assessee company. The CIT(A) further adverting to the remaining issues forming part of the difference of income of Rs.334,57,16,988/-(excluding 320,72,82,510/-), therein on the basis of his observations as regards the respective issues, except for the issues which were confirmed or not pressed by the assessee, therein deleted the remaining disallowances/additions.

12. That both the assessee and the revenue being aggrieved with the respective findings of the CIT(A), had therein carried the matter in appeal before us. That at the very outset of the hearing of the appeal, it was submitted by the ld. Authorized representative (for short 'A.R') for the assessee company that it was not pressing 'Ground of appeal No.2' so raised in the appeal filed by the assessee company. That in the light of the concession made by the Ld. A.R, the 'Ground of appeal No.2' so raised by the assessee company is thus dismissed as not pressed. Thus only the 'Ground of appeal No. 1' survives for adjudication in the appeal filed by the assessee company before us. The Ld. A.R adverting to the 'Ground of appeal No. 1' therein averred that the CIT(A) had rightly concluded that the revised return filed by the assessee company was a valid return, and the reasons as regards the difference of Rs. 334,57,16,988/- in the income shown by the assessee in its original return of income and the revised return had duly been explained by the assessee, both by way of a note appended in the statement of the total income filed alongwith the return of income, as well as by replying to the query as was raised by the A.O on the said issue during the course of the assessment proceedings. The Ld. A.R submitted that the year

under consideration was its first year of assessment, as the assessee company had started functioning from 06.06.2005 after the erstwhile Maharashtra State Electricity Board (for short 'MSEB') trifurcated into 3 companies, viz Maharashtra State Power Generation Co. Ltd. (i.e. the assessee), Maharashtra State Electricity Distribution Co. Ltd., and Maharashtra State Electricity Transmission Co. Ltd. That the Ld. A.R therein submitted that each of the aforesaid companies were to look into one of the three aspects of the erstwhile MSEB, viz. generation, distribution and transmission, respectively, as a result whereof the assessee company was engaged in the business of electricity generation. It was submitted by the ld. A.R that as the audit of accounts of the assessee company was not completed, therefore it had on the basis of the 'Provisional Accounts' and the Tax Audit Report, dated. 28th, November, 2006, had filed its return of income for A.Y. 2006-07 on 30.11.2006, declaring Nil income after claiming the set off of brought forward losses and unabsorbed depreciation aggregating to Rs. 623,47,43,689/-. It was further averred by the ld. A.R that the assessee company during the year under consideration, i.e its very first year of operation had generated electricity and sold to another company i.e. Maharashtra State Electricity Distribution Co. Ltd.(for short 'MSEDCL'), wherein the rate of electricity supplied was fixed as per mutual consent of management of both the companies. The Ld. A.R in order to fortify the aforesaid factual position so averred by him, therein drew out attention to Page 2 – Para 7 of his 'Paper book' (for short 'APB'), which is an extract of a letter dated. 20.07.2009 filed by the assessee company with the CIT(A) during the course of the appellate proceedings, and read as under:-

> *"7. The said Provisional Accounts were prepared after considering the sales made by the Appellant company to the Maharashtra State Electricity Distribution Co. Ltd. (MSEDCL) (one of the successor companies to the MSEB) at the rates mutually decided by the Managing Directors of the two companies."*

That it was further submitted by the Ld. A.R that prior to demerger MSEB's' tariff structure including other aspects, were being controlled by the statutory body, viz. Maharashtra Electricity Regulatory Commission (for short 'MERC'). It was submitted that after trifurcation of MSEB, the assessee along with other two companies came into existence, and the said trifurcated companies also remained under the statutory control of MERC in respect of tariff structure of power and other items, and as such the orders of MERC were statutorily binding on the assessee company. It was thus submitted by the Ld. A.R that as both of the aforesaid companies were under the statutory control of MERC in respect of fixation of tariff and other items, therefore pursuant to the order dated. 07.09.2006 passed by MERC, as per which it was decided that the assessee company should charge lower tariff, the revenue from sale of electricity to MSEDCL shown in the accounts of the assessee company (as per the mutual consent of both companies) on the basis of which the original return of income had been filed, was found to be recorded on the higher side. The Ld. A.R averred that in the backdrop of the MERC order which was binding on the assessee company, the latter reversed the excess revenue of Rs. 320,72,82,510/- on the count of lower tariff fixed by MERC (forming part of the total difference of Rs. 334,57,16,988/- in the income shown by the assessee in its original return of income and the

revised return), and thus revised it return of income on 02.08.2007, therein declaring 'Nil' income after claiming set off of brought forward losses amounting to Rs. 288,90,26,701/-. The assessee company in its revised return of income had appended a 'Note' below the statement of its computation of income, therein elaborating that while for the original return of income was based on unaudited accounts, the revised return of income on the other hand was compiled on the basis of the audited accounts, which therein explained the reason for filing of the revised return of income. The Ld. A.R submitted that both the assessee company and MSEDCL remained under the statutory control of MERC in respect of fixation of tariff and other items. It was in the backdrop of the aforesaid factual position, therein averred by the Ld. A.R that pursuant to the order of MERC, dated. 07.09.2006, wherein it was ultimately decided that the assessee company should charge lower tariff, as a result whereof the revenue from sale of electricity shown in the accounts of the assessee company (as per the mutual consent of both companies) which was shown as such in the original return of income was recorded in excess to the extent of Rs. 320,72,82,510/-, therefore the assessee company had correctly reversed the excess revenue of Rs. 320,72,82,510/- by filing a revised return of income. The Ld. A.R drew our attention to the order of MERC, dated. 07.09.2006, placed at Page 465 of the 'APB', relevant extract of which read as under:-

Approval of Maharashtra State Power Generation Company Limited (MSPGCL)'s Annual Revenue Requirements for FY 2005-06 & FY 2006-07
and
Determination of Tariff for FY 2006-07
Dr. Pramod Deo, Chairman
Shri A. Velayutham, Member
Shri S.B Kulkarni, Member

Date of Order: September 7,2006

Upon directions from the Maharashtra Electricity Regulatory Commission (Commission), Maharashtra State Power Generation Company Limited (MSPGCL) filed its tariff petition on 10th Feb, 2006, which came up for public hearing before several consumers, the representatives of various consumer organizations, and other shareholders on 13th June, 2006 and having stood over for consideration till this day, the Commission passes the following ORDER.

_____

MERC, Mumbai

_____"

The Ld. A.R reverting to the adverse inferences drawn by the CIT(A), who by referring to the order dated: 07.09.2006 of MERC, had therein observed that MERC vide its aforesaid order had categorically directed that the tariff order was to be effective prospectively from the month of September, 2006 for all billing purposes, and as such was in respect of determination of tariff for F.Y.2006-07, and would not be thus effective for the year under consideration, viz. F.Y 2005-06, therein in order to drive home his contention that the aforesaid order dated : 07.09.2006 of MERC was applicable and therein regulated the tariff chargeable by the assessee company from MSEDCL for F.Y. 2005-06, thus referred to a letter dated. 16.07.2009 received by the assessee company from the Director (Tariff), MERC, which therein clearly spelt out that the tariff chargeable by the assessee company, viz. MSPGCL from MSEDCL for the year ended 31.03.2006 [Financial year: 2005-06] was as approved by MERC vide its order dated. 07.09.2006. The relevant extract of the aforesaid letter dated. 16.07.2009 therein read as under:-

" *MAHARASHTRA ELECTRICITY REGULATORY COMMISSION*

13th Floor, Centre No. 1, World Trade Centre, Cuffe Parade, Colaba, Mumbai 400 005
*Tel No. 022 2216 3964/2216 3969 * Fax 022-2216 3976 * Website: www.mercindia.org.in*
E-mail: merc@mercindia.org.in

MERC

No. MERC/TRF/Case No. 48 of 2005/1373 *July 16,2009*

The Chief General Manager(Accounts)
Maharashtra State Power Generation Company Limited
Plot No. g-9, Prakashghad, Aliyavar Jung Marg,
Station Road, Bandra (East), Mumbai 400 051

Dear Sir,

Sub:Applicability of MERC Order dated September 7,2006 in Case No.48 of 2005

This is with reference to your letter dated July 14, 2009, seeking clarification on the applicability of the Commission's above –said Order for the FY 2005-06.

It is confirmed that for the year ended March 31, 2006 [Financial year 2005-06] the tariff charged by the Maharashtra State Power Generation Company Ltd. (MSPGCL) from the Maharashtra State Electricity Distribution Co. Ltd. (MSEDCL) was as approved by the Commission vide its Order dated September 7, 2006 in Case No. 48 of 2005 [refer Section III – Chapter thereof and more specifically Pages 30, and Table No's 17, 18 and 19 on Page No. 37 and 38 of the said Order].

For easy reference, the copies of the relevant pages of the above –said Order are enclosed with this letter.

Yours faithfully

Sd/-

(Rajendra G Ambekar)

Director (Tariff)

Encl: a/a"

The Ld. A.R thus taking support of the aforesaid letter dated. 16.07.2009 of MERC, wherein the assessee company on the basis of the clarification sought as regards the scope of applicability of the tariff by the assessee company from MSEDCL, was therein informed that the tariff approved by the Commission vide its order dated. 07.09.2006, was to regulate the tariff chargeable by the assessee company on the sale of electricity to MSEDCL during the year ended March 31, 2006 [Financial Year 2005-06]. The Ld. A.R further drew our attention to the Notes to the Balance Sheet as on

31st March, 2006 at Page 97 of the 'APB', wherein the auditors had clearly made a mention of excess billing of Rs. 320.73 crores by the assessee company, which had been reversed in the balance sheet. The aforesaid Note 14 reads as under: -

> *"MSPGCL has billed total 5684.40 crores (at notional unit rate which is base rate Rs. 1.26 plus adhoc FAC Rs. 0.14 per unit plus actual FAC approved MERC) for sale of Electricity to the MSEDCL and accordingly excess billing of Rs. 320.73 Crores have been reversed in the Balance Sheet."*

The Ld. A.R thus on the basis of the aforesaid facts, coupled with the fact that as appreciated by the CIT(A) that now when the excess purchase value of electricity, which was claimed as an expenditure by MSEDCL (i.e the company which had purchased electricity from the assessee company) was disallowed in the latters assessment which thereafter had been upheld in appeal, and that irrespective of the year in which effect to the difference in the income was to be given in the hands of the assessee company, viz the year under consideration A.Y. 2006-07 (as claimed by the assessee) or the immediately succeeding year, i.e A.Y. 2007-08 (as averred by the department), keeping in view the fact that the respective tax rates for both the years was same, would thus not lead to any loss of revenue to the department by the said act of the assessee. The Ld. A.R placed on record the copy of the order of the **ITAT 'G' Bench, Mumbai**, dated: 12.08.2015, in the case of : **M/s Maharashtra State Electricity Distribution Co. Ltd. Vs. ACIT,10(1), Mumbai, ITA No. 720/Mum/2010, A.Y. 2006-07**, wherein the Tribunal had confirmed the disallowance of excess provision for purchase of power amounting to Rs. 320.72 crores by MSEDCL from the

assessee company, viz. Maharashtra State Power Generation Co. Ltd. The Ld. A.R drew our attention to Page 19 – Para 22 -23 of the order of the ITAT, wherein the Tribunal confirming the disallowance of Rs. 320.72 crores in the hands of the assessee before them, viz. MSEDCL (the company to whom the assessee company had sold electricity), while disposing of the latters appeal for A.Y. 2006-07, had therein held as under:-

> *"We have heard both the sides on this issue and we find that the ld. CIT(A) was fair enough to give requisite direction to the AO to allow the relief to the assessee company in A.Y. 2007-08 after due verification. In our view the assessee should not be aggrieved when appropriate direction has already been issued to allow the claim in the correct manner and in the correct year. We find the ground of the assessee to be devoid of of merits and the same is dismissed upholding the order of the Ld. CIT(A) on this issue."*

Thus in the backdrop of the aforesaid facts, it was averred by the Ld. A.R that now when the total billing of the assessee company for the year under consideration was Rs. 5,361.70 crores and not Rs. 5,692.56 crores as considered by the A.O, therefore the CIT(A) who though had duly upheld the validity of the revised return, had however misconceived the clearly worded order of MERC dated. 07.09.2006 r.w its letter dated. 16.07.2009 which was placed on the record of the CIT(A) during the course of the appellate proceedings, and therein irrebutably and rather inescapably revealed that MERC vide its order dated. 07.09.2006 had directed the assessee company to charge lower Tariff from its client, viz. MSEDCL, and was effective for the F.Y 2005-06, as was clarified

beyond any scope of doubt by MERC vide its reply dated. 16.07.2009 in context of the very issue under consideration. It was averred by the ld. A.R that not only the CIT(A) had misconstrued and rather drawn self suiting inferences by distorting the aforementioned clearly worded Order dated. 07.09.2006 r.w letter dated. 16.07.2009 of MERC, but rather had most arbitrarily failed to take cognizance of the observations of the ITAT so passed in the case of **M/s Maharashtra State Electricity Distribution Co. Ltd.(supra), ITA No. 720/Mum/2010, A.Y. 2006-07,** wherein the Tribunal had confirmed the disallowance of excess provision for purchase of power amounting to Rs. 320.72 crores by MSEDCL from the assessee company, viz. Maharashtra State Power Generation Co. Ltd in the year under consideration, viz. A.Y. 2006-07. The Ld. A.R thus submitted that the addition of Rs. 320,72,82,510/- sustained by the CIT(A) may therein be deleted. That on the other hand the Ld. Departmental representative placed heavy reliance on the order of the CIT(A), and specifically took support of the observations of the first appellate authority at Page 19 – Para 2.3.2 and Page 21 of the latters order. The Ld. D.R therein referring to the order dated. 07.09.2006 of MERC, therein submitted that as the tariffs contemplated therein were for F.Y. 2006-07 and not for the year under consideration, therefore the CIT(A) had rightly upheld the addition of Rs. 320,72,82,510/- in the hands of the assessee company. It was submitted by the Ld. D.R that as the appeal of the assessee company was devoid of any merit, the same was thus liable to be dismissed.

13. We have heard the Ld. Authorized representatives of both the parties, perused the orders of the lower authorities as well as the material placed on record. We find that the order of the CIT(A)

therein upholding the validity of the revised return as well as dislodging the other adverse inferences raised by the A.O in the course of the assessment proceedings, as regards the issue of the revision of the return of income had been accepted by the department, and the same not having been assailed before us, thus to the said extent had attained finality. We now advert to the sole issue which survives in the appeal of the assessee company, viz. whether the order dated. 07.09.2006 of MERC which exercised statutory control in respect of tariff structure of power and other items of the assessee company, is relatable to the year under consideration, i.e F.Y. 2005-06 as claimed by the assessee, or was applicable only w.e.f F.Y. 2006-07, as canvassed by the department. We have given a thoughtful consideration to the facts of the case and had purposively, intentionally and consciously, for the sake of clarity had dealt with at length the findings and observations of both the A.O and the CIT(A), as well as reproduced the material/documents referred to and relied by the assessee company in support of its contention, hereinabove. We though find ourselves to be in agreement with the CIT(A) that at the first blush the order dated. 07.09.2006 of MERC (Page 465 of 'APB'), therein reveals that the words "Determination of Tariff for F.Y. 2006-07" therein gives an impression that the applicability of the said order, which therein provides for determination of tariff, stands restricted only to F.Y. 2006-07. We are further persuaded to subscribe to the observation of the CIT(A) that the term "Approval of Maharashtra State Power Generation Company Limited (MSPGCL)'s Revenue Requirements for FY 2005-06 & 2006-07" used as a heading of the said order, which is used with the conjunction "and" with the words "Determination of Tariff for F.Y. 2006-07", therein further *prima*

facie suggests and strengthens the conviction that the said order dated. 07.09.2006, solely regulates the determination of Tariff for F.Y. 2006-07, and the terms "....Revenue Requirements for FY 2005-06 & 2006-07", can thus be safely construed by according a literal meaning thereof, as an approval which was sought by the assessee company from MERC in respect of F.Y. 2005-06 & F.Y. 2006-07. However, we cannot loose sight of the very fact that the assessee company had placed on record of the CIT(A) a letter dated. 16.07.2009 of MERC (Page 732 of 'APB'), which had therein put to rest the dilemma as regards the scope of its order dated. 07.09.2006, by clarifying beyond any scope of doubt that the tariff chargeable by the assessee company, viz. Maharashtra State Power Generation Company Limited from Maharashtra State Electricity Distribution Co. Ltd. (MSEDCL) for the year ended March 31, 2006 [Financial Year: 2005-06] was as approved by the Commission, viz. MERC, vide its order dated. 07.09.2006. Thus the plain and clear language of the letter dated. 16.07.2009 of MERC, which was in pursuance of the specific query raised by the assessee company vide its letter dated. July 14, 2009, as to whether the order of the Commission would also be applicable for F.Y. 2005-06, which as observed by us hereinabove, was answered by MERC in affirmative. We may herein clarify that had the letter dated. 16.07.2009 of MERC would had simply stated that its order dated. 07.09.2006 would be applicable for the F.Y. 2005-06 in the hands of the assessee company, then the same would not have dispelled the doubts in our mind as regards the issue in context of which the applicability of the order of the Commission for F.Y. 2005-06 was being referred to in the hands of the assessee company, but then the fact as it so remains is that the Commission, viz. MERC by

categorically referring about the applicability of the order dated. 07.09.2006 in context of the 'tariff chargeable' by the assessee company from MSEDCL for the F.Y. 2005-06, had thus put all the doubts to rest. We are unable to persuade ourselves to subscribe to the observations of the CIT(A), who by restricting himself to the words "Annual Revenue Requirements" used in the order dated 07.09.2006, had therein concluded that the order of MERC dated. 07.09.2006 was in respect of determination of tariff for F.Y. 2006-07 only. We are of a strong conviction that in light of the clarificatory letter dated. 16.07.2009 obtained by the assessee company from MERC, on the very issue as to whether the order dated. 07.09.2006 of the Commission would be applicable as regards the 'tariff chargeable' by the assessee company for F.Y. 2005-06, which was replied by the Commission, viz. MERC vide its aforesaid reply stating (extract) :-

> ***"It is confirmed that for the year ended March 31, 2006 [Financial year 2005-06] the tariff charged by the Maharashtra State Power Generation Company Ltd. (MSPGCL) from the Maharashtra State Electricity Distribution Co. Ltd. (MSEDCL) was as approved by the Commission vide its Order dated September 7, 2006 in Case No. 48 of 2005 [refer Section III – Chapter thereof and more specifically Pages 30, and Table No's 17, 18 and 19 on Page No. 37 and 38 of the said Order]."***

, are thus of the considered view would safely and inescapably lead to the only view, viz. the tariff chargeable by the assessee company from MSEDCL for the F.Y. 2005-06 would stand regulated by the order of MERC dated. 07.09.2006.

14. We further find that our aforesaid view stands fortified by the order of the **ITAT 'G' Bench, Mumbai**, dated: 12.08.2015, in the case of : **M/s Maharashtra State Electricity Distribution Co. Ltd.**

Vs. ACIT,10(1), Mumbai , ITA No. 720/Mum/2010, A.Y. 2006-07, wherein the Tribunal as observed by us hereinabove had confirmed the disallowance of excess provision for purchase of power amounting to Rs. 320.72 crores by MSEDCL from the assessee company, viz. Maharashtra State Power Generation Co. Ltd. We thus in the backdrop of our aforesaid observations, as well as the fact that a coordinate bench of the Tribunal while disposing of the appeal of the purchaser company, viz. MSEDCL, had already related the order of the Commission, viz. MERC with the year under consideration, i.e A.Y. 2006-07, therefore we find no reason to take a different view, and as such delete the addition of Rs. 320,72,82,510/- in the hands of the assessee company. The 'Ground of appeal No. 1' is thus allowed in terms of our aforesaid observations. That as the 'Ground of appeal No.3' is general in nature and the Ld. A.R had not raised any averment as regards the same, the same is dismissed as not pressed.

15. The appeal of the assessee company is partly allowed in light of our aforesaid observations.

ITA NO. 418/MUM/2010 :

1. We now advert to the appeal of the revenue. The revenue had assailed the admission of the 'additional evidence' by the CIT(A), vide 'Ground of appeal No.1', as under:-

> "*On the facts and in the circumstances of the case, the ld. CIT(A) erred in admitting the additional evidences without appreciating that the appropriate and sufficient opportunities were given to the assessee to explain the reduction of income*

in revised return, which the assessee failed to explain and prove".

1.1. The Ld. D.R had averred that the CIT(A) had erred in admitting the 'additional evidences' without appreciating that the assessee was afforded appropriate and sufficient opportunities to explain the reduction of the revised income, which the assessee had failed to explain and prove. The Ld. A.R on the other hand placed reliance on the order of the CIT(A). We have given a thoughtful consideration to the issue raised before us and are of the considered view that the CIT(A) while admitting the 'additional evidence' U/rule 46A had called for a report of the A.O, and thereafter only on being satisfied that the assessee duly satisfied the requisite conditions contemplated under Clause (a) & (d) of Rule 46A, had therein admitted the same. That still further we find that the CIT(A) had called for a 'remand report' from the A.O, and thereafter perusing the contentions of both the parties, viz. the assessee and the revenue, had therein adjudicated the respective issues. Thus in the backdrop of the facts involved in the present case, we do not find any infirmity in the admission of 'additional evidence' by the CIT(A), and are thus unable to persuade ourselves to subscribe to the contention of the A.O that the CIT(A) had erred in admitting the 'additional evidence'. We thus uphold the order of the CIT(A) on the issue under consideration, and as such dismiss the 'Ground of appeal No.1' raised by the department before us.

2. The revenue had assailed the allowing of relief by the CIT(A) in respect of interest payable to 'Power Finance Corporation' (for short 'P.F.C') which had become due during the period 31.05.2005 to 31.03.2006, which in case of non payment would had attracted a

disallowance u/s 43B, without making any verification as regards the same, vide 'Ground of appeal No. 2', as under:-

> "*On the facts and in the circumstances of the case, the ld. CIT(A) erred in accepting the claim of the assessee that wherever required, interest was capitalized without calling for and examining the relevant details and evidences of such capitalization".*

2.1 The Ld. D.R during the course of hearing of the appeal therein submitted that the CIT(A) summarily accepting the contention of the assessee, had therein most arbitrarily and without carrying out any verification as regards the genuineness and veracity of the claim of the assessee company, thus simply going by the statement of the assessee had therein stated at Page 19 of his order, as under:-

> *"The appellant has explained that interest on Power Finance Corpn. is allowable u/s 43B."*

It was thus averred by the Ld. D.R that the CIT(A) had erred in allowing the aforesaid relief to the assessee on the basis of a non-speaking order, which thus could not be sustained in the eyes of law, and as such was liable to be set aside. That on the other hand the Ld. A.R referring to 'Schedule 31' of the 'Statement of accounts' of the assessee company, which is headed as 'Payments due on Capital Liabilities' (Page 134 of 'APB'), therein submitted that it stood duly certified by the auditors that an amount of Interest of Rs. 5,492.54463 (in lac) had became due during the period 31.05.2005 to 31.03.2006, but the said entire amount, viz. Rs. 5,492.54463 (in lac) was paid by the assessee company during the

period 31.05.2005 to 31.03.2006, as a result whereof no part of the amount of 'Interest' was due on loan from P.F.C as on 31.03.2006. The Ld. A.R therein to drive home his aforesaid contention, therein referred to the observations of the CIT(A) recorded at Page 22 – Para 2.3(i) of the order of the CIT(A), and therein submitted that the CIT(A) only after making the necessary verifications and on being satisfied had not carried out any disallowance u/s 43B in the hands of the assessee company.

2.2 We have heard the Ld. Representatives for both the parties, perused the orders of the lower authorities and the material produced before us. We find that Sec. 43B(d) specifically provides that any sum payable by an assessee as interest on any loan or borrowing from any public financial institution [or a State financial corporation or a State Industrial investment corporation], in accordance with the terms and conditions of the agreement governing such loan or borrowing, irrespective of the previous year in which the liability to pay such sum was incurred by the assessee according to the method of accounting regularly employed by him, shall be allowed as a deduction in the hands of the assessee in respect of the previous year in which the liability to pay such sum was incurred, only if the said amount is actually paid by the assessee on or before the 'due date' applicable in his case for furnishing the return of income under sub-section (1) of Sec. 139, failing which the said amount shall be allowed as a deduction in computing the income referred to in section 28 of that previous year in which such sum is actually paid by him. We find that in the backdrop of the aforesaid settled position of law, the interest of Rs. 5,492.54463 (in lac), which had become due on the 'Project loan' raised by the assessee company from P.F.C, as had become due

during the period 31.05.2005 to 31.03.2006, would had called for a disallowance u/s 43B, if the said interest would had been payable as on 31.03.2006, and had not been paid by the assessee company upto the 'due date' of filing of its return of income. We find that as claimed by the assessee company that no part of the interest on the P.F.C loan was payable as on 31.03.2006, therefore there was no occasion to carry out any disallowance of any part of such interest u/s 43B of the 'Act'. We have given a thoughtful consideration to the facts of the case in light of the settled position of law, and though find ourselves to be in agreement with the contention of the Ld. A.R, but then are of the considered view that the said factual position was supposed to be verified by the CIT(A), whom we find had dispensed with the same and had gone by and accepted the contention of the assessee at the very face of it. We thus are of the considered view that the facts pertaining to the said issue requires verification, and thus restore the matter to the file of the CIT(A). The CIT(A) is herein directed to pass a speaking order and if the claim of the assessee is found to be in order, then no disallowance of any part of the interest on P.F.C loan would be called for in its hands. Needless to say, the CIT(A) shall during the course of the set aside proceedings shall consider the objections of the department on the issue under consideration, and afford reasonable opportunity to the assessee company to rebut the objections raised by the department and substantiate its claim that no disallowance of any part of interest on P.F.C loan is called for under Sec. 43B of the 'Act'. The 'Ground of appeal No. 2' is thus allowed for statistical purposes.

3. The revenue had assailed the accepting of the claim of the assessee company by the CIT(A), that wherever required, interest

was capitalized without calling for and examining the relevant details and evidences of such capitalization by the CIT(A), vide 'Ground of appeal No.3', as under:-

> "*On the facts and in the circumstances of the case, the ld. CIT(A) erred in accepting the claim of the assessee that wherever required, interest was capitalized without calling for and examining the relevant details and evidences of such capitalization".*

3.1 We find that the A.O in his 'remand report' taking cognizance of the Interest and finances charges capitalized, had therein averred that it ws not explained by the assessee as to why and which block of asset has the interest been capitalized, and as such it was not clear as to whether the said interest was eligible for capitalization or was outrightly disallowable. The assessee vide his rejoinder dated. 09.11.2009 to the aforesaid 'remand report', had therein referring to the *1st proviso* of Sec. 36(1)(iii) and *Explanation 2* of Sec. 41(1), had therein claimed that it had rightly capitalized the interest, and the complete details as regards the same were given in 'Schedule 13A' of the 'Annual accounts' of the assessee (Page 112 to 115 of 'APB'). We find that though the A.O vide his remand report had categorically raised his objection on the issue under consideration, to which the assessee had reverted vide his reply dated. 09.11.2009, but then the CIT(A) merely stating that the interest and finance charges were allowable u/s 36(1)(iii) r.w.s 43(1) of the 'Act', had on the basis of a non-speaking order, which except for making a mere reference to the statutory provisions, is absolutely bereft and devoid of any reasoning, had summarily accepted the claim of the assessee company without placing on record a satisfactory

reasoning as regards the same. We are of the considered view that as the CIT(A) had allowed the aforesaid claim of the assessee on the basis of a non-speaking order, therefore in all fairness we herein restore the issue to his file for passing a speaking order after considering the submissions of the assessee company and the objections of the revenue to the same. The 'Ground of appeal No. 3' is thus allowed for statistical purposes in light of our aforesaid directions.

4. The revenue had further averred that the CIT(A) had erred in allowing the claim of the prior period expenses made by the assessee company in its revised return of income, without appreciating that the said expenses pertained to the period prior to the existence of the assessee company and hence, were not allowable. The revenue had further claimed that the CIT(A) had erred in allowing claim of reduction of Rs. 4.27 lac on account of prior period billing without appreciating that the assessee itself had during the course of the appellate proceedings before the CIT(A) therein stated that the said amount was taxable during the year under consideration. The revenue had assailed the aforesaid issues vide 'Ground of appeal no. 4' and 'Ground of appeal no. 5', as under:-

> ***"****4. On the facts and in the circumstances of the case, the ld. CIT(A) erred in allowing the claim of prior period expenses made in the revised return by the assessee company without appreciating that the said expenses pertained to the period prior to existence of the assessee company and hence, were not allowable.*

5. On the facts and in the circumstances of the case, the ld. CIT(A) erred in allowing claim of reduction of Rs. 4.27 lacs on account of prior period billing without appreciating that vide letter dt. 20.05.2009 submitted during the course of the appellate proceedings, the assessee itself had stated that the said amount is taxable in the year under consideration".

4.1 We have given a thoughtful consideration to the aforesaid grounds of appeal so raised by the revenue before us and are of the considered view that the same are misconceived and do not emerge from the order of the CIT(A), as the latter at Page 19 – Para 2.3(f) had concluded that since it was the first year of the assessee company, therefore there could not have been any prior period expenses. Thus in light of the aforesaid facts, now when the 'Ground of appeal no. 4' and 'Ground of appeal no. 5' do not arise from the order of the CIT(A), therefore the same are dismissed.

5. The revenue had vide 'Ground of appeal no. 6' therein averred that the CIT(A) had erred in allowing the claim of set off of b/f loss/unabsorbed depreciation without appreciating that in the case of MSEB no loss or unabsorbed depreciation was allowed to be carried forward in the final order for A.Y. 2006-07 and hence, there cannot be any eligibility for set-off or allowance of loss or unabsorbed depreciation in the case of assessee under any provisions.

5.1 We have given a thoughtful consideration to the contention of the revenue in the backdrop of the facts of the case. We find that

the CIT(A) had merely given 'directions' to the A.O for making certain verifications, by observing as under:-

> *"I have considered the facts of this particular issue. It is held that the A.O has to allow the assessed brought forward unabsorbed losses and depreciation of MSEB in the hands of the appellant. However, the A.O has to allow the same on the basis of some information or record. The authenticated information is the assessment order in the case of M/s. MSEB. Since, in the case of MSEB, the facts of balance carried forward unabsorbed losses/depreciation was not mentioned, therefore, the A.O was correct for rejecting appellants claim on this basis. However, there may be a case that the A.O in assessment order of MSEB allowed set off of unabsorbed depreciation/losses to the extent income available and may not have mentioned the balance losses/depreciation remained to be carried forward. In any case, the figures mentioned in the assessment record were not final as the same were subject to out come of further appellate orders in case of MSEB. It has been brought to the notice of undersigned that the CIT(A)-1, Mumbai has passed appeal order dated. 18.03.2009 for A.Y. 2001-02 in case of MSEB deleting the additions made to the total income of MSEB amounting to Rs. 1947.86 crore which will consequently effect c/f of losses. The A.O is directed to consider the same including any other orders passed subsequently by CIT(A)/ITAT and courts in case of MSEB."*

We find that the CIT(A) had merely given 'directions' to the A.O for carrying out certain verifications as regards the assessed brought forward unabsorbed losses and depreciation of erstwhile MSEB, as

was available as a final outcome of the further appellate orders passed in the case of MSEB. We are of the considered view that the final outcome of the exercise carried out by the A.O in pursuance to the directions of the CIT(A), would safely take care of the issues assailed by the revenue vide 'Ground of appeal no. 6' , hereinabove. Thus in the backdrop of the aforesaid facts as they so remain, we find no infirmity in the aforesaid directions of the CIT(A), and finding no reason to interfere in the said directions of the CIT(A), thus dismiss the 'Ground of appeal No. 6' raised by the revenue before us.

7. The appeal of the revenue is partly allowed for statistical purposes in terms of our aforesaid observations.

The appeal of the assessee is partly allowed, while for the appeal of the revenue is partly allowed for statistical purposes in terms of our aforesaid observations.

Order pronounce in the open court on 03/03/2017.

Sd/-	Sd/-
(D.Karunakara Rao)	(Ravish Sood)
लेखासदस्य / Accountant Member	न्यायिकसदस्य / Judicial Member

मुंबईMumbai; दिनांकDated : 03.03.2017

<u>आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to</u> :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT- concerned
5. विभागीयप्रतिनिधि,आयकरअपीलीयअधिकरण, मुंबई/ D.R, ITAT, Mumbai
6. गार्डफाईल/ Guard File

आदेशानुसार/BY ORDER,**उप/सहायकपंजीकार**(Dy/Asstt .Registrar)**आयकरअपीलीयअधिकरण,** मुंबई**/ ITAT, Mumbai.**