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

Before Sh. A.D. Jain, Vice President

Dr. B. R. R. Kumar, Accountant Member

ITA No. 5718/Del/2015 : Asstt. Year: 2007-08
ITA No. 4083/Del/2014 : Asstt. Year: 2008-09
ITA No. 2295/Del/2018 : Asstt. Year: 2008-09
ITA No. 7063/Del/2014 : Asstt. Year: 2010-11
ITA No. 5392/Del/2017 : Asstt. Year: 2010-11
ITA No. 298/Del/2016 : Asstt. Year: 2011-12
ITA No. 5393/Del/2017 : Asstt. Year: 2011-12
ITA No. 299/Del/2016 : Asstt. Year: 2012-13
ITA No. 5394/Del/2017 : Asstt. Year: 2012-13

NTPC Limited, Core-7, SCOPE Complex, 7, Institutional Area, Lodhi Road, New Delhi-110003	Vs	Addl. CIT, Range-13/18, New Delhi-110002 DCIT, Circel-13(1)/18(2), New Delhi
(APPELLANT)		(RESPONDENT)
PAN No. AAACN0255D		

ITA No. 5704/Del/2015 : Asstt. Year: 2007-08
ITA No. 4086/Del/2014 : Asstt. Year: 2008-09
ITA No. 6983/Del/2014 : Asstt. Year: 2010-11
ITA No. 156/Del/2016 : Asstt. Year: 2011-12
ITA No. 175/Del/2016 : Asstt. Year: 2012-13

DCIT, Circel-13(1)/18(2), New Delhi	Vs	NTPC Limited, Core-7, SCOPE Complex, 7, Institutional Area, Lodhi Road, New Delhi-110003
(APPELLANT)		(RESPONDENT)
PAN No. AAACN0255D		

Assessee by : Sh. Ved Jain, Adv. &
Sh. Ashish Goel, CA
Revenue by : Sh. Bhavnesh Kulsheshtha, CIT-DR

Date of Hearing: 11.05.2022		Date of Pronouncement: 05.08.2022

ORDER

Per Bench:

The issues spread over a number of appeals before us and hence adjudicated issue wise by a common order.

Deduction u/s 80IA CCGPH Units:

Ground No. 4 in ITA No. 5704/Del/2014 (Revenue)
Ground No. 3 in ITA No. 6983/Del/2014 (Revenue)
Ground No. 2 in ITA No. 156/Del/2016 (Revenue)
Ground No. 2 in ITA No. 175/Del/2016 (Revenue)

2. This issue of deduction u/s 80IA of the Income Tax Act, 1961 on Combined Cycle Gas Power Plants (CCGPS) stands adjudicated by the order of the Tribunal authored by the same Bench in the case of the assessee for the A.Y. 2006-07 in ITA No. 3590/Del/2014 and in ITA No. 3194/Del/2016 vide order dated 04.05.2022. For the sake of ready reference, the relevant portion of the order is reproduced below:

"55. This Ground of appeal pertains to disallowance of deduction claimed under section 80IA in respect of steam units of Combined Cycle Gas Power Plants (CCGPS), with a view that steam turbine units do not constitute independent separate industrial units and the profits derived therefrom do not qualify for deduction under section 80IA.

56. The issue under consideration is already decided in favor of the appellant by the coordinate bench of the Tribunal and the

Hon'ble Delhi High Court in appellant's own case for preceding years."

3. Since, the matter stands covered by the order of the Tribunal in the assessee's own case, keeping in view the absence of any change in the factual position, the addition made in the instant year is liable to be deleted.

Set off of Losses:

Ground No. 4 in ITA No. 5718/Del/2015 (Assessee)
Ground No. 4 in ITA No. 4086/Del/2014 (Revenue)
Ground No. 3 in ITA No. 6983/Del/2014 (Revenue)
Ground No. 2 in ITA No. 298/Del/2016 (Assessee)
Ground No. 2 in ITA No. 299/Del/2016 (Assessee)

4. The issue of set off of losses stands adjudicated by the order of the Tribunal authored by the same Bench in the case of the assessee for the A.Y. 2006-07 in ITA No. 3590/Del/2014 and in ITA No. 3194/Del/2016 vide order dated 04.05.2022. For the sake of ready reference, the relevant portion of the order is reproduced below:

"50. It was argued that the issue under consideration is no longer res-integra and has already been decided by the Hon'ble Madras High Court in the case of Velayudhswamy Spinning Mills, 340 ITR 477, dated 11.03.2010, wherein it was held that the initial assessment year cannot be the year in which the undertaking commenced its operations but has to be the year in which assessee has chosen to claim deduction under section 80-IA for the first time. It was accordingly held that the provisions of section 80-IA(5) treating undertaking as a separate sole source of income cannot be applied to a year prior to the year in which the assessee opted to claim relief under section 80-IA

for the first time. The Court concluded that depreciation and carry forward loss relief to the unit which claims deduction under section 80-IA, cannot be notionally carried forward and set off against the income from the year in which the assessee started claiming deduction under section 80-IA. Relevant observations of the Hon'ble Court in this regard are as under:

"18. From a reading of the above, it is clear that the eligible business were the only source of income, during the previous year relevant to the initial assessment year and every subsequent assessment years. When the assessee exercises the option, the only losses of the years beginning from initial assessment year alone are to be brought forward and no losses of earlier years which were already set off against the income of the assessee. Looking forward to a period of ten years from the initial assessment is contemplated. It does not allow the Revenue to look backward and find out if there is any loss of earlier years and bring forward notionally even though the same were set off against other income of the assessee and the set off against the current income of the eligible business. Once the set off is taken place in earlier year against the other income of the assessee, the Revenue cannot rework the set off amount and bring it notionally. A fiction created in sub-section does not contemplate to bring set off amount notionally. The fiction is created only for the limited purpose and the same cannot be extended beyond the purpose for which it is created.''

51. The SLP against the above said decision has been dismissed by the Hon'ble Supreme Court in ACIT vs. Velayudhaswamy Spinning Mills Pvt. Ltd. reported in 244 Taxman 58 (SC).

52. Further, the CBDT vide Circular No.1/2016 dated 15.02.2016 has clarified that the initial assessment year for the purpose of Section 80IA(5) is not the year of commencement of production, but it is the first year of claim of deduction at the assessee's choice out of block period of 10 years.

53. In fact, taking note of the above said decision of Madras High Court in the case of Velayudhswamy Spinning Mills (supra) and the CBDT Circular No. 1/2016 (supra), a plethora of courts have held that loss in years earlier to the initial assessment year which were already absorbed against the profit of other business cannot be notionally brought forward and set off against profit of eligible business in the Initial AY, as no such mandate is provided in section 80IA(5).

- *CST vs. M/s G. R. T. Jewellers (India) in TCA No. 176 of 2016 (Madras)*
- *South India Corporation Ltd. vs. ACIT in ITA Nos. 74 & 75 of 2008 dated 07.01.2019 (Kerala)*
- *Tata Power Co. Ltd. vs. ACIT in ITA No.3452/Mum/2012, dated 29.11.2019 (ITAT Mumbai)*
- *Bajaj Electricals Ltd. vs. ACIT in ITA No. 3892/Mum/2011, dated 14.10.2019 (ITAT Mumbai)*
- *DCIT vs. Birla Corporation Ltd. in ITA No. 971/Kol./2012, dated 25.08.2017 (ITAT Kolkata)*
- *M/s. Zaveri & Co. P. Ltd. vs. DCIT in ITA No.1080 & 1081/Ahd./2018, dated 19.03.2020 (ITAT Ahmadabad)"*

5. In light of the above, we find that the issue under consideration already stands settled in favor of the appellant by

various judicial precedents upto the level of the apex court. Hence the appeal of the assessee on this ground is allowed.

Addition on account of downward revision of Sales:

Ground No. 2 in ITA No. 5718/Del/2015 (Assessee)
Ground No. 1 in ITA No. 5704/Del/2015 (Revenue)
Ground No. 8 in ITA No. 4083/Del/2014 (Assessee)
Ground No. 2 in ITA No. 4086/Del/2014 (Revenue)

6. The issue stands adjudicated by the order of the Tribunal authored by the same Bench in the case of the assessee for the A.Y. 2006-07 in ITA No. 3535/Del/2014 vide order dated 04.05.2022. For the sake of ready reference, the relevant portion of the order is reproduced below:

"32. The Central Electricity Regulatory Commission (CERC) has notified by regulation in March 2004, the terms and conditions for determination of tariff applicable w.e.f. 01.04.2004 for a period of five years. Pending final determination of the tariff for the period 01.04.2004 onwards, CERC has directed, by notification that on provisional basis, the annual fixed charges as applicable on 31st March 2004 shall be billed at target availability and variable charges based on norms of operation notified in Regulation 2004. The amount billed for the year on this basis was Rs. 26,830.1 cr.

33. Since, the amount billed is subject to adjustment w.e.f. 01.04.2004, pending final determination of the tariff by CERC, sales amounting to Rs. 25,717.9 cr. for the year have been provisionally recognized on the basis of principles enunciated by the CERC in Regulations, 2004.

34. Such downward revision of sales of Rs. 1,112.20 cr. reflecting the difference between provisional billing of sales at Rs. 26,830.10 cr. and its downward accounting at Rs. 25,717.90 cr. was disallowed and added back as sale of the year to the total income of the appellant.

35. It is to be mentioned that the impugned issue arose for the first time in A.Y. 2005-06, wherein though no addition in this respect was made by the AO, however the case on this issue was reopened by the Ld. CIT(A) u/s 263 of the Act.

36. It is pertinent to mention that initiation of the said re-assessment proceedings were further upheld by Co-ordinate Bench of the Tribunal vide its order dated 30.04.2012.

37. Against the decision of Co-ordinate Bench of the Tribunal in assessee's own case for A.Y. 05-06 (supra), the appellant preferred an appeal before the Hon'ble Delhi High Court.

38. As on 31.03.2014, when the Ld. CIT(A) passed his order for the impugned assessment year i.e., AY 2006-07, the matter (with respect to the proceedings initiated under section 263 of the Act) for the immediately preceding assessment year i.e., AY 2005-06, remained decided against the appellant by the coordinate bench of this Hon'ble Tribunal vide its order dated 30.04.2012 (supra), and the pending for adjudication by the Hon'ble Delhi High Court.

39. Owing to such facts, the Ld. CIT(A) for the impugned assessment year, upheld the addition made by the AO, thereby making the following observations:

"7.3 In this regard, it is found that similar issue was pending before ITAT Delhi, wherein vide para 16 of the order dated 30.04.2012 has decided the issue against the appellant …….

7.4 Against the above order, appellant has filed an appeal before Hon'ble Delhi High Court which is still pending. So, as on date, this issue has been found to be decided against the appellant by the order of ITAT and matter is sub-judis before Hon'ble Delhi High Court. So, respectfully following the order of Hon'ble ITAT, ground of appeal no. 3 is dismissed."

40. From the above, it is clearly evident that the issue under consideration was decided by the Ld. CIT(A) against the appellant, because as on the date of passing of the order, the matter was sub-judis before the Hon'bie Delhi High Court.

41. The said issue has now been decided by the Hon'ble Court in favour of the assessee in assessee's own case for A.Y. 2005-06 vide order dated 16.04.2014 in ITA No. 507/2013. Relevant observations made by the Hon'ble Court in this regard are reproduced below:

"19. The narrative and discussion of facts in the previous part of this judgment has showed that there was some tentativeness in the CERC Reputations about the tariff rates and conditions that were to be applied for the period 01-04-2004 onwards. The previous Tariff Reputations - framed in 2001 - were to end on 31.03.2004, yet by the latter date, even though the conditions for tariff applicability had been more or less finalized, the final tariff order, notifying the rates and some final principles. had not been brought into force. In these circumstances, the CERC

directed that the existing conditions were to be applied till 30.9.2004. The notification of 01.04.2004 thereafter directed corporations like NTPC in the following terms:

"... It is hereby directed that the billing of charges in terms of the Commission's notification No.L-7/25(7)/2004-Legal dated 30.4.2004, read with the notification of even number dated 11.6.2004, shall be continued on provisional basis for a period up to 31.3.2005 or till disposal of the applications made by the utilities for approval of tariff, whichever is earlier and shall be subject to adjustment after final determination of tariff by the Commission based on such applications.''

20. NTPC thus had no choice in the matter but to carry on billing in terms of the previous notification on a provisional basis up to 31.03.2005 or till the approval of tariffs; such billing figures were to be subject to adjustment after final tariff determination. Thus, inherently there was a degree of uncertainty and incompleteness in the process. This was reflected in the return when the adjustment of the billing became necessary on account of the application of the CERC notification. NTPC's argument that the tariff for power plants from 2004-09 was lower than the tariff norms for 2000-04 has not been disputed by the Revenue. Even a bare look at the later Tariff Regulations shows that the rate of return was revised downwards. NTPC submits that it accounted sales for electricity for Rs. 2212.8 crores based upon the previous experience in tariff fixation orders of CERC. This was even though the billed amount was Rs.2306.6 crores. This estimate was bona fide and made on a realistic assessment of sales estimation that could be

realized in terms of accepted tariff notifications. There was nothing erroneous or prejudicial to Revenue's interest in such estimate.

21. This Court finds that power generation companies owned or controlled by the Central Government are a sub-species of business entities for which a separate provision has been enacted by the Act. There is no dispute that the income of utilities, especially ones subject to stringent public control, are tightly regulated in terms of what are the accounting methods to be adopted, how depreciation is to be claimed, allowances rate of return on capital, etc. All these aspects are subject to CERC Regulations. At the relevant time, i.e. the transition between the old (2001) CERC Regulations, and the later ones (2004-2009). had not been fully worked out by the CERC as to what had to be recovered by NTPC and other entities. It therefore directed that the previous regime be followed. Apparently for a portion of previous accounting periods, provisional figures were being indicated as income estimates, and depending on how the final figures were worked out at times, higher figures would be offered as amounts received in excess of the sum estimated and reported during other periods. An example cited is one for 2006-07 when an excess figure of over Rs. 46 crore was reported and brought to tax. Furthermore, the revision downward - in the present instance - was based on past experience, whenever revision of tariff had taken place. If downward revision were not undertaken, there would have been a likelihood of the higher figure not being realized after tariff finalization.

21. There is authority, in the form of Supreme Court judgments in Shree Sajjan Mills Ltd v. CIT, (1985) 156 ITR 585, Bharat Earth Movers Ltd v. CIT, (2000) 245 ITR 428 and Metal Box Company of India Ltd v. Their Workmen, (1969) 73 ITR 53, that a provision made on a reasonable basis, it would be in the nature of an ascertained liability and that in a mercantile system of accounting, provision for liability ascertained during the course of the relevant accounting period, which is payable at a future is permissible.

22. The expression "error of law" resulting in prejudice to the interests of the revenue are not to be given wide connotation, as is sought to be urged by the Revenue here. Where two views are possible, the Commissioner should not exercise his power under Section 263; Leisure Wear (supra) aptly summarizes this power as not enabling a revisional interdict on the mere existence of another view which conflicts with what was adopted by the Income Tax Officer; so long as the tatter's opinion is a plausible one, exercise of power would be unwarranted. The fulfillment of both preconditions, i.e. error of law, and prejudice to revenue is essential, else the revenue would have wide ranging powers to oversee and re-open almost every assessment order. In the present case, the court is satisfied that the AO's order was made after appropriate inquiry; the absence of discussion regarding downward revision of sales figures in this case did not make it any less vulnerable to correction under Section 263. The view taken by him is one which is endorsed by law, as the CERC Regulations left the NTPC with little choice to make such revision awaiting a final

determination in regard to the whole period after the expiry of the assessment in that instance.

23. This Court is of the opinion that the question of law framed in this appeal has to be answered in favour of the assessee. The Commissioner acted erroneously in exercising revisional power under Section 263. The orders of the Commissioner and the ITAT are hereby set aside. The order of the AO dated 27.11.2006 is restored. However, the merits of that order, on aspects other than what has been discussed here and pending in appeal, are not being touched upon. The appeal is allowed in the above terms."

42. Importantly, the matter concerning the proceedings initiated under section 263 of the Act for A.Y. 2005-06, inter-alia, concerning the impugned issue, even reached the Apex Court, wherein the Hon'ble Supreme Court found no infirmity with the decision of the Hon'ble Delhi High Court dated 16.04.2014 (supra) vide its decision dated 07.03.2017 [Civil Appeal No. 5108 of 20151].

43. Relying on the above said decision of the Hon'ble Delhi High Court in appellant's own case for A.Y. 2005-06, even the Ld. CIT(A) on similar issue for A.Y. 2007-08 and A.Y. 2008-09 has deleted the addition made by the AO on account of downward revision of sales. Notably, even the department has accepted this position as no addition in this respect has ever been made in any year post A.Y. 2008-09."

7. Since, the matter stands covered by the order of the Tribunal in the assessee's own case, keeping in view the

absence of any change in the factual position, the addition made in the instant year is liable to be deleted.

Income recoverable from State Electricity Board:

Ground No. 2 in ITA No. 5704/Del/2015 (Revenue)
Ground No. 1 in ITA No. 4086/Del/2014 (Revenue)
Ground No. 1 in ITA No. 6983/Del/2014 (Revenue)

8. The issue stands adjudicated by the order of the Tribunal authored by the same Bench in the case of the Revenue for the A.Y. 2006-07 in ITA No. 3590/Del/2014 vide order dated 04.05.2022. For the sake of ready reference, the relevant portion of the order is reproduced below:

"11. This ground of appeal pertains to taxability of Income Tax Recoverable from State Electricity Boards (SEBs) i.e., at the amount ascertained at the time of filing of return of income (being Rs. 115.85 cr.) or at the amount recorded in the books of accounts (being Rs. 586.3 cr.)

12. With regard to the above, it was submitted that as per para 7 of the CERC guideline, Regulation No. L-7/25(5)/2003-CERC dated 26.03.2004, the incidence of income tax on income from generation of electricity (generation income), is on the customers i.e., here SEBs. In other words, out of the total income of the appellant, the tax on 'generation income' is recoverable from SEBs while it is payable by the appellant itself on 'other income'.

13. The correct amount of tax payable by the appellant on its generation income (as is recoverable from SEBs) is

ascertainable only at the time of filing of return when due adjustments to taxable income are made.

14. Thus, as at the time of finalization of accounts, the amount of tax recoverable from SEBs is recorded on provisional basis, and is reduced from the provision for taxes made in the books of accounts. Thereafter, at the time of filing of return of income, the correct tax liability on generation income is computed and paid on grossing up basis.

15. In light of the above, for the year under consideration, created a provision of Rs. 586.3 cr. (being 566.6 cr. towards income tax liability and Rs. 17.9 cr. towards Fringe Benefit Tax) as recoverable from SEBs, on estimation basis, in its books of accounts. Since the said amount was recorded in the books only on estimation basis, and the correct amount of tax liability as was recoverable from SEBs was ascertainable only at the time of filing of the return of income, the said amount of Rs. 586.3 cr. was reduced from the Provision for taxes. The same is evident from copy of Profit & Loss account of the appellant for the year under consideration.

16. Thereafter, at the time of filing of return of income, the correct amount of tax recoverable from SEB was computed and paid on grossing up basis at Rs. 115.85 cr. (being 104.72 cr. towards income tax liability and Rs. 11.13 cr. towards Fringe Benefit Tax).

17. With regard to the above, it was submitted that the grossing up basis of computing the actual tax liability on Generation income has been followed by the appellant on year

to year basis and the same has also been affirmed by the Ld. CIT(A) for AY 2004-05.

18. The said issue also stands decided in favour of the assessee by the Ld. CIT(A) for A.Y. 1999-2000, A.Y. 2001-02 & A.Y. 2002-03, wherein the department had reopened the cases. Even the Hon'ble Delhi High Court has quashed the reassessment proceedings initiated by the department for A.Y. 1999-2000 to 2003-2004, vide its order dated 10.01.2013.

19. In view of the above, even the Ld. CIT(A) has decided the issue in favor of the appellant, by noting the following observations:

"{11} Ground of appeal No. 6 has been taken against in making addition of Rs. 470.45 crores on account of income tax recoverable from the State Electricity Boards. In this regard, learned Authorized Representative of the appellant has submitted as under:-

This issue has already been decided by ld. CIT(A) in his order for A.Y. 2004-05 in favour of NTPC. In addition, ld. CIT(A) has also decided this issue in favour of NTPC for AYs 1999-2000, 2001-02 & 2002-03 wherein the Deptt. had reopened the cases.

Further, the Hon'ble Delhi High Court has also quashed the reassessment proceedings initiated by the IT department for AYs 1999-00 to 2003-04 vide its orders dated 10.01.2013 and 07.03.2013 on the same issue.

11.1 As the issue has already been settled by various appellate orders and re-assessment proceedings initiated by Department has already been quashed by Hon'ble Delhi High Court, Ground of appeal No. 6 is allowed."

9. Since, the matter stands covered by the order of the Tribunal in the assessee's own case, keeping in view the absence of any change in the factual position, the addition made in the instant year is liable to be deleted.

Additional Depreciation:

Ground No. 3 in ITA No. 5704/Del/2015 (Revenue)
Ground No. 3 in ITA No. 4086/Del/2014 (Revenue)
Ground No. 2 in ITA No. 6983/Del/2014 (Revenue)
Ground No. 1 in ITA No. 156/Del/2016 (Revenue)
Ground No. 1 in ITA No. 175/Del/2016 (Revenue)

10. The issue stands adjudicated by the order of the Tribunal authored by the same Bench in the case of the Revenue for the A.Y. 2006-07 in ITA No. 3590/Del/2014 vide order dated 04.05.2022. For the sake of ready reference, the relevant portion of the order is reproduced below:

"6. The revenue has challenged the action of the Ld. CIT(A) in allowing additional depreciation of Rs. 449.49 cr. on the following two contentions:

(i) that the activity of power generation cannot be considered as manufacturing of an article or thing, so as to be entitled for additional depreciation.

(ii) that the Ld. CIT(A) erred in placing reliance on the decision of coordinate bench of this Hon'ble Tribunal in appellant's own case for AY 2005-06, ignoring the fact that the matter is sub-judice as the department has preferred an appeal before the Hon'ble Supreme Court on this issue.

7. Hon'ble Supreme Court in the ease of CST Vs. M.P. Electricity Board, [1970] 25 STC 188 (SC) and in the case of State of AP & Ors. Vs. National Thermal Power Corpn. Ltd. and Ors., 2002 AIR 1895 has held that electricity is capable of abstraction, transmission, transfer, delivery, possession, consumption and use like any other movable property and thus qualifies to be 'goods'. In view of the said decisions of the apex court, the coordinate bench of ITAT Delhi In appellant's own case for the immediately preceding year i.e., AY 2005-06 in ITA No. 1438/Del/2009 dated 30.04.2012 has also allowed the appellant's claim of additional depreciation with the following observations:

"22. The expression "article, thing or goods" are not defined in the Income- tax Act, 1961. Learned Commissioner while treating the electricity as not an article or thing has not made reference to any provisions of the Income-tax Act, 1961, he simply construed the meaning of electricity as not article or thing on the basis of his own inference drawn from the nature of this item but if we evaluate the conclusion drawn by the Learned Commissioner in the light of the decision of the Hon'ble Supreme Court given in the case of Indian Cine Agency. CST vs. M.P. Electricity Board and State of Madhya Pradesh Vs. NTPC then it would suggest that electric energy has all trapping of an article or goods. The process of its generation is also akin to manufacture or production of an article or thing. It is being generated in huge plants though scientifically one may say it is transformation of one source of energy into the other. But all these aspects have been considered in these three judgments of the Hon'ble Supreme Court wherein Hon'bie Court has explained

what is manufacture or production and what is electricity. Learned DR at the time of hearing, had made reference to the order of the IT AT, Chennai and the judgment of the Hon'ble Supreme Court in the case of NC Budhiraja. As far as the judgment of the Hon'ble Supreme Court in the case of N.C. Budhiraja is concerned that has been considered by the Hon'ble Supreme Court itself in the case of Indian Cine Agency (supra). The ITAT in the case of Tamilnadu Chlorates has considered the admissibility of deduction under section 80-HH and in that test held that electricity is not an article. The ITAT has not dealt with these two judgments extensively rather simply observed that decision in the case of Madhya Pradesh Electricity Board was given in the context of the language of a particular statute. The only discussion made by the ITAT with regard to these two judgments of the Hon'ble Supreme Court reads as under:

"6. Reference was made to the decisions of Apex Court rendered in the case of M.P. Electricity Board 35 STC 188 (sic). In this case it was held that electricity is goods within the meaning of section 2(3) of Central Province and Virar Sales-tax Act. This decision was rendered in the context of the language of a particular statute. /As such this meaning cannot be extended to the facts of the present case".

23. Thus, taking into consideration all these aspects, we are of the view that admissibilitv of additional depreciation cannot be denied to the assessee merely on the ground that electricity is not an article or thing. The order of the Learned CIT(Appeals) is reversed to this extent and the disallowance is deleted.

24. In the result, the appeal of the assessee is partly allowed. Decision pronounced in the open court on 30.04.2012".

8. Further, Hon'ble Delhi High Court has decided the matter in favour of the assessee. in the case of Pr. CIT Vs. NTPC Sail Power Co. Pvt. Ltd. in ITA No. 1290/2018. Relevant observations of the Hon'ble Court in this regard are reproduced below for ready reference:

"9. The Tribunal's judgment in NTPC vs. DCIT [relied upon in the orders of the CIT(A) as well as the Tribunal in the present case] followed this judgment of the Supreme Court to hold that electricity has all the necessary trappings of "articles" or "things" and the benefit of additional depreciation cannot be denied.

10. As held by the Constitution Bench, electricity is capable of abstraction, transmission, transfer, delivery, possession, consumption and use like any other movable property. Following the same logic, to deny the benefit of additional depreciation to a generating entity on the basis that electricity is not an "article" or "thing" is in our view an artificially restrictive meaning of the provision. The benefit of additional depreciation under Section 32(1)(iia) has, therefore, been rightly granted to the assessee by the concurrent judgments of the CIT(A) and the Tribunal.

11. We also note that, w.e.f. from 01.04.2013, the provision has been amended by the Finance Act, 2012 and assessees engaged in the generation of power have expressly been included in the ambit thereof.

12. For the above reasons, the Court is of the opinion that no substantial question of law arises. The appeal is dismissed.''

9. And also, the following Courts have also decided the matter in favour of the assessee:

- *Pr. CIT versus M/S Kadodara Power Pvt. Ltd., R/Tax Appeal No. 383 of 2019 [Gujarat High Court]*
- *Tenzing Match Works vs. Dy. CIT, Tax Case (Appeal) Nos. 655, 656 and 657 of 2009 [Madras High Court]"*

11. Since, the matter stands covered by the order of the Tribunal in the assessee's own case, keeping in view the absence of any change in the factual position, the addition made in the instant year is liable to be deleted.

Disallowance in respect of Road, Rail connectivity:

Ground No. 5 in ITA No. 5718/Del/2015 (Assessee)
Ground No. 6 in ITA No. 5704/Del/2015 (Revenue)
Ground No. 6 in ITA No. 4086/Del/2014 (Revenue)
Ground No. 5 in ITA No. 6983/Del/2014 (Revenue)
Ground No. 4 in ITA No. 156/Del/2016 (Revenue)
Ground No. 4 in ITA No. 299/Del/2016 (Assessee)
Ground No. 4 in ITA No. 175/Del/2016 (Revenue)

12. The issue stands adjudicated by the order of the Tribunal authored by the same Bench in the case of the assessee for the A.Y. 2006-07 in ITA No. 3535/Del/2014 vide order dated 04.05.2022.

13. The expenses were in principle adjudicated as allowable owing to business contingencies. The AO may verify the fact of incurring of such expenses.

Amortization of Premium paid on purchase of securities:

Ground No. 6 in ITA No. 5718/Del/2015 (Assessee)

14. The issue stands adjudicated by the order of the Tribunal authored by the same Bench in the case of the assessee for the A.Y. 2006-07 in ITA No. 3535/Del/2014 vide order dated 04.05.2022. For the sake of ready reference, the relevant portion of the order is reproduced below:

"60. The assessee has purchased GOI securities from the market having face value of Rs. 455 cr. at Rs. 508.4 cr. i.e., at a premium of Rs. 53.4 cr. It was submitted that these securities were purchased at a premium, as interest rate on these securities was higher than the prevailing market rate. On redemption of such securities, only the face value was to be received.

61. It was argued that such premium was amortized over the maturity period of the securities, being in line with Accounting Standard 13 and opinion of Expert Advisory Committee of the ICAI issued on this subject. Accordingly, Rs. 41.3 cr. was amortized during the year under consideration.

62. During the year under consideration, the interest income earned on such securities of Rs. 61.8 cr. However, the appellant offered Rs. 20.5 cr. to tax, being interest earned Rs. 61.8 cr., as reduced by the impugned amount of amortization of premium of Rs. 41.3 cr., as evident from Schedule 20 of the audited Financial Statements.

63. The AO disallowed by taking a view, that payment of premium made at the time of purchase of securities is a part of cost of acquisition of securities, and the same cannot be set off against interest accrued on securities. Reliance was placed by the AO on the decision of the Hon'ble Supreme Court In the case of Vijaya Bank Ltd. vs. CIT, 187 ITR 451.

64. Further, appreciating the reliance placed by the AO on the decision of the apex court in the case of Vijaya Bank (supra), the impugned disallowance was also confirmed by the Ld. CIT(A).

65. Thus, the impugned disallowance has been made by the Ld. AO, and has further been upheld by the Ld. CIT(A) based on the decision of the apex court in the case of Vijaya Bank (supra).

66. Vide the said decision, the apex court held that the broken period interest, as is accrued till the time of purchase of securities and is paid for purchase of securities, is in the nature of capital outlay and no part of it can be set off as expenditure against income accruing on those securities. The said decision however, does not deal with the scenario of premium paid over the cost price on purchase of securities, as under consideration. The above said contention that the decision of the apex court in the case of Vijaya Bank (supra) is not applicable on the facts under consideration involving premium paid on purchase of securities, is also evident from CBDT Circular No. 17 of 2008 dated 26.11.2008 (though issued for assessment of banks), which clearly segregates the two issues as under:

(i) In case of securities purchased at a price inclusive of any accrued interest - no allowance of such interest, as per the decision of the apex court in the case of Vijaya Bank (supra).

(ii) In case securities purchased (as 'Held to maturity' and not 'Held for sale') at a premium - the premium is to be amortized over the maturity period of securities.

67. Relevant extract of the above said Circular is reproduced below for ready reference:

"(vi) In cases where an assessee bank purchases securities under capital account at a price inclusive of any accrued interest, the entire purchase consideration is in the nature of capital outlay. Therefore, any interest element included in the purchase consideration is not allowable a expenditure against income accruing on those securities. (Vijaya Bank v/s CIT 187 UR 541 Supreme Court).

(vii) As per RBI guidelines dated 16th October 2000, the investment portfolio of the banks is required to be classified under three categories viz. Held to Maturity (HTM), Held for Trading (HFT) and Available for Sale (AFS). Investments classified under HTM category need not be marked to market and are carried at acquisition cost unless these are more than the face value, in which case the premium should be amortized over the period remaining to maturity. In the case of HFT and AFS securities forming stock in trade of the bank, the depreciation /appreciation is to be aggregated scrip wise and only net depreciation, if any, is required to be provided for in the accounts. The latest guidelines of the RBI may be referred to for allowing any such claims."

68. The above Circular provides for amortization of premium paid on purchase of securities, as the same is in line with the RBI guidelines, governing the assesses being banks. Having regard to the above said Circular and distinguishing the decision of the apex court in the case of Vijava Bank (supra), several coordinate benches of the Hon'ble Tribunal have allowed deduction claimed on account of amortization of premium on purchase of securities, as in the facts of the appellant under consideration. Reliance in this regard is placed on the following decisions:

- *ACIT vs. Krishna Grameena Bank in ITA No. 592/Bang/2014 (ITAT Bangalore)*
- *ACIT vs. Tumkur Veerashiva Cooperative Bank Ltd. in ITA No. 1174/Bang/2014 (ITAT Bangalore)*

69. Reliance in this regard is also placed on the following decisions, wherein also, amortization of premium on purchase of securities has been allowed:

- *Catholic Syrian Bank Ltd. vs. ACIT 38 SOT 553 (ITAT Cochin)*
- *Pr. CIT vs. Kalupur Commercial Co-op. Bank Ltd., R/Tax Appeal No. 782 of 2019 (Guj.)"*

15. Since, the matter stands covered by the order of the Tribunal in the assessee's own case, keeping in view the absence of any change in the factual position, the addition made in the instant year is liable to be deleted.

Disallowance u/s 14A:

Ground No. 5 in ITA No. 5704/Del/2015 (Revenue)

Ground No. 7 in ITA No. 4083/Del/2014 (Assessee)
Ground No. 5 in ITA No. 4086/Del/2014 (Revenue)
Ground No. 4 in ITA No. 7063/Del/2014 (Assessee)
Ground No. 4 in ITA No. 6983/Del/2014 (Revenue)
Ground No. 3 in ITA No. 298/Del/2016 (Assessee)
Ground No. 3 in ITA No. 156/Del/2016 (Revenue)
Ground No. 3 in ITA No. 299/Del/2016 (Assessee)
Ground No. 3 in ITA No. 175/Del/2016 (Revenue)

16. This issue stands adjudicated by the order of the co-ordinate Bench of ITAT vide its decision dated 04.05.2018 in ITA No. 15/Del/2009. Relevant observations made vide the said order are reproduced below for ready reference:

"14. After considering the submissions of both the parties and the material available on the record, it is noticed that an identical issue having similar facts has been adjudicated in the aforesaid referred to case of DCIT Vs Power Grid Corporation of India Ltd. wherein the relevant findings have been given in paras 10 to 11.5 which read as under:

"10. We have heard both the parties and gone through the facts of the case as also the aforecited decisions relied on by the Id. AR on behalf of the assessee. Indisputably, the assessee did not incur any expenditure by way of interest for investment in tax free bonds. In fact, the tax free bonds were acquired on the orders of the Government on conversion of sundry debtors of State Electricity Boards, facing financial crunch. The AO disallowed 2.5 % of the administrative expenses for earning interest income from tax free bonds in the assessment years 2002-03 to 2004-05 while in assessment year 2007-08 disallowance has been made having recourse to provisions of rule 8D of the I.T. Rules, 1962. There is no material before us, suggesting that the assessee incurred any expenditure by wav

of administrative expenses for earning interest income in these four assessment years nor the AO identified any item of such expenditure for earning the interest income. In these circumstances, the estimated disallowance made by the AO, without establishing the nexus between administrative expenses and interest income from tax free bonds cannot be sustained.

11. We find that the Hon'ble Bombay High Court in their decision dated 12.8.2010 in case of Godrej & Boyce Mfg. Co. Ltd. Mumbai while holding that Rule 8D inserted w.e.f. 24.3.2008 cannot be regarded as retrospective because it enacts an artificial method of estimating expenditure relatable to tax-free income and is applicable only w.e.f. AY 2008-09 concluded that for the assessment years where Rule 8D does not apply, the AO will have to determine the Quantum of disallow able expenditure by a reasonable method having regard to all the facts and circumstances. Thus, the disallowance made by the AO invoking Rule 8D of the IT Rules, 1962 in the AY 2007-08, is not justified.

11.1. Moreover, Hon'ble Supreme Court in their decision dated 6.7.2010 in CIT vs. Walfort Share & Stock Brokers (P.) Ltd., 326 ITR 1, inter alia, observed that for attracting section 14A of the Act there has to be a proximate cause for disallowance, which is its relationship with the tax exempt income. Hon'ble Apex Court observed in the context of provisions sec.14A of the Act in the following terms:

"17. The insertion of section 14A with retrospective effect is the serious attempt on the part of the Parliament not to allow deduction in respect of any expenditure incurred by the

assessee in relation to income, which does not form part of the total income under the Act against the taxable income (see Circular No. 14 of 2001, dated 22- 11-2001). In other words, section 14A clarifies that expenses incurred can be allowed only to the extent they are relatable to the earning of taxable income. In many cases the nature of expenses incurred by the assessee may be relatable partly to the exempt income and partly to the taxable income. In the absence of section 14A, the expenditure incurred in respect of exempt income was being claimed against taxable income. The mandate of section 14A is clear. It desires to curb the practice to claim deduction of expenses incurred in relation to exempt income against taxable income and at the same time avail the tax incentive by way of exemption of exempt income without making any apportionment of expenses incurred in relation to exempt income. The basic reason for insertion of section 14A is that certain incomes are not includible while computing total income as these are exempt under certain provisions of the Act. In the past, there have been cases in which deduction has been sought in respect of such incomes which in effect would mean that tax incentives to certain incomes was being used to reduce the tax payable on the non-exempt income by debiting the expenses, incurred to earn the exempt income, against taxable income. The basic principle of taxation is to tax the net income, i.e., gross income minus the expenditure. On the same analogy the exemption is also in respect of net income. Expenses allowed can only he in respect of earning of taxable income. This is the purport of section 14A. In section 14A, the first phrase is "for the purposes of computing the total income under this Chapter" which makes it clear that various heads of income as prescribed

under Chapter IV would fall within section 14A. The next phrase is, "in relation to income which does not form part of total income under the Act". It means that if an income does not form part of total income, then the related expenditure is outside the ambit of the applicability of section 14A. Further, section 14 specifies five heads of income which are chargeable to tax. In order to be chargeable, an income has to be brought under one of the five heads. Sections 15 to 59 lay down the rules for computing income for the purpose of chargeability to tax under those heads. Sections 15 to 59 quantify the total income chargeable to tax. The permissible deductions enumerated in sections 15 to 59 are now to be allowed only with, reference to income which is brought under one of the above heads and is chargeable to tax. If an income like dividend income is not a part of the total income, the expenditure/deduction though of the nature specified in sections 15 to 59 but related to the income not forming part of total income could not be allowed against other income includible in the total income for the purpose of chargeability to tax. The theory of apportionment of expenditures between taxable and non-taxable has, in principle, been now widened under section 14A. Reading section 14 in juxtaposition with sections 15 to 59, it is clear that the words "expenditure incurred" in section 14A refers to expenditure on rent, taxes, salaries, interest, etc. in respect of which allowances are provided for (see sections 30 to 37)……………..”

11.2 Hon’ble Punjab & Haryana High Court in their decision in CIT vs. Hero Cycles Ltd., 323 ITR 518 have observed that disallowance under section 14A requires finding of incurring of

expenditure and where it is found that for earning exempted income no expenditure has been incurred, disallowance under section 14A cannot stand.

11.3 Hon'ble Kerala High Court in their decision in Catholic Syrian Bank Ltd. (supra) held that there being no precise formula for proportionate disallowance, no disallowance is called for out of administrative expenses until Rule 8D came in to force.

11.4 Hon'ble jurisdictional High Court in their decision in Printers House (P) Ltd. (supra) upheld the findings of the ITAT, holding that expenditure cannot be disallowed on the basis of a mere estimate as to what possibly could have been incurred to earn income exempted from tax.

11.5 In the light of view taken in the aforesaid decisions, especially when the Revenue has not placed before us any material in order to controvert the aforesaid findings of the Id. CIT(A) so as to enable us to take a different view in the matter nor even referred to us any material that impugned expenditure was incurred to earn tax free interest income, we are not inclined to interfere with the findings of the Id. CIT(A). In view thereof, around no. 2 in the appeal for assessment year 2003-04, ground nos. i to iii in the appeal for the AY 2002-03, ground no.2 in the appeal for assessment year 2004- 05 and ground no.1 in the appeal for the AY 2007- 08, are dismissed."

17. Since, the matter stands covered by the order of the Tribunal in the assessee's own case, keeping in view the

absence of any change in the factual position, the addition made in the instant year is liable to be deleted.

Profit of Badarpur Unit:

Ground No. 7 in ITA No. 5704/Del/2015 (Revenue)
Ground No. 7 in ITA No. 4086/Del/2014 (Revenue)

18. The AO observed that during the year the Ministry of Power, Govt. of India had transferred the Badarpur Thermal Power Station vide notification dated 31 May 2006 to NTPC.

19. Para 1(c) of notes of accounts being schedule 27 to the balance sheet states that Govt. of India has taken over all the liabilities prior to 31st May 2006 and after book adjustments of the current assets / liabilities and provisions for the period prior to take over, 70 million is shown to be payable to Govt. of India subject to their confirmation. Para 7 of schedule 27 indicates that an amount of Rs. 1155 Million due to BTPS from Govt. of India is not recognized to Revenues.

20. Before the AO, the assessee company submitted as under:

"As per the agreement between Government of India and NTPC, Government of India is to pay NTPC a management fee calculated at l/8of of the net annual sale proceeds of energy subject to ceiling of Rs.5 lakhs per year.

If the station generates profit during the term of the contract, NTPC shall also be entitled to a share of 10% of the net annual profit so earned.
The amount of Rs.115.5 crore as mentioned at SI. No. 7 of Schedule 27 of the Annual Accounts for the period ended as on 31.03.2007 is on the above account.

The amount for the period of if April 2006 to 31st May, 2006 on the above account is of Rs.83,333/- and it includes in the total amount to be realized from the GOI."

21. The AO observed that an amount of Rs. 115.5 crores, pertained to the assessee's income accrued from such BTPS for the period between 1986 to 31.05.2006 was not recognized as revenue. In this regard, the AO took cognizance of the auditor's report in Schedule 27 to the Notes of Accounts and held that such sales had crystallized during the year and, accordingly, made addition of Rs. 115.5 crores in the hands of the assessee.

22. Before the ld. CIT(A), the assessee submitted as under:

"Based on the Notes on Accounts, A.O. has made addition of non-recognition of profit of Badarpur unit of Rs.115,50,00,000/- for the period between 1986 to 31st May, 2006. A.O. has discussed this issue at para 13 at page No. 39-40 of the assessment order.

As per the agreement between Government of India and NTPC, Government of India entrusted the management of Badarpur Thermal Power Station (earlier owned by Govt. of India) to NTPC and Govt. of India was to pay NTPC a management fee calculated at l/8th of the net annual sale proceeds of energy subject to ceiling of Rs.5 lakhs per year. If the station generates profit during the term of the contract, NTPC shall also be entitled to a share of 10% of the net annual profit so earned.

The amount of Rs.115.5 crore as mentioned at para 7 of Schedule 27 (Notes on Accounts) of the Annual Accounts for the period ended as on 31.03.2007 is on the above account for the period 1st April 1986 to 31st May, 2006 as Badarpur Power Station has been taken over by NTPC w.e.f. 1st June, 2006.
Due to uncertainty of realization of such amount from Government of India, the same had not been recognized as income in the relevant year and it would be recognized as income on realization from the Government.

However, A.O. had treated this amount as income crystallized in the AY 2007-08 and hereon in the assessment.

In this regard, it is submitted that this income will accrue to NTPC only upon sanction by the GOI. As sanction of GOI has not yet been received, there is total uncertainty regarding realization of this amount. Therefore, this amount cannot be considered as real income of NTPC, at best it can be considered as a contingent income till it is sanctioned by the GOI.

NTPC's contention of not recognizing share of profit of Badarpur gets strength from the case of Orissa State Civil Supplies Corporation Ltd v. DCIT, [2003] 259 ITR (A.T.) 0020- wherein the ITAT Cuttak held that:

"Income-tax liability is in respect of the income actually earned by the assessee and not on the receipts, particularly when the assessee is following the mercantile basis of accounting. Even in the cash system of accounting there is no deviation from the general principle that a contingent income is not the income until the contingency has happened."

23. The ld. CIT(A) deleted the addition holding that it is evident that the income that had accrued for the period 01.04.1986 to 31.05.2006 with regard BTPS plant, which was operated by appellant on contract basis, was not recognized in its books by the appellant due to uncertainty of realization of such amounts from the Government of India (CEA), who was owning BTPS. Such income is an income which is contingent on the decision of GOI to sanction the payment to the appellant. It is seen that the Government has not paid the appellant since 01.04.1986 with regard its dues for operation and maintenance of BTPS plant except sum of Rs. 21.37 crores paid during 2003-04 to 2005-06. Therefore, such income is certainly contingent on the Government of India's decision.

24. Having gone through the fact that the amount of Rs.115.5 Cr. pertains to the period 1986 to 2006 and still not been paid by Government of India except Rs.21.37 Cr., the addition made by the Assessing Officer during this year cannot be sustained. Keeping in view, the decision of the Hon'ble Apex Court in the case of Excel Industries Ltd. 358 ITR 295, the order of the ld. CIT(A) is hereby affirmed.

25. The addition of Rs.115,50,00,000/- has been made in the A.Y. 2007-08 as well as A.Y. 2008-09. The ld. CIT(A) for the A.Y. 2008-09 has deleted the addition holding that the same addition has been made for the A.Y. 2007-08. For the A.Y. 2007-08, the ld. CIT(A) deleted the addition which has been a matter for adjudication on merit during the year. Since, we affirmed the order of the ld. CIT(A) for the A.Y. 2007-08, no separate adjudication for the A.Y. 2008-09 is required.

Disallowance of Expenditure related to bond issue:

Ground No. 8 in ITA No. 5704/Del/2015 (Revenue)
Ground No. 6 in ITA No. 6983/Del/2014 (Revenue)
Ground No. 5 in ITA No. 156/Del/2016 (Revenue)
Ground No. 5 in ITA No. 175/Del/2016 (Revenue)

26. The AO observed that the assessee had claimed bond issue and bond servicing expenses. The assessee had issued bonds to institutional investors for capital expenditure of the projects including annual listing fee paid to the stock exchange, trusteeship fees, rating fee, the service charges paid to registrar, etc. The assessee informed that such borrowing cost, which was incurred after commercial operation of the project hence charged in the P&L A/c. The AO held that such expenditure was in connection with issue of shares and hence,

relying upon the decision in the case of Brooke Bond India Ltd. (1997) 225 ITR 0798 (SC), such expenses were capitalized.

27. The ld. CIT(A) deleted the addition holding that the bonds cannot be equated with debentures/ debts. Hence, the reliance on Brooke Bond India Ltd. is misplaced.

28. We find that the CBDT has clarified vide its circular No. 56 dated 19.03.1971 at Sr. No. 45 that "where a company which is already in business incurs expenditure on issue of debentures such expenditure is admissible as a deduction against profits of the year in which it is incurred by virtue of the decision of the Supreme Court in the case of India Cements Ltd. Vs. CIT (1996) 60 ITR 72."

29. In the case of CIT Vs. Southern Petrochemical Industries Corporation Ltd, [2009] 311 ITR 0202, the Hon'ble Madras High court held that expenditure incurred on issue of debenture are revenue expenditure.

30. In the case of CIT Vs. Secure Meters Ltd, [2010] 321 ITR 0611, the Hon'ble Rajasthan High Court held that,

"the debenture when issued were a loan and therefore, whether they were convertible or non-convertible did not militate against the nature of the debenture, being loan and, therefore, the expenditure incurred would be admissible as revenue expenditure."

31. Further, the Hon'ble Delhi High Court has also held in the case of CIT Vs. Thirani Chemical Ltd. (2007) 290 ITR 196 that

the expenditure incurred on the issue of debentures is a permissible deduction.

32. Hence, keeping in view the jurisprudence on this issue as laid down by the various Hon'ble High Courts of Madras, Rajasthan and Delhi and keeping view the judgment of Hon'ble Apex Court and the clarification of the CBDT, we hereby decline to interfere with the order of the ld. CIT(A) on this issue.

Addition of waiver of interest:

Ground No. 7 in ITA No. 5704/Del/2015 (Revenue)

33. The AO observed that the assessee had not recognized interest income of Rs. 275 million for the current year in respect of certain dues of the assessee with Grid Corporation of Orissa Ltd. (GRIDCO). Further, an amount of Rs. 640 million recognized as income in the earlier years has been claimed in P&L account as a deduction. The assessee explained that certain dues of the assessee with Western Electricity Supply Company (WESCO), North Eastern Electricity Supply Company (NESCO) & Southern Electricity Supply Company (SOUTHCO), 3 Distcom companies had become irrecoverable and, therefore, the assessee entered into a tripartite agreement with GRIDCO under which 12.5% Secured Non-Convertible Redeemable Bonds of three companies issued to appellant were transferred to the GRIDCO against settlement of its dues.

34. In the process, the appellant had incurred loss of Rs. 91.5 crores upto 31.03.2007. Accordingly, the appellant had not recognized interest income of Rs. 27.5 crores for the current

year and loss of Rs. 64 crores in respect of interest recognized as income in the earlier years was written off.

35. The AO examined the agreement dated 31.03.2007 and observed that the Board Resolution in this regard was passed only on 23.04.2007. In view of this, relying upon decision in the case of CIT vs. Sarabhai Holdings P. Ltd. 307 ITR 89 (SC), the AO held that as the interest income has already accrued to the appellant company, the same cannot be waived off against revenue. Accordingly, addition of Rs. 91.5 crores was made to the total income.

36. The assessee's submissions on this issue are as under:

"*Grid Corporation of Orissa (GRIDCO), a Govt., of Orissa Undertaking, owed Rs.400 crores to NTPC towards purchase of power. In order to liquidate its liability, GRIDCO transferred bonds worth Rs.400 crores issued to it by distribution companies (distcoms), Western Electricity Supply Company of Orissa Ltd. (WESCO), North Eastern Electricity Supply Company of Orissa Ltd. (NESCO) and Southern Electricity Supply Company of Orissa Ltd. (SOUTHCO) in favour of NTPC. GRIDCO further agreed to service these bonds on fallback basis.*

However, the issuer distcoms did not service these bonds regularly and only partly paid the due interest intermittently. Even redemption value of these bonds was not paid by these companies. NTPC took up the matter with GRIDCO and Orissa Govt. apart from the debenture trustees. As GRIDCO had agreed to service these bonds on fallback basis, some of the amount was also unilaterally adjusted by NTPC against credits due to GRIDCO.

However, neither any further payments were made by GRIDCO or the issuer companies against part redemption or the interest due nor were any credits available for adjustments. As the matter was remaining unresolved despite efforts at local level, regional office level and corporate level and GRIDCO and distcoms were not coming forward to make any payments, NTPC took up the issue again with GRIDCO.

In this regard, meetings were also held on 18.10.2006, 21.12.2006 and 26/27.12.2006 between CMD and Director (Finance), GRIDCO and Director (Commercial), NTPC. NTPC issued notice on 17.01.2007 to GRIDCO for regulation of power. In pursuance of the above notice for regulation and on intervention of Ministry of Power (MoP), a meeting was convened by Secretary (Energy), Govt. of Orissa on 09.02.2007 wherein NTPC reiterated that unless liability under these bonds is met by GRIDCO, NTPC would go ahead with the regulation of power supply to GRIDCO.

Meetings were held on 15.03.2007, 20.03.2007 and 21.03.2007 with GRIDCO and meeting was also held in Ministry of Power, Govt. of India on 21.03.2007 to arrive at one time settlement of outstanding dues.

In these circumstance, it was decided at the 298th meeting of the Board of Directors of NTPC held on 23.03.2007 that NTPC may agree to a one time settlement involving payment of cash by GRIDCO to settle the long pending issue on or before 31.03.2007 and may return the bonds back to GRIDCO. The Chairman and Managing Director (CMD) of the company was authorized to approve the settlement with GRIDCO. Further, it was resolved that on final settlement the status of the same shall be submitted to the Board.

Protracted negotiations were held with GRIDCO and it was settled vide agreement dated 31.03.2007 between NTPC and GRIDCO as under:

a) GRIDCO shall pay Rs. 216 crores to NTPC towards full and final settlement of its dues towards purchase of power covered under the bonds issued by the distcoms after considering the adjustment of Rs.276.70 crores made by NTPC and amount of Rs.110.80 crores paid to NTPC directly by Distcoms.

b) On full payment of above amount by GRIDCO, bonds issued by Distcoms shall be re-transferred to GRIDCO.

This settlement was approved by the CMD of the company on 30.03.2007 and in accordance with the above agreement, GRIDCO paid Rs. 216 crores on 31.03.2007 to NTPC and consequently the bonds were also transferred back to GRIDCO. As a result of this settlement, interest accrued on these bonds amounting to Rs.295 crores was reduced by Rs. 91.50 crores.

As such, the interest income of Rs.27.5 crores for the previous year i.e. AY 2007-08 has not been recognized and R 64.0 crores recognized as income in the earlier years has been charged as revenue expenditure.

The interest income of Rs. 64.0 crores has already been assessed in the relevant year on accrual basis and tax paid thereon. Now during the previous year, this interest amount has been waived as per the settlement between NTPC and GRIDCO, the same has been charged as revenue expenditure in Profit & Loss A/c.

Further, in line with the resolution of the Board meeting 298th meeting the status of the settlement was communicated to the Board in its 300th meeting held on 23.04.2007 and the board noted the position.

Therefore, it can be seen from above facts, the process of settlement of old outstanding dues resulting in waiver of interest amounting to Rs. 91.50 crores had started well before the end of the financial year. In fact mandate of the Board of Directors of the company authorizing the CMD to enter into a settlement with GRIDCO was also obtained on 23.03.2007 and payment against full and final settlement has also been received by NTPC on 31.03.2007.

So, the argument of the AO at para 18.4, page 45 of the assessment order that the company has sought to wipe out the taxability on interest income which had already accrued to it upto 31.03.2007 on the pretext of an agreement dated 31.03.2007 being the last day of the accounting year 2006-07 and a board resolution dated 23.04.2007 being after the year is factually incorrect. The settlement arrived at with GRIDCO is a commercially prudent decision taken after all other avenues were explored to protect the interests of the company, which has resulted in settlement of the old outstanding dues.

Further, section 36(1)(vii) of the IT Act provides for deduction of any bad debt or part thereof which is written off as irrevocable in the accounts of the assessee. Hon'ble Delhi High Court in the case of CIT vs. Samara India (P) Ltd. [2013] 356ITR 0012- held that as per the amended provisions of section 36(1)(vii) of the IT Act that it is not necessary for the assessee to prove that the debt, in fact has become irrecoverable. It is enough if the bad debt is written off as irrecoverable in the accounts of the assessee.

37. The ld. CIT(A) held and we concur,

it is a fact that, the assessee had huge outstanding dues with three Distcom companies, namely, WESCO, NESCO and SOUTHCO. The assessee had undisputedly accounted for such

income in the earlier years. However, as these dues could not be realized even after long persistent efforts, with the mediation of Government of Orissa through GRIDCO, a Tripartite agreement was entered into which was mediated by Ministry of Power, Govt. of India by which a settlement was reached on 21.03.2004 for one-time settlement of outstanding dues.

38. The assessee is a public sector company of the Ministry of Power and, accordingly, the decision of Ministry of Power is binding on its Board, which in the meeting dated 23.03.2007, agreed for such one-time settlement by which the bonds issued by the three Distcom companies to the appellant company were to be returned to GRIDCO in lieu of Rs. 216 crores to be paid by GRIDCO to appellant.

39. In the process, the appellant had to waive off interest of Rs. 91.50 crores. Therefore, it is evident that what the assessee had effectively done was to have written off of the bad debts u/s 36(1)(vii) in respect of interest income, which was offered for tax in the earlier years aggregating to Rs. 64 crores. Further, debt in respect of income of Rs.27.5 crores for the current year was also written off. Such liabilities have been duly written off in the books. Under the circumstances, the inferences of the AO on the basis of endorsement of Board's Resolution dated 23.04.2007 is of no value, since the only requirement u/s 36(1)(vii) is to actually write off the liabilities in the books and nothing more. The reliance is being placed on the order of the Hon'ble Supreme Court in the case of TRF Ltd. vs. CIT, 321 ITR (SC). In the result, the appeal of the Revenue on this ground is dismissed.

AS-15- Employee Benefits:

Ground No. 7 in ITA No. 5718/Del/2015 (Assessee)

40. It was observed by the AO that the appellant had claimed an amount of Rs. 155.3 crores in the computation of income towards the deduction on account of certain liabilities including Leave Travel Concession (LTC) - a short term employee benefit for earlier years liabilities amounting to Rs. 90.2 crores, which was adjusted against opening balance of General Reserve as per the transitional provisions of AS 15 (revised 2005). The AO also observed that the appellant had claimed an amount of Rs. 6.6 crores relating to construction activity, which was transferred to capital work-in-progress. Before the AO, it was submitted that the valuation of liability in respect of LTC as on 01.04.2006 amounting to Rs. 90.2 crores was computed on actuarial valuation. Accordingly, it was submitted that the same being based on scientific valuation, was an ascertained liability and allowable. The AO, however, observed that the appellant's claim tantamounts to claim of deduction for earlier years liability, which was not allowable in the mercantile system of accounting. Accordingly, addition of Rs. 155.3 crores was made to the total income.

41. The ld. CIT(A) confirmed the action of the Assessing Officer on the grounds that the provisions of Income-tax Law and the AS-15 on which the appellant has relied upon and the appellant has not taken the consistent stand in the matter. It was held that while in the balance sheet (scheduled- 27), an amount of Rs. 90.2 crores has been shown towards LTC liability, in its submissions, the assessee has covered various other

employee benefits including retirement benefits like Long Service Award, Economic Rehabilitation Scheme, Earned Leave and LTC, etc. and no details were produced.

42. Secondly, the ld. CIT(A) held that the assessee has relied upon the transitional provisions of the AS-15. On careful perusal of AS-15 issued by ICAI, it is seen that in the said accounting standard-15, employee benefits have been classified as under:

(i) Short term employee benefits;
(ii) Long term employee benefits;
(iii) Post employee defined benefits plan; and
(iv) Post employee defined contribution plans.

43. The transitional provisions of the AS-15 apply only in respect of long term benefit plans including defined benefit plans and termination plans. With regard to the short term employee benefit plan, the AS-15 provides as under:

"Accounting for short-term employee benefits is generally straight forward because no actuarial assumptions are required to measure the obligation or the cost and there is no possibility of any actuarial gain or Employee Benefits/loss"

44. It was held that the Schedule 27 to the balance sheet, it has been mentioned that such liability was in the nature of LTC which was a short term employee benefit. Under the circumstances, in view of the provisions of AS-15, as no actuarial assumption was required, there was no possibility of actuarial gains or employees benefits/loss. Under the

circumstances, the claim of the assessee is not even as per AS-15.

45. The assessee submitted as under:

"Accounting Standard (AS) 15, Employee Benefits (revised 2005), issued by the council of the Institute of Chartered Accountants of India, came into effect in respect of accounting periods commencing on or after April 1, 2006. In order to comply with the measurement and disclosure requirements of the revised AS-15, the company provided liability against employee benefits (including retirement benefits like Long Service Award, Economic Rehabilitation Scheme, Earned Leave and Leave Travel concession etc.) The liability created against these employee benefits is an ascertained liability determined on a scientific basis.

Further, as per transitional provisions of the AS-15, an amount of Rs.198.8 crores, related to period upto 31.03.2006 was adjusted against the General Reserve of the company. In line with the regu/Vemenf of AS-15 this amount has not been debited in the Profit & Loss account of the company, the same has been claimed by NTPC in the computation of the income. This expenditure being an ascertained liability determined on a scientific basis is an allowable expenditure u/s 37 of the IT Act. Out of the total amount of Rs.198.8 crores, an amount of Rs.43.5 crores related to leave liability has been added back in the computation of income u/s 43B.

However, the AO has disallowed the net expenditure of Rs.155.3 crores (Rs.198.8 crores – Rs.43.5 crores) taking the plea that the above expenditure has not been incurred in the previous

year. In this regard, it is submitted that although these expenses pertain to periods before 01.04.2006, liability against these expenses has been crystallized in the AY 2007-08 due to change in the provisions of AS-15 on Employee Benefits."

46. The ld. AR also relied on the order of the co-ordinate Bench of Tribunal in the case of M/s Indus Towers Ltd. Ltd. (Formerly know as Barati Infratel Ltd.) Vs. DCIT in ITA No. 425/Del/2018 vide order dated 15.11.2021, M/s Glaxo Smithkline Consumer Healthcare Ld. Vs Addl. CIT 25 ITR (Trib.) 100 (ITAT Chandigarh) and NMDC Ltd. Vs. JCIT 2014(3) TMI 682. We find the facts are differentiable.

47. We find that the LTC benefit is claimed by the assessee on an actual basis which can be easily quantifiable. Similarly, the other short term benefits are generally straight forward and no actuarial assumptions are required to measure the obligations. These amounts are such that they are quantifiable on actual basis or on accrual basis. Hence, we decline to interfere with the order of the ld. CIT(A) on this ground.

<u>Disallowance of cost of Mobile Phones:</u>

Ground No. 8 in ITA No. 5718/Del/2015 (Assessee)

48. The AO observed that the assessee had made a change in the accounting policy with regard the cost of mobile phones reimbursed to certain category of employees, by which such cost was treated as revenue expenditure. The AO, however, held that such mobile phones were in the nature of assets on which depreciation could have been claimed by the assessee. Accordingly, such expenses were disallowed.

49. The assessee submitted as under:

"AO has made a disallowance of Rs.20,00,000/- considering the reimbursement of cost of mobile by NTPC to its employees as a capital expenditure. This issue has been discussed by the AO at para 17 on page nos. 43-44 of the assessment order.

NTPC has a policy of reimbursing the cost of mobile phones to a certain specified categories of employees subject to individual monetary limit. The cost of mobile phone is reimbursed to such specified employees against the documentary evidence of the expenditure incurred subject to the monetary limit specified by the company for such employees. The monetary ceiling of reimbursement of the cost of mobile phones for more than 90% of the entitled employees is Rs.4000/- only.

As the amount of expenditure involved is less than Rs.5,000/-, management of the company keeping in view the principle of materiality, decided to charge off the cost of purchase of mobile phones to expenditure in the year of its payment itself.

In the present case as the value of the mobile phone is not material and keeping records of such assets and getting the same physically verified is very difficult keeping in view its large numbers, the management decided to charge off the cost of purchase of mobile phones to expenditure. The materiality concept of accounting provides that if the amount involved is small, changing its accounting will not mislead the readers of the financial statements and cost of its proper accounting outweighs the benefits thereof, then other accounting principles may be ignored."

50. In the peculiar facts and circumstances of the instant case wherein,

a. The cost of the mobile phones is reimbursed.
b. The mobile phones do not augment an asset base on the company.
c. The lifetime, durability and working capability is for shorter period.
d. The amount is spent for running the business to have regular communication of the employees.
e. The value of the mobiles after a short period is abysmally low.
f. The change in the accounting policy doesn't alter the financials.
g. The impact over a period is revenue neutral.

and hence, we hold that the expenditure of purchase of mobiles on annual basis for utilization of staff can be treated as revenue in nature in the hands of the company. The Assessment Years wherein the cost of mobile phones is treated as depreciation in each year would be allowable.

51. The appeal of the assessee on this ground is allowed.

<u>Disallowance on account of Employee Benefits:</u>

Ground No. 7 in ITA No. 6983/Del/2014 (Revenue)
Ground No. 4 in ITA No. 298/Del/2016 (Assessee)
Ground No. 5 in ITA No. 299/Del/2016 (Assessee)

52. The issue of employee benefits similar to the issue of the "Employee Benefit" dealt above in this order. Following the

same ratio, we decline to interfere with the order of the ld. CIT(A).

Interest – Arbitration Award:

Ground No. 5 in ITA No. 7063/Del/2014 (Assessee)
Ground No. 5 in ITA No. 298/Del/2016 (Assessee)

53. The assessee has claimed the liability against arbitration award received during the year on disputes with contractors and also challenged the arbitration award by filing appeal before Higher authority. All the claims made by the assessee are revenue in nature and the same was also undisputed by the AO and the ld. CIT(A). The AO raised the issue of allowability of expenditure in the current year since the arbitration award is challenged before higher authority and alleged that the liability is yet to be crystallized. The assessee relied upon the judgment of Navjivan Roller Flour & Pulse Limited Vs. DCIT (2009) 315 ITR 190 (Guj.) wherein it has been held that liability got crystallized when the arbitration award is received subsequent appeal does not impact the allowability of expenditure.

54. The ld. CIT(A) has relied upon the judgment of Delhi High Court in the case of Fazilka Electric Supply Co. Ltd. 143 ITR 551 which held that when the award is challenged before Higher authority, the liability on the date of award will be treated as contingent liability and hence the disallowance was confirmed. Since, the order of the ld. CIT(A) is based on the decision of the Hon'ble Jurisdictional High Court, we decline to interfere with the order of the ld. CIT(A).

Disallowance of payment to contractors:

Ground No. 6 in ITA No. 7063/Del/2014 (Assessee)
Ground No. 6 in ITA No. 298/Del/2016 (Assessee)

55. During the year, the unsettled liabilities for price variation in case of contracts are accounted for on estimated basis as per the times of contracts. It was submitted by the assessee that keeping in view the assurance given to the CAG, the accounting policy was changed irrespective of the fact that the claims have been received/accepted by the company considering the applicable indices and formulae provided in the respective contracts. The AO held that estimation of expenditure on such claims being raised by the contractors and non-finality with regard to acceptance of the same by the assessee, the expenditure partakes the character of contingent liability and hence treated the same as non-allowable expenditure.

56. The ld. CIT(A) confirmed the action of the Assessing Officer holding that it was clear that the liabilities are estimated on the basis of times of contract and no claims have been received from the concerned contractors. Liabilities were also not accepted by the assessee and there were no claims of price variation as received from the contractors nor accepted by the assessee.

57. Before us, it was submitted that assessee is bound to follow the directions of the CAG Audit being a PSU and hence the liabilities have been duly charged in the P&L account. The assessee is at liberty to follow the accounting system, however for determination of the taxable profit, the contingent amount

needs to be added back to the taxable profits in the computation of the income for tax purposes.

58. As per the Accounting Standard (AS-22) which deals with accounting for tax on income made to public reveals that taxable income is calculated in accordance with tax laws. In some circumstances, the requirements of these laws to compute taxable income differ from the accounting policies applied to determine accounting income. The effect of this difference is that the taxable income and accounting income may not be the same.

59. The differences between taxable income and accounting income can be classified into permanent differences and timing differences. Permanent differences are those differences between taxable income and accounting income which originate in one period and do not reverse subsequently. For instance, if for the purpose of computing taxable income, the tax laws allow only a part of an item of expenditure, the disallowed amount would result in a permanent difference.

60. Timing differences are those differences between taxable income and accounting income for a period that originate in one period and are capable of reversal in one or more subsequent periods. Timing differences arise because the period in which some items of revenue and expenses are included in taxable income do not coincide with the period in which such items of revenue and expenses are included or considered in arriving at accounting income. For example, machinery purchased for scientific research related to business is fully allowed as deduction in the first year for tax purposes whereas the same

would be charged to the statement of profit and loss as depreciation over its useful life. The total depreciation charged on the machinery for accounting purposes and the amount allowed as deduction for tax purposes will ultimately be the same, but periods over which the depreciation is charged and the deduction is allowed will differ. Another example of timing difference is a situation where, for the purpose of computing taxable income, tax laws allow depreciation on the basis of the written down value method, whereas for accounting purposes, straight line method is used.

61. Hence, keeping in view the Accounting Standards, the expenditure claimed by the assessee is contingent in nature, not even remotely crystallized, we hereby decline to interfere with the order of the ld. CIT(A).

Non-deduction of TDS on Load Dispatch Charges:

Ground No. 6 in ITA No. 156/Del/2016 (Revenue)
Ground No. 6 in ITA No. 175/Del/2016 (Revenue)

62. The Assessing Officer observed that the assessee has claimed expenses of Rs. 98.35 crores under the head 'Load Dispatch Center' (LDC) charges on which no TDS was deducted by it. The assessee's plea was that such payment was in the nature of reimbursement of system operation charges, market operation charges and one-time registration charges and fibre optic charges payable to Power System Operation Corporation Ltd. (POSOCO), which are payable as statutory charges as specified by CERC. Relying upon Hyderabad ITAT's decision in the case of DCIT vs. Central Power Distribution Co., Hyderabad in ITA No. 1798/Hyd./2012, the AO held that such payment was

covered u/s 194C. Accordingly, disallowance of Rs. 98.35 crore was made.

63. We have gone through the submission of the assessee and the facts on record.

64. The Load Dispatch Centre charges, as determined by the Central Electricity Regulatory Commission (CERC), are paid by NTPC to M/s Power System Operation Corporation Limited (POSOCO), a wholly owned subsidiary of M/s PGCIL (Govt. of India Enterprise). The LDC shall perform following functions:

a. Optimum scheduling and dispatch of electricity within the region in accordance with contracts entered into with licensees or generating companies.
b. Monitor grid operations
c. Keep accounts of electricity transmitted through regional grid
d. Exercise supervision and control over inter-state transmission system
e. Carry our real time operations for grid control and dispatch of electricity through secure and economic operation of regional grid in accordance with Grid Standards and the Grid Code.

65. LDC may give necessary directions and exercise supervision and control to the generating companies or transmission licensees for ensuring stability of the grid operations and for achieving maximum economy and efficiency in the operations of the power system in the region under its control. The generating companies or transmission licensees

shall comply with the directions issued by the LDC. There is a provision of penalty also for failing to comply with the directions of the LDC. Thus, it can be held that the LDC is a regulator and controller for optimum scheduling and dispatch of electricity and discharging a statutory function. Payments made to LDC are statutory payments and not for any service rendered. Had it been a payment towards services, the users of the services (generating companies/ transmission licensees) could have claimed compensation for deficiency in service instead of the LDC being allowed to impose penalty for non-compliance of its directions.

66. We find that the judgment in the case of Central Power Distribution Co. dealt with a basket of services received by APTRANSCO. In this case, the assessee was providing other services also in addition to the payment of transmission charges which is clear from the following:

"15. From the assessee's agreement with APTRANSCO, it is noticed that the services rendered by the payees not only included the services in connection with transmission of the power but also several other distinct services such as maintenance of metering system, noting down meter reading, sealing and resealing of meters etc. It is thus evident that the nature of services received by the assessee under such agreement were much more than those received in the case of Jaipur Vidyut Vitran Nigam Ltd., (supra) which were confined only to purchasing power from the generation company and selling it to consumers through transmission network. This factual position could not be controverted. The assessee chose to stuck to its stand that the services were similar to those in

the case of Jaipur Vidyut Vitran Nigam Ltd., (supra) without pointing out that the additional services as noted above were present in the case of Jaipur Vidyut Vitran Nigam Ltd. After reading major part of the order of Jaipur Vidyut Vitran Nigam Ltd., he failed to prove that such additional services were also there in that case. Since host of other services were provided to the assessee, apart from those received by Jaipur Vidyut Vitran Nigam Ltd., it becomes manifest that at this preliminary stage the conclusion drawn in that case cannot be straight away applied to the instant case inasmuch as it is a question of determination of nature of services which decides about the section under which tax is deductible, if required. As such it cannot be held that prima facie the facts of these two cases are matching. Being so, the assessee is liable to deduct TDS u/s 194C of the Act."

67. Further, we find that similar issue has been adjudicated in the following cases:

- M/s Jaipur Vidyut Vitran Nigam Ltd. Vs. DCIT 123 TTJ 888
- ACIT vs. Dakshin Haryana Bijli Vitran Nigam Ltd. in ITA no. 1388/Del/2011
- Gulbarga Electricity Supply Co. Ltd. Vs. ITO in ITA no. 839 to 844/Bang/2011)
- Bangalore Electricity Supply Co. Ltd. Vs. ITO (TDS) in ITA Nos. 530 to 535/Bang/2010

68. Keeping in view the above, we hereby hold that the provisions of TDS are not attracted on these payments.

Community Development Expenses:

Ground No. 6 in ITA No. 298/Del/2016 (Assessee)
Ground No. 7 in ITA No. 299/Del/2016 (Assessee)

69. The Assessing Officer observed that the assessee had claimed CSR expenses of Rs.79.06 crores towards community development & welfare expenses in accordance with Deptt. Of Public Enterprises Guidelines dated 09.04.2010, for education, health, drinking water, sanitation etc. The AO held that such expenses were not allowable u/s 37 and moreover the DPE guidelines refer to 'net profit' for the purpose of CSR liability as 'profit after tax'. It was also observed that for CSR expenses, there is a separate mechanism in the form of section 35AC and section 80G.

70. The ld. CIT(A) confirmed the addition holding that the core business of the assessee is generation of Thermal Electrical Power. Therefore, spending financial assistance to Ramkrishna Mission, renovation of Swami Vivekanand centre, sponsoring vocational training program, organizing health clinics, construction of house in Leh and various vocational training programmes, cannot be considered to be wholly and exclusively incurred for earning business income. These expenses were incurred on the direction of DPE, but are clearly in the nature of 'below the line' expenses whose very basis itself was 'Profit after tax' and cannot be held as tax- deductible.

71. The issue of deduction of CSR expenses read with Explanation 2 to Section 37(1) w.e.f. 1st April 2015 has been examined by the Co-ordinate bench of this Tribunal in the case

of ACIT vs. Jindal Power Ltd. (2016) 70 taxmann.com 389 (Raipur Tribunal) wherein it was held as under:-

"*18. We have also take note of the fact that in view of insertion of Explanation 2 to Section 37(1), with effect from 1st April 2015, which provides that "for the removal of doubts, it is hereby declared that for . the purposes of sub-section (1), any expenditure incurred by an assessee on the activities relating to corporate social responsibility referred to in section 135 of the Companies Act, 2013 (18 of2013) shall not be deemed to be an expenditure incurred by the assessee for the purposes of the business or profession", the expenses incurred in discharging corporate social responsibility are not deductible in computation of business income. Learned Departmental Representative submits that this amendment should be treated as clarificatory in nature, as it is stated to be in so many words, and we should, therefore, hold that the expenses in discharging corporate social responsibility were outside the ambit of expenses deductible under section 37(1).*

19. We are unable to see legally sustainable merits in this plea either. The amendment in the scheme of Section 37(1), which has been introduced with effect from 1st April 2015, cannot be construed as to disadvantage to the assessee in the period prior to this amendment. This disabling provision, as set out in Explanation 2 to Section 37(1), refers only to such corporate social responsibility expenses as under Section 135 of the Companies Act, 2013, and, as such, it cannot have any application for the period not covered by this statutory provision which itself came into existence in 2013. Explanation 2 to Section 37(1) is, therefore, inherently incapable of retrospective application any further. In any event, as held by Hon'ble Supreme Court's five judge constitutional bench's landmark judgment, in the case of CIT v. Vatika Townships Pvt. Ltd (2014) 367 ITR 466/227 Taxman 121/49 taxmann.com 249 (SC), the legal

position in this regard has been very succinctly summed up by observing that "Of the various rules guiding how legislation has to be interpreted, one established rule is that unless a contrary intention appears, legislation is presumed not to be intended to have a retrospective operation. The idea behind the rule is that a current law should govern current activities. Law passed today cannot apply to the events of the past. If we do something today, we do it keeping in view the law of today and in force and not tomorrow's backward adjustment of it. Our belief in the nature of the law is founded on the bedrock that every human being is entitled to arrange his affairs by relying on the existing law and should not find that his plans have been retrospectively upset. This principle of law is known as lex prospicit non respicit: law looks forward not backward. As was observed in Phillips v. Eyre [, a retrospective legislation is contrary to the general principle that legislation by which the conduct of mankind is to be regulated when introduced for the first time to deal with future acts ought not to change the character of past transactions carried on upon the faith of the then existing 'taw." It may appear to be some kind of a dichotomy in the tax legislation but the well settled legal position is that when a legislation confers a benefit on the taxpayer by relaxing the rigour of pre-amendment law, and when such a benefit appears to have been the objective pursued by the legislature, it would be a purposive interpretation giving it a retrospective effect but when a tax legislation imposes a liability or a burden, the effect of such a legislative provision can only be prospective. We have also noted that the amendment in the scheme of Section 37(1) is not specifically stated to be retrospective and the said Explanation is inserted only with effect from 1st April 2015. In this view of the matter also, there is no reason to hold this provision to be retrospective in application. As a matter of fact, the amendment in law, which was accompanied by the statutory requirement with regard to discharging the corporate social responsibility, is a disabling provision which puts an additional tax

burden on the assessee in the sense that the expenses that the assessee is required to incur under a statutory obligation in the course of his business are not allowed deduction in the computation of income. This disallowance is restricted to the expenses incurred by the assessee under a statutory obligation under section 135 of Companies Act 2013, and there is thus now a line of demarcation between the expenses incurred by the assessee on discharging corporate social responsibility under such a statutory obligation and under a voluntary assumption of responsibility. As for the former, the disallowance under Explanation 2 to Section 37(1) comes into play, but, as for latter, there is no such disabling provision as long as the expenses, even in discharge of corporate social responsibility on voluntary basis, can be said to be "wholly and exclusively for the purposes of business". There is no dispute that the expenses in question are not incurred under the aforesaid statutory obligation. For this reason also, as also for the basic reason that the Explanation 2 to Section 37(1) comes into play with effect from 1st April 2015, we hold that the disabling provision of Explanation 2 to Section 37(1) does not apply on the facts of this case. "

72. In the absence of any contrary judgments of either Hon'ble jurisdictional High Court or any other Hon'ble High Courts, we hereby direct the AO to delete the disallowance.

<u>Non-deduction of TDS on bank guarantee fees:</u>

Ground No. 7 in ITA No. 298/Del/2016 (Assessee)
Ground No. 8 in ITA No. 299/Del/2016 (Assessee)

73. The AO made disallowance u/s 40(a)(ia) of the Income Tax Act, 1961 holding that the assessee has not deducted TDS on bank guarantee payment. It was held that such default was not

covered within the Notification No. 56/2012 dated 31.12.2012 r.w.s. 197A(IF), which was effective from 01.01.2013.

74. We find that the assessee has not made any payment to banks towards bank guarantee commission, rather the banks have directly debited the charges to the assessee's account. So, the assessee did not get any opportunity to deduct TDS on such charges. While the bank guarantees have been directly debited by the bank itself and charged to the assessee's account, deducting the tax again to the assessee would amount to double deduction. Further, banks have accounted for the Bank Guarantee Commission in their income and Income Tax thereon has been paid by recipient banks after accounting of Guarantee commission. As the banks have already paid Income Tax on this amount, the revenue has been collected and the due tax paid, therefore, the payer cannot be again called in to pay the tax on the same amount.

75. The appeal of the assessee on this ground is allowed.

<u>Reduction in Sales:</u>

Ground No. 3 in ITA No. 5718/Del/2015 (Assessee)
Ground No. 2, 3 & 6 in ITA No. 4083/Del/2014 (Assessee)

76. At the outset, the ld. AR submitted that the ground is no more relevant. Hence, being dismissed.

Enhanced depreciation:

Ground No. 5 in ITA No. 4083/Del/2014 (Assessee)
Ground No. 3 in ITA No. 7063/Del/2014 (Assessee)

77. At the outset, the ld. AR submitted that the ground is no more relevant. Hence, being dismissed.

ITA No. 5392/Del/2017: A.Y. 2010-11
ITA No. 5393/Del/2017: A.Y. 2011-12
ITA No. 5394/Del/2017: A.Y. 2012-13
ITA No. 2295/Del/2018: A.Y. 2008-09

78. In view of the above orders, the penalty levied u/s 271(1)(c) is liable to be deleted.

79. In the result, the appeals of the assessee are partly allowed and the appeals of the Revenue are dismissed.

Order Pronounced in the Open Court on 05/08/2022.

Sd/-	**Sd/-**
(A.D. Jain) **Vice President**	**(Dr. B. R. R. Kumar)** **Accountant Member**

Dated: 05/08/2022

Subodh Kumar, Sr. PS

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

ASSISTANT REGISTRAR