IN THE HIGH COURT OF JUDICATURE AT MADRAS
Dated : 16.07.2012
Coram
The Honourable Mrs.Justice CHITRA VENKATARAMAN
and
The Honourable Mr.Justice K.RAVICHANDRABAABU

Tax Case (Appeal) No. 1317 of 2005

M/s. Neyveli Lignite Corporation Limited
Neyveli 607 801. ... Appellant

-Vs-

The Assistant Commissioner of Income Tax
Company Circle- IV (4)
Chennai 34 ... Respondent

Prayer: Appeal filed under Section 260-A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal "B" Bench, dated August 2004 in ITA No. 2315/Mds/2003 for the assessment year 2001-02.

For appellants : Mr.R.Vijayaraghavan

For respondent : Mr.T.R.Senthilkumar
Standing Counsel for Income Tax

JUDGMENT

(Judgment of the Court was made by CHITRA VENKATARAMAN,J.)

The following are the questions of law raised by the assessee in the tax case appeal filed as against the order of the Tribunal relating to the Assessment Year 2001-02.

1. Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that components of price for sale of electricity fixed on the basis of tax liability should not

be taken as part of the transfer price of lignite and sale price of electricity in computing relief under Section 80IA/80IB ?

2. If the answer to the question No. 1 is in favour of appellant, whether the notional tax reimbursement in the case of Unit VII of Thermal Power Station II whose entire income is deductible u/s 80IA should also be taken into account for computing relief u/s 80IA ?

2. The assessee is engaged in the business of mining and production of lignite and using them in the generation of electricity. Under Bulk Power Supply Agreement dated 18.2.1999 entered into between Neyveli Lignite Corporation Limited and Transmission Corporation of Andhra Pradesh Ltd., Karnataka Electricity Board, Kerala State Electricity Board, Tamilnadu Electricity Board and the Electricity Department of Union Territory of Pondicherry, the assessee herein agreed to sell the electricity generated by it from the second Thermal Power Station Stages 1 & 2 at Neyveli. The agreement speaks about the allocation of power to various State Electricity Boards. The computation of generation tariff, the basic principles on the working of the tariff which are set out in Annexure A which is treated as integral part of the agreement. Clause 4 of the agreement deals with the computation of generation tariff; Clause 5 deals with Billing and payments; Clause 6 deals about tax liability of NLC to be borne by the Transmission Corporation of Andhra Pradesh Limited and Others. The said clause reads as under:

6. INCOME TAX

6.1 Tax liability, if any, on the following income streams of NLC shall be borne by the recipients.

i) Generation of power from Power Station II (Stage I) and Power Station II (Stage II)

ii) Mining of lignite from Mine II for the purpose of generation of power from Power Station II (Stage I) and Power Station 11(Stage II).

iii) The amount of grossed up tax that is payable by NLC under the income streams mentioned at items (i) and (ii)

6.2 The total tax liability of the Recipients shall however be:-

(a) the tax payable on the return on Equity and Internal Resources relating to Mine II and Power Station 11 adopted in the tariff calculations and the grossed up tax thereon.

(b) the actual tax assessed for the above streams, whichever is less.

6.3. The income tax allocated to the Recipients shall be in proportion to their energy drawals during the year to which the income tax pertains to.

6.4. NLC shall estimate its liability for income tax that will fall due for payment as advance tax every quarter and also the income and tax relating to Mine II and Power Station II and the tax recoverable from the Recipients and allocate it among the Recipients in the combined ratio of allocation of capacity of Power Station II (Stage 1) and Power Station II (Stage II) indicated in para 1.1. NLC shall claim the advance tax liability allocated to the Recipients by presenting a statement specifying the date on which the advance payment is due and the amount thereof. The Recipients shall pay the amount specified in the statement as payable by them atlleast three days prior to the due date for payment of advanced tax in respect of each quarter as prescribed under the Income Tax Act 1961 viz., 15th June, 15th September, 15th December and 15th March, failing which the Recipient concerned shall pay interest on the amount so delayed, computed in accordance with the provisions of the Income Tax Act 1961.

6.5. After finalization of return of income and again after tax assessment of the income for any financial year, the excess or shortfall in the advance tax collected from the Recipients shall be adjusted in the claim for advance tax for the subsequent quarters. Certificates from the Statutory Auditors of the company regarding the allocation of the returned/ assessed income and tax for the above income

streams of NLC and among the Recipients shall be furnished to the Recipients."

3. It is seen from the documents placed before this Court that this agreement is the culmination of a series of meetings of the above stakeholders with the assessee. In the meeting held on 16.10.1998, decision was taken on the details on the tariff fixation. It recorded that the meeting held on 22.04.1998 had recommended for reimbursement of income tax which was not built into the tariff. The minutes of the meeting held on 22.04.1998 at Chennai reads as under:

" 10.0 INCOME TAX:

While the SEBs agreed for reimbursement of actual Income Tax, NLC explained that the Company has to discharge advance tax liability on quarterly basis and suggested for building the tax in the Tariff itself or as an alternative for payment of advance tax as and when paid by NLC and for payment of interest on the advance tax from the date of payment by nNLC up to the date of reimbursement by the EBs. The SEBs expressed that they will examine the alternatives suggested by the NLC and revert back. "

Thus, on 25.8.1998 in the letter written by the assessee to the other recipients of energy, it was stated that Neyveli Lignite Corporation would not insist on building the tax element into the tariff.

4. In the meeting held on 16.10.1998, it was decided as follows:

"3. The Committee in the previous meeting held at Chennai on 22.04.1998 had recommended for reimbursement of Income Tax which is not built into the tariff. In this meeting it was decided that the extent of liability and modalities of payment of Income Tax have to be further discussed along with other items in the draft agreement. "

However, the Central Electricity Regulatory Commission issued a notification dated 26th March 2001 in accordance with Section 13 of the Electricity Regulatory Commission Act,

1998, prescribing the terms and conditions on the tariff fixation. Paragraph 1.4 states that the generation tariff under the Regulations shall be determined station wise and transmission tariff shall be determined line-wise, sub-station-wise, etc., and aggregated to regional tariff. It also contemplated maintaining separate tax escrow account for the beneficiaries. Clause 14 is on tax escrow account. Chapter 2 deals with the rate of energy charges. Clause 2.12 refers to tax on income. It states that tax on income from core activity, viz., the activity of generation and transmission of electricity of the Generating Company is to be computed as an expense and shall be recoverable by the generating company from the beneficiaries. "Any under or over recoveries of tax shall be adjusted every year on the basis of certificates of statutory auditors." The proviso to the said clause states that the tax on any income streams other than income from core-activity, if any, accruing to the Generating Company shall not constitute as a pass through component in the tariff. Tax on such other income shall be payable by the Generating Company.

5. It is a matter of relevance to point out herein that in the notification issued on 19.01.2009, Chapter 3 deals with Computation of tariff, wherein clause 13, provided that the components of tariff for the supply of electricity shall comprise of two parts, namely, capacity charge (for recovery of annual fixed cost consisting of the components specified to in regulation 14) and energy charge (for recovery of primary fuel cost and limestone cost where applicable). The tariff for supply of electricity from a hydro generating station shall comprise capacity charge and energy charge to be derived in the manner specified in regulation 22, for recovery of annual fixed cost (consisting of the components referred to in regulation 14) through the two charges. Clause 14 defines Annual Fixed Cost.

6. A reading of the agreement dated 18.02.1999 entered into between the assessee and the various State Electricity Boards thus show the modalities of arriving at the tariff which includes the tax liability of Neyveli Lignite Corporation. Thus, it is evident that the tariff that was arrived at between the parties consisted of various components including tax

liability on the income streams from the core activity of NLC and the quantification was to be done on the basis of the methods given in Clause 6.2 of the agreement. A reading of the same thus makes it clear that in strict sense, there was no reimbursement of the tax liability by the recipient, but was treated as part of the tariff and whatever was done on the receipt of the statement of the tax payable by the assessee was that the tariff price payable on the electricity sold was finally reckoned with reference to the above said tax payment. In the circumstances, it is clear that by "reimbursement", it does not mean that the tax paid by the assessee was very much part of the tariff and hence, part of the sale price.

7. It is seen from the proceedings of the Commissioner of Income Tax under Section 263 of the Act that the assessment was sought to be revised on the ground that the deduction claimed under Section 80IA was not properly considered by the Assessing Officer. The Commissioner further pointed out that on a perusal of the agreement the income tax liability of the assessee had been paid by the Electricity Boards and the amount received by the assessee was shown as receipt of the income and included for claiming deduction under Section 80IA. The Commissioner of Income Tax viewed that the receipt of the income tax by way of reimbursement was not an income from the manufacturing or production activity. Consequently, no deduction under Section 80IA or 80IB is to be allowed. Thus, the Commissioner of Income Tax issued the notice under Section 263.

8. The assessee resisted the said proceedings and pointed out that the recovery of the income tax was only a component of two part tariff for sale of power. The notification issued by the Ministry of Power dated 30th March 1992 in exercise of the powers conferred on the Central Government under Section 43A(2) of the Electricity Supply Act, 1948, thus provided for the various components of the tariff to be charged on the sale of electricity. The power purchase agreement entered into between the parties thus rested on the notification issued by the Ministry of Power. As regards the claim of the Commissioner that the payment of income tax was nothing but reimbursement of the assesssee's tax liability, the assessee pointed out that income tax was one of the

components of the tariff and it was not reimbursement of the tax liability of the appellant herein and not referable to the tariff fixation. The parties to the agreement rightly considered and included the tax liability as a component of the tariff for the sale of power. Hence, necessarily being part of the sale consideration, the said amount was available for deduction under Section 80IA. In considering the said issue, the Commissioner pointed to clause 4 regarding the computation of general tariff under the agreement as well as clause 6 regarding the treatment of amount received as income tax reimbursement and ultimately reasoned out that the notification issued by the Government was only a model which had been followed all over India. The Commissioner however pointed out that the agreement did not mention any where that the reimbursement of income tax was or would be part of the sale price. Therefore, the contention of the assessee that the income tax liability of the assessee was treated as part of the sale price could not be sustained. The Commissioner pointed out that as per the opinion of the Institute of Chartered Accountants of India, the reimbursement of income tax was not directly linked to the quantum of power sold. If the same had been part of the sale price, then the amount could have been collected in the sale invoices or in some other manner by way of journal entries or raising debit / credit notes. Hence, the tariff did not include income tax reimbursement. On the other hand, the total income tax payable by the assessee was reduced by the reimbursement of the income tax. In the circumstances, the Commissioner rejected the assessee's claim. Consequently, the relief granted under Section 80IA was also directed to be reworked.

9. As regards the extent of the amount included in the working of Section 80IA, the Commissioner further pointed out that the power tariff paid by Electricity Board for all the units in TS-II, Stage II was uniform and hence the grossed up tax related to units eligible for 80IA deduction as well. The Commissioner pointed out that it is not as though the income tax liability related to all units for the purpose of working out the relief under Section 80IA. As per clause 6.1, the tax liability of the assessee shall be borne by the recipients. In terms of clause 6.2, the grossed up tax or actual tax

assessed for the streams mentioned therein which ever is less alone would come for reimbursement by recipient. Thus, the receipt for the reimbursement of the income tax of an unit could never exceed the actual income tax liability of that unit. If the income was totally tax free, then, the question of considering any tax liability for reimbursement did not arise. In the light of the reasoning, no adjustment need be made for the time being in the power generation activity. However, if the reimbursement amount was also eligible for deduction under Section 80IA, then the Assessing Officer had to make the adjustments in the income of both the activities, while giving effect to the order of higher judicial authorities. Aggrieved by this, the assessee went on appeal before the Income Tax Appellate Tribunal which concurred with the view of the Commissioner of Income TAx (Appeals). Aggrieved by the same, the present appeal has been filed by the assessee before this Court.

10. Learned counsel appearing for the assessee referred to the Bulk Power Supply Agreement between NLC and State Electricity Boards and pointed out that the tariff fixation in the agreement has to necessarily go by the notification issued by the Ministry of Power dated 30th March 1992. As per the notification, two-part tariff for sale of electricity from Thermal Power Generating Stations would comprise the recovery of annual fixed charges consisting of interest on loan capital, depreciation, operation and maintenance expenses (excluding fuel), taxes on income reckoned as expenses, return on equity and interest on working capital at a normative level of generation and energy (variable) charges covering fuel cost recoverable for each unit of energy supplied and shall be based on the norms given therein. Thus, when the tariff for sale of energy is fixed under a particular method of computation necessarily the agreement that the assessee had with the State Electricity Boards had to go in line of the said method of computation. The Department does not dispute the genuineness of the agreement and the notification issued by the Ministry of Power in the matter of fixing the tariff and the tax components which go in the making of the tariff.

11. Referring to the correspondences and minutes of the meeting held between the parties herein, learned counsel pointed out that the parties to the agreement had stated that the working out the liability of a particular component of price was to be determined in the manner relied on in Clause 6. All the authorities had committed serious error in considering this component as reimbursement of a tax payable by the assessee. On the other hand, all that NLC had received was the price for the sale of energy on the tariff fixed by the Government in its notification and one of the components of the sale price was arrived at based on the grossed up tax or the actual tax assessed whichever is less. Thus, the fundamental error in the reasoning of the Commissioner and the Tribunal is that there was a reimbursement of tax paid by the assessee and hence it could not be treated as part of the income for the purpose of deduction under Section 80IA or 80IB. In the context of the various clauses in the agreement, what the assessee had received was the tariff consisting of various components which happened to include the income tax paid by the assessee and by such inclusion, there could be no reimbursement of income tax.

12. As far as the second question raised by the assessee is concerned, learned counsel pointed out that considering the fact that the assessee had given up the grossed up tax on the return on equity, and the internal resources relating to Mine II and Power Station II there is difficulty in working out the individual unit's liability and no exception could be taken to the claim made by the assessee.

13. Per contra, learned Standing Counsel appearing for the Revenue supported the order of the Commissioner as well as the Tribunal and contended that the Tribunal had rightly rendered a finding that there was only reimbursement of tax paid by the assessee and no infirmity could be seen in the order of the Tribunal.

14. Heard the learned counsel appearing for the assessee as well as the learned standing counsel appearing for the Revenue and perused the material available on record.

15. We agree with the submissions made by the learned counsel for the assessee. As rightly pointed out by learned counsel for the assessee, the Revenue does not dispute the genuineness of the Bulk Power Supply Agreement between NLC and the State Electricity Board dated 18.2.1999. The Revenue also does not dispute the fact that the Notification issued by Ministry of Power dated 30.3.1992 provides for the various components of the tariff to be charged for the sale of electricity by the Generating companies to the Board and the same is relevant for understanding the clauses in the agreement. As already seen, the Notification dated 30.3.1992 provides the basis for working of the tariff for sale of electricity. Clause 1.5(d) of the Notification dated 30.3.1992 refers to the manner of what could be the components that could be included in the tariff to be charged on various income streams. Keeping these guidelines in the background, when we look at the agreement entered into betweenthe various State Electricity Boards and the assessee, we find that the computation of the generation tariff is done on the lines indicated in the notification.

16. It is no doubt true that clause 6 of the agreement separately deals with tax liability of the assessee which would form part of the tariff as per the Notification. Equally, it is true that Annexure A to the agreement gives the norms and parameters for working out the generation power tariff for the 5 year period 1996-97 to 2000-01. The said Annexure however has to be read in the context of clause 4.1. Hence, going by this, we do not find any income tax payable by the assessee or paid by the assessee figuring in Annexure A. The reason is that in clause 6 of the agreement specifies the tax liability of NLC in respect of the income on generation of power from Power Station II (Stage I) and Power Station II (Stage II), mining of lignite from Mine II for the purpose of generation of power from Power Station II (Stage I) and Power Station 11 (stage II), the amount of grossed up tax that is payable by NLC on the income streams mentioned at items (i) and (ii) were to be borne by the recipients. viz, the State Electricity Boards. Clause 6.2 clarifies that either the grossed up or the actual tax assessed, whichever is less alone would be the liability for the Recipients to bear.

17. In the context of the direction issued in the notification dated 30.3.1992 and Clause 6 in the agreement, it is clear that tax liability is part of the tariff charged for sale of electricity from Thermal Power Generating Stations and it does not stand independent of the tariff charge. If the contemplation is otherwise, there is absolutely no need at all for anyone to enter into an agreement to make the tax liability of one party viz., the assessee as a liability to be borne by another party to the agreement. When the agreement between the parties is guided by the Notifications issued by the Ministry of Power, Government of India and the deliberations between the parties also pointed out the guidelines, under which the agreement themselves were entered into, we do not think there exists any justification in the contention of the Revenue to treat the tax payment shown under clause 6 of the agreement as an independent payment not connected with the tariff charged on the supply of energy. At the risk of repetition, we would say that the tax component is very much part of the sale of electricity from the Thermal Power Generating Stations and the mere fact that a component of the tariff makes a reference to the tax liability with reference to income streams mentioned in clause 6, it does not make such a component as not income to be excluded in considering the relief under Section 80IA/80IB. In the circumstances, we hold that there is no such reimbursement of tax paid by NLC from the State Electricity Board. On the other hand the tariff component is quantified in terms of the liability met by the NLC which by no stretch of imagination could convert such a payment by the recipient as a tax liability of the recipient.

18. In the circumstances, we have no hesitation in accepting the plea of the assessee that the Commissioner committed serious error in dissecting the tariff to come to the conclusion that the tax component specified as part of the tariff is reimbursement of the liability of the assesseee and hence it would not form part of the income. As already pointed out, when the Revenue had not questioned the genuineness of the agreement between the parties and liberty is thus available for the parties to arrive at the cost of the energy to be supplied by the assessee as guided by the notifications of the Ministry of Power in this regard, we find no ground to sustain the plea

of the Revenue that the relief to be granted under Section 80IA calls for exclusion of the tax component in the sale price of electricity. Consequently, the first question raised in the tax case is answered in favour of the assessee and the order of the Tribunal is set aside.

19. As far as the second question is concerned, we do not think that there exists any ground for entering into a question as to whether there was a notional tax reimbursement in the case of Unit VII of Thermal Power Station II. Given the fact that the first question is answered in favour of the assessee and the so called tax reimbursement is nothing but a component of price, the relief in respect of all units have to be taken into account for the purpose of deduction under Section 80IA. Consequently, in the light of our answer to the first question in favour of the assessee, the second question does not arise at all and reimbursement shall be computed in the matter of granting the relief under Section 80IA.

20. In the circumstances, the order of the Tribunal is set aside and tax case appeal is allowed. No costs.

(C.V.,J) (K.R.C.B,.J)
16.07.2012

Index:Yes/No
Internet:Yes/No

krr/

To

1. The Income Tax Appellate Tribunal 'B' Bench, Madras
2. The Commissioner of Income Tax , Chennai III, Madras.
3. The Assistant Commissioner of Income Tax,
   Company Circle IV (4), Madras 34.

CHITRA VENKATARAMAN,J.
AND
K.RAVICHANDRABAABU,J.

krr/

Tax Case (Appeal)
No. 1317 of 2005

Dated 16.07.2012