IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'G' NEW DELHI

BEFORE SHRI G. D. AGRAWAL, VICE PRESIDENT
AND
MS SUCHITRA KAMBLE, JUDICIAL MEMBER

I.T.A. No. 3481/DEL/2016 (A.Y 2011-12)

Noida Power Company Ltd. Commercial Complex, H-Block, Alpha-II, Sector Greater Noida AAACN4984D **(APPELLANT)**	Vs	JCIT Range-3 Noida **(RESPONDENT)**

Appellant by	**Ms. Sushmita Basu, CA**
Respondent by	**Sh. S. S. Rana, CIT DR**

Date of Hearing	**13.03.2019**
Date of Pronouncement	**10.04.2019**

ORDER

PER SUCHITRA KAMBLE, JM

This appeal is filed by the assessee against the order dated 31/3/2016 passed by CIT(A)-1, Noida for Assessment Year 2011-12.

2. The assessee is a company engaged in the business of distribution of power in the Greater Noida area. On 29.09.2011, the assessee filed its income declaring NIL income after set off of brought forward losses of Rs. 20,78,56,147/- and brought forward depreciation of Rs. 36,90,610/- and Book Profit u/s 115JB at Rs. 27,33,44,869/-. The case was processed u/s 143(!). Thereafter, the case was selected for compulsory Scrutiny and notice u/s 143(2) dated 20.09.2012. Thereafter, the assessee e-filed revised return on 31.03.2013 showing NIL income after set off of brought forward losses of Rs. 16,47,92,260/- and brought forward depreciation of Rs. 36,90,610/- and Book Profit u/s 115JB at Rs. 27,33,44,869/-. The reason for filing revised return

was stated that company has filed revised return claiming further deduction on account of power purchase price not debited to Profit and Loss account which was less claimed in the Original Return. Notice u/s 142(1) dated 06.11.2013 along with questionnaire was issued and served upon the assessee. In response, Company Secretary and CA attended on behalf of the assessee from time to time and furnished the details / explanation as called for during the course of assessment proceedings. The books of accounts and bills/vouchers were also produced and verified by the Assessing Officer. The Assessing Officer completed the assessment on 21.03.2013 and made addition of Rs. 8,02,20,769/- regarding power purchase price not debited to P & L account by the Assessee. The Assessing Officer further made addition of Rs. 16,84,82,870/- towards on account of set-off of brought forward business losses & unabsorbed Dep. as well as disallowance u/s 14A amounting to Rs. 53,624/- and disallowance of transmission charges u/s 40(a)(ia) amounting to Rs. 18,41,83,032/-. Being aggrieved by the Assessment Order the assessee filed appeal before the CIT(A). The CIT(A) by following earlier years order dismissed the appeal of the assessee

3. At the time of hearing, the Ld. AR submitted that Ground No. 1 & 2 are general in nature. As Ground No. 3 (a), 3(b), 3(c), 4(a), 4(b), the Ld. AR submitted that the same are not pressed/withdrawn. The reasons for not pressing these ground has been submitted by the Ld. AR are here in below:

"i) Noida Power Company Limited entered into an agreement with Uttar Pradesh State Electricity Board [now known as Uttar Pradesh Power Corporation Limited (UPPCL)] to purchase power. UPPCL raised invoices on the assessee for supply of power at marginal cost being a higher rate. The assessee disputed the rate before the appropriate forum formed for this purpose. For income tax purpose, following mercantile system of accounting, the assessee claimed power purchase cost at the rates billed by UPPCL. However, in its books of accounts the assessee debited the power purchase

cost at the rate provisionally determined by Uttar Pradesh Electricity Regulatory Commission (UPERC) which was lower than the invoice amount.

The Assessing Officer allowed the power purchase cost at the rates at which power purchase was debited in the profit and loss account and not the invoiced amount as claimed by the assessee. The assessee contested the action of the Assessing Officer and hence these grounds of appeal.

ii) As stated above, the assessee challenged the rates at which UPPCL raised the invoices and the matter travelled before the UPERC for determination of the final rate.

iii) UPERC decided the rate issue in favour of the assessee and UPPCL did not file any appeal against the same, the issue has attained finality. Therefore, the present grounds 3(a) to 4(b) claiming billed amount have become academic and infructuous for the year.

iv) It may not be out of place to mention that recently, the appeal of UPPCL in the earlier years on the rate issue which travelled to Supreme Court has been dismissed on the grounds of non-prosecution.

v) Without prejudice t the above, the assessee craves liberty to revive the appeal in the event the Hon'ble Supreme Court decides to re-consider the rate issue on merits for the earlier years."

Therefore, Ground No. 1 to 4(b) are dismissed.

4 Remaining grounds of appeal contested before us are as under:-

"5(a) That the Learned CIT(Appeals) erred in not adjudicating Ground No. 3 taken by the appellant before him relating to allowing setoff of brought forward business loss and depreciation allowance while calculating the total income taxable.

5(b) That on facts and circumstances of the case Assessing Officer erred in not allowing setoff of brought forward business loss and depreciation allowance while calculating the total income taxable under the provisions of the Act other than section 115JB thereof in the impugned order under appeal.

6(a) That on the facts and in the circumstances of the case, the Learned CIT(Appeals) without application of mind erred in confirming the action of Assessing Officer in disallowing additional sum of Rs. 53,624 u/s 14 r.w. Rule 8D on the wrong pretext that the issue has been decided against the appellant by Hon'ble ITAT.

6(b) That the Learned CIT(Appeals) erred in conf rming the action of the Assessing Officer in invoking the provisions of Rule 8D of the Income-tax Rules, 1962 for arriving at the amount disallowable u/s. 14A of the Act without satisfying the pre-conditions for application of the said provisions.

7(a) That on the facts and in the circumstances of the case, the learned CIT (Appeals) erred in holding that the appellant is liable to deduct tax at source under section 194J of the Act on the transmission/wheeling charges purportedly amounting to Rs. 18,41,83,032 and accordingly disallowance was warranted u/s 4o(a)(ia) of the Act.

7(b) Tha the Learned CIT(A) erred in confirming the action of the Assessing Officer in disallowing the transmission/wheeling charges u/s 40a(ia) of the Act without appreciating the fact that the appellant has not been held as assesse in default u/s 201(1)/ 20i(iA) of the Act for the year under consideration.

7(c) Without prejudice to the above, the CIT(A) failed to appreciate that out of the said amount of Rs. 18,41,83,032, the sum of Rs. 9,70,000 and Rs. 61,86,000 respectively are paid on account of application fees and operating charges which in any event, cannot be covered within the purview of section 194J of the Act.

7(d) Without prejudice to the above, the learned CIT (Appeals) failed to appreciate that out of the said amount of Rs. 18,41,83,032 the appellant, in any event, is not liable to deduct tax on an aggregate amount of Rs. 6,55,09,814 which represents reimbursement of expenses.

8. That on the facts and in the circumstances of the case and in law, the Learned CIT(Appeals) without application of mind erred in confirming the action of Assessing Officer in quantifying book profit u/s 115JB of the Act to be Rs. 27,34,44,869 instead of Rs. 27,33,44,869.

9. That on the facts and in the circumstances of the case, the Learned CIT(Appeals) erred in confirming the action of As essing Officer in charging interest u/s. 234B and u/s. 234D of the Act at Rs. 3 35,89,080 and Rs. 4,623 respectively.

5. With regard to ground Nos.5, 5(a) and 5(b), it is stated by the Ld. AR that the assessee had raised the above issue before the learned CIT(A) vide ground No.3. However, the same remained to be adjudicated. Therefore, the CIT(A) may be directed to adjudicate ground No.3 raised before him. The Ld. DR had no objection to the above request of the assessee's counsel.

6. We have carefull considered the submissions of both the sides and have also gone through the grounds of appeal raised before the CIT(A) as well as his order. We find that in the grounds of appeal before the CIT(A), ground No.3 reads as under :-

> *"3. That on facts and circumstances of the case Assessing Officer erred in not allowing setoff of brought forward business loss and depreciation allowance while calculating the total income taxable under the provisions of the Act other than section 115JB thereof in the impugned order under appeal."*

However, the CIT(A) at page 2 of his order vide paragraph 5 adjudicated ground No.2 while at paragraph 6 ground No.4. Thus, it is evident that ground No.3 has not been adjudicated by him. In view of the above, we allow ground Nos.5, 5(a) and 5(b) of assessee's appeal by directing the CIT(A) to adjudicate ground No.3 raised before him.

7. Ground Nos. 6(a) and 6(b) are with regard to disallowance under Section 14A amounting to Rs.53,624/-.

8. We have heard the arguments of both the sides and perused the material placed before us. We find that during the year under consideration, the assessee has earned total dividend income of Rs 1,60,329/- from the units of UTI. The assessee himself has offered the disallowance under Section 14A amounting to Rs.42,803/-. The Assessing Officer has worked out the disallowance under Rule 8D at Rs.96,427/- and accordingly, he made the additional disallowance of Rs.53,624/- (96,427 – 42,803). Section 14A reads as under :-

> *"14A. Expenditure incurred in relation to income not includible in total income.—*
>
> *(1) For the purposes of computing the total income under this Chapter, no deduction shall be allowed in respect of expenditure incurred by the assessee in relation to income which does not form part of the total income under this Act.*
>
> *(2) The Assessing Officer shall determine the amount of expenditure incurred in relation to such income which does not form part of the total income under this Act in accordance with such method as may be prescribed, if the Assessing Officer, having regard to the accounts of the assessee, is not satisfied with the correctness of the claim of the assessee in respect of such expenditure in relation to income which does not form part of the total income under this Act.*
>
> *(3) The provisions of sub-section (2) shall also apply in relation to a case where an assessee claims that no expenditure has been*

incurred by him in relation to income which does not form part of the total income under this Act:

Provided *that nothing contained in this section shall empower the Assessing Officer either to reassess under section 147 or pass an order enhancing the assessment or reducing a refund already made or otherwise increasing the liability of the assessee under section 154, for any assessment year beginning on or before the 1st day of April, 2001."*

From sub-section (2) above, it is evident that the Assessing Officer shall determine the amount of expenditure incurred for earning of exempt income in accordance with such method as may be prescribed if he is not satisfied with the correctness of the claim of the assessee in respec of such expenditure in relation to exempt income. Admittedly, the method of disallowance is prescribed under Rule 8D. However, the Assessing Officer will invoke Rule 8D only when he records that he is not satisfied with the correctness of the claim of the assessee in respect of such expenditure. In the case under appeal, we do not find any proper satisfaction having been recorded by the Assessing Officer in the light of Section 14A(2) It is also stated by the Ld. AR that in the preceding as well as subsequent years, the disallowance made by the assessee was accepted by the Assessing Officer himself and no further disallowance has been made by invoking Rule 8D. In view of the above, we deem it appropriate to delete the additional disallowance of Rs.53,624/- made by the Assessing Officer.

9. As regards Ground No. 7 (a) to 7(d) relating to disallowance under Section 40(a)(ia) for non-deduction of tax on payment of transmission charges amounting to Rs. 18,41,83,032/-, the Ld. AR submitted that the issue is covered in favour of the assessee by the decision of the Tribunal in assessee's own case. The Ld. DR relied upon the Assessment Order and the order of the CIT(A).

10. We have heard both the parties and perused all the relevant material available on record. The Tribunal in A.Y. 2012-13 being ITA No. 4878/Del/2016 held as under:

17. We have heard both the parties and perused all the records. As regards Ground Nos. 1, 2, 3, 4(a), 4(b), 5(a) and 5(b) are not pressed by the Ld. AR as the same are academic and becomes infructuous. Therefore, Ground Nos. 1, 2, 3, 4(a), 4(b), 5(a) and 5(b) are dismissed. As relates to Ground Nos. 6(a) to 6(e) regarding disallowance under Section 40(a)(ia) for non-deduction of tax on payment of transmission charges the same is covered in favour of the assessee by the decision of the Tribunal in assessee's own case for A.Y. 2011-12 & 2012-13 (ITA Nos. 5442 & 5443/DEL/2015 orders dated 29.11.2017 16.11.2017. ACIT vs. Noida Power Company Ltd.) relevant extract of 2012-13 order is as under:-

"6 ……We find that section 194J would have application only when the technology or technical knowledge, experiences/skills of a person is made available to others which can be further used by him for its own purpose and not where by using technical systems, services are rendered to others. Rendering of services by allowing use of technical System is different than charging fees for rendering technical services. In the present case no scientific knowledge experience or skill is made available/rendered by the PGCIL to the assessee. From the records, we have seen that the assessee itself has its own engineers and technicians who consistently monitor and supervise the flow of the electricity to its system and ultimately supplies to its customers which according to Ld. CIT(A) are the designated function of power grid which do not amount to providing technical services within the meaning ofexpln.2 to section g(i)(vii) of the Act. Moreover, we also in complete agreement with the judgment of Hon'ble Delhi High Court in the case of CIT vs. Bharati Cellular Limited [175 Taxmann 573 (Del)] affirmed by the Hon'ble Supreme Court in 193 Taxman 97(SC) wherein, it has been held that technical services which are relevant for the purpose of section

194J would be those technical services which involve human interface/element. In other words, the expression 'technical service' could have reference to only technical service rendered by a human and that it would not include my service provided by machines or robots. However as against above contention we find that the AO has completely failed to bring relevant materials, whatsoever, on record to prove the existence of human interface/element in the present case. In view of the above, we find that such transmission and wheeling charges paid by the assessee does not come within the purview of fees for technical service as defined under Explanation 2 to sec g(i)(vii) of the Act and accordingly no tax is required to be deducted by the assessee u/s. 194J therefrom. Hence, the action of the AO in treating the assessee to be an assessee-in- default u/s. 201(1) of the Act and the order dated 27.3.2014 passed u/s 201(1)/201(1A) of the I.T. Act were rightly deleted by the Ld. CIT(A), which does not need any interference on our part, hence, we uphold the action of the Ld. CIT(A) and reject the ground raised by the Revenue. ……"

As relates to Ground No. 6(a) to (e) the Hon'ble Delhi High Court in case of CIT vs. Delhi Transco Ltd. (supra) considering the provisions of section 194J of the Act held that wheeling charges paid for transportation of electricity cannot be characterized as fee for technical service. Relevant portion is reproduced below:

"31 The system operated by PGCIL and used for transmission of electricity is no doubt maintained by skilled technical personnel professional. This also ensures that PGCIL complies with the standards and norms put in place by the statutory regulations. However, the beneficiary of such services is PGCIL itself. PGCIL is operating and maintaining its own system using the service of engineers and qualified technicians. PGCIL is in that process not providing technical services to others, including DTL.

32. A comparison could be made with the system of distribution of some other commodity like water. It might require the operation and maintenance of water pumping station and the maintenance of a network of pipes. However, what is conveyed through the pipes and the equipment to the ultimate consumer is water. The equipment and pipes have to no doubt be maintained by technical staff but that does not mean that a person to whom the water is distributed through using the pipes and equipment is availing of any technical service as such."

This decision of the Hon'ble Delhi High Court is confirmed by the Hon'ble Apex Court. The contentions of the Ld. AR was not refuted by the Ld. DR and the decisions relied by the Ld. AR squarely covers the issues in favour of the assessee Thus, Ground No. 6 (a) to 6 (e) are allowed "

The issue is squarely covered in favour of the assessee by the decision of the Tribunal in assessee's own case for the Assessment Year 2012-13 on identical facts. The Tribunal deleted the disallowance made by the Assessing Officer u/s 40(a) (ia) of the Act for non deduction of tax at source on transmission charges. Besides that no tax is required to be deducted at source from the amount of Rs. 6,55,09,814 out of the total expenditure on transmission and wheeling charges of Rs. 18,41,83,032 incurred by the assessee during the year under consideration, being reimbursement of cost.The Ld. DR could not controvert this factual aspect. It is just and proper not to withheld tax from transmission charges and accordingly the disallowance made by the Assessing Officer on account of non-deduction of tax from such payment is proper and is liable to be deleted. Therefore, Ground No. 7(a) to 7(d) are allowed.

11. As regards Ground No. 8, there is a wrong quantification of book profit u/s 115JB to the extent of excess of Rs. 1 lakh by the Assessing Officer. Therefore, we remand back this issue to the file of the Assessing Officer and after verifying the same, we direct the Assessing Officer to pass the order accordingly. Thus, Ground No. 8 is partly allowed for statistical purpose.

12. As regards Ground No.9, the same is consequential, hence is not adjudicated at this juncture.

13. In result, the appeal of the assessee is partly allowed for statistical purpose.

Order pronounced in the Open Court on 10th April, 2019.

Sd/-	Sd/-
(G. D. AGRAWAL)	**(SUCHITRA KAMBLE)**
VICE PRESIDENT	**JUDICIAL MEMBER**

Dated: 10/04/2019
*R. Naheed **

Copy forwarded to:

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

ASSISTANT REGISTRAR

ITAT NEW DELHI

Date of dictation	11.03.2019
Date on which the typed draft is placed before the dictating Member	12.03.2019
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr. PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr PS/PS	10.04.2019
Date on which the final order is uploaded on the website of ITAT	10.04.2019
Date on which the file goes to the Bench Clerk	10.04.2019
Date on which the file goes to the Head Clerk	