THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 10.01.2013

+ W.P.(C) 14562/2006

NTPC LTD ... Petitioner

versus

DCIT & OTHERS ... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr S. E. Dastur, Sr Advocate with
Mr Muralidhar, Ms Bindu Saxena, Ms Aparajita Swarup, Ms Neha Khattar and Mr K. K. Patra

For the Respondents : Ms Prem Lata Bansal, Sr Advocate with
Mr Ruchir Bhatia

CORAM:-
HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MS JUSTICE VEENA BIRBAL

JUDGMENT

BADAR DURREZ AHMED, J

1. By way of this writ petition, the National Thermal Power Corporation Limited (NTPC Limited), a public sector undertaking, is seeking the quashing of a notice dated 03.02.2006 issued by the respondent No.1 (Deputy Commissioner of Income Tax, New Delhi) issued purportedly under Section 148 of the Income Tax Act, 1961 (hereinafter referred to as 'the said Act'), whereby the said respondent No.1 has indicated that he has reason to believe that the petitioner's

income chargeable to tax for the assessment year 2000-01 has escaped assessment within the meaning of the said Section 148 and, therefore, the respondent No. 1 proposes to re-assess the income for the said assessment year. By virtue of the said notice, as is the requirement under law, the petitioner was required to deliver a return in the prescribed form for the said assessment year within thirty days of the service of the notice. The said notice was accompanied by a copy of the purported reasons for re-opening of the case.

2. The reasons are in respect of several assessment years, namely, 1999-2000, 2000-01, 2001-02, 2002-03 and 2003-04. However, we are, in this petition, concerned only with the assessment year 2000-01. Two reasons have been set out in the said document. Reason one pertains to the non-eligibility of deduction under Section 80IA in respect of the steam turbine of the combined cycle gas power stations belonging to the petitioner. The second reason pertains to the taxability of income tax recoverable by NTPC from the State Electricity Boards'. We shall deal with these purported reasons in greater detail later. For the present, it would be necessary to set out in brief the challenge of the petitioner to the

impugned notice dated 03.02.2006. According to the petitioner, the notice is barred by limitation inasmuch as it has been issued beyond four years from the end of the relevant assessment year. In the present case, 2000-01 is the relevant assessment year. Therefore, the four-year period would have ended on 31.03.2005. The notice which is impugned in this petition has been issued on 03.02.2006. This is clearly beyond the period of four years. The only way in which this notice can be saved is if the factual position falls within the parameters specified under the proviso to Section 147 of the said Act.

3. It was contended on behalf of the petitioner that before the proviso to Section 147 of the said Act can be invoked by the revenue, it has to be shown that there is an escapement of income chargeable to tax from the assessment done under Section 143(3) of the said Act and that this has been occasioned by reason of failure on the part of the assessee to make a return under Section 139 or in response to a notice under Section 142(1) or Section 148 or a failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for that assessment year. In the present case, the question of non-filing of a return does not

arise and, therefore, the only two things that need to be seen are whether any income chargeable to tax has escaped assessment and whether this has been occasioned by the failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment in respect of the assessment year 2000-01.

4. According to the learned counsel for the petitioner, neither of these two conditions have been satisfied. In other words, there is no income chargeable to tax which has escaped assessment nor has there been any failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment.

5. It has also been contended that for these reasons the proviso to Section 147 of the said Act is not triggered and, therefore, the impugned notice dated 03.02.2006, having been issued beyond the period of four years from the end of the relevant assessment year, is clearly time barred and, therefore, ought to be quashed as also all proceedings pursuant thereto.

6. We shall now set out the sequence of events. On 27.11.1998, the petitioner filed its income tax return with the respondent No.1 for the

assessment year 1998-99. In the assessment order pertaining to the year 1998-99, the entire manner of functioning of the gas turbine unit and the steam turbine unit at the four different projects of the petitioner at Anta, Auraiya, Kawas and Dadri were discussed. The assessee had been asked to explain as to how the fuel cost in the steam unit was shown as zero by the petitioner. By a letter dated 10.01.2001, the petitioner replied as under:-

> "CONSUMPTION OF FUEL IN GAS POWER STATION
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> NTPC has set up Gas Power Station at Anta, Auraiya, Kawas, Dadri, Jhanor Gandhar and Faridabad as combined cycle gas power stations. These stations have number of gas turbines, which independently generate power, by separately feeding fuel in the form of natural gas/HSD or Naptha. The natural gas after mixing with the air is burnt in the gas combustion chamber to produce gases at a very high temperature. These gases are used to run gas turbines for generation of electricity. The Gas Turbine exhaust hot air gases, which otherwise have no commercial value, are then released into atmosphere. With the advancement in technology the waste heat recovery boilers have been invented to utilize such hot exhaust gases.
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> The exhaust hot gases from gas turbine are routed through the waste heat recovery boilers to utilize it in heating water and producing steam. The steam produced in waste heat recovery boilers is then run to generate electricity in the steam turbine attached separately with such boilers. The steam turbine can only be run from hot gases released from the gas turbine. In case of any failure of the steam turbine the hot gases being

released after generation of power in gas turbine has to be discharged in the atmosphere since it has no other commercial value. All gas turbine and steam turbines separately generate electricity and have separate control system, separate turbines, separate gas combustion chambers for gas turbines and boiler for steam turbine for generation.

As explained above the steam turbine does not consume any fuel except waste hot gases of gas turbine. In view, thereof, no fuel cost has been indicated in steam turbines."

Thereafter, the petitioner furnished another letter dated 27.02.2001 indicating the working of the steam turbine at the gas power station. The said working was described as under:-

"WORKING OF STEAM TURBINE AT GAS POWER STATION

NTPC has set up Gas Power Station at Anta, Auraiya, Kawas, Dadri, Jhanor Gandhar and Faridabad. These power station have two distinct types of prime movers gas Turbines and Steam Turbines. The fuel (Natural Gas/KSD/Naptha) is burnt in the combustion chamber of Gas Turbine and the product of combustion (hot gases) is expanded in Gas Turbine. The mechanical power thus developed drives an electric generator for generating electricity.

Hot gases are exhausted after their expansion in the gas turbines. As the exhausted gases are no longer required they are known as waste hot gases and are let out in the atmosphere. These waste hot gases do not have any combustion properties. With the availability of technology, steam turbines are installed at a massive cost, which is higher than the cost of the normal gas turbine. These waste hot gases are routed through the waste heat recovery boilers for generation of power. These waste

exhaust hot gases from gas turbines can also be let out to the atmosphere directly through a by pass stack. If waste hot gases are exhausted directly to the atmosphere the residual heat contained in it is totally lost. However, when it is passed through a Waste Heat Recovery Boiler, it is possible to partly reclaim the residual heat for generation of power.

No fuel is required to be used for generation of power by the waste heat recovery boiler (WHRB). In other words, the steam turbine uses only the waste exhausted heat of such gases in WHRB for generation of power.

You have desired us to furnish quantity and cost of exhausted hot gases used in waste heat recovery boiler. On this point we wish to submit that it is not possible to work out actual quantity of exhaust hot gases consumed in WHRB. Depending on grid conditions flow of gases in the waste heat recovery boiler varies from time to time on continuous basis. At times on account of technical reasons the gas station is run in an open cycle and therefore waste hot gases are being discharged into atmosphere.

In view of above the flow of waste hot gases in waste heat recovery boilers is neither practicable nor being measured on actual basis. We reiterate that since no fuel is being consumed in waste heat recovery boiler there is no fuel cost that can be allocated to generation of power by steam turbine.

It may be mentioned here that the waste hot gas is not a commercial commodity and is not brought to the market for sale and purchase. It is not capable to being transported to a distant place because it would lose it potential heat. Moreover, because of huge requirement of compressor power for transportation and capital cost of equipment like compressor, piping, etc., it is uneconomical to transport the gases even to a nearby location as these waste hot gas is of very low pressure and density.

In view of the above, it is submitted that waste hot gases are not marketable nor are being sold or bought in the market. They have not market value at all."

7. From the above, it is clear that the petitioner had made it known to the respondent No.1 that the gas turbine exhausts hot air gases, which otherwise have no commercial value and would normally be released into the atmosphere. However, with the advancement of technology, waste heat recovery boilers have been invented to utilize such hot exhaust gases, which, in turn, run the steam turbines to generate additional electricity. It has been clearly pointed out by the petitioner that the power stations of the petitioner have two distinct types of prime movers, gas turbines and steam turbines. The fuel which could be naptha, natual gas or HSD is burnt in the combustion chamber of the gas turbine and the product of combustion – hot gases, generates mechanical power which drives the electric generator for generating electricity. These hot gases are exhausted after their expansion in the gas turbines, as they are no longer required in the gas turbine unit. However, because of the technology of waste heat recovery boilers, the exhaust gases from the gas turbine unit are utilized by the steam turbine unit for further generation of electricity. In this

manner, through the use of the waste heat recovery boiler, it is possible to partly reclaim the residual heat for generation of additional power. The steam turbine uses only the waste exhaust heat of such gases generated in the gas turbine unit through the technology of waste heat recovery boiler. One of the contentions of the petitioner was that the fuel cost of the steam turbine unit was zero. We shall deal with this aspect of the matter subsequently. For the present, it is clear that the waste hot gases produced in the gas turbine unit in the course of generating electricity are re-utilized through the waste heat recovery boiler for driving the steam turbine which, in turn, generates additional electricity. The entire process of generation of electricity was clearly set out by the petitioner before the respondent No.1 in respect of the assessment year 1998-99.

8. We may also point out that in the course of finalizing the assessment for the assessment year 1998-99, the respondent No.1 wrote a letter to the petitioner to clarify, inter alia, the following:-

> "1. Income-tax recoverable from customers - On page 157 of the Return of Income, it is stated (point no. 13) that as per Tariff Notification issued by the Govt, of India. The Incidence of Income tax on the Income from generation of electricity is recoverable from customers. For the A.Y. 1998-99, this amount

is Rs. 86081 lacs. This has not been taken as part of income or as part of sales of electricity. Why?"

The said letter was replied to by the petitioner on 05.03.2001, wherein they enclosed a detailed note regarding the impact of income tax liability of NTPC with regard to generation of income.

9. On 29.11.2000, the petitioner filed its original return for the assessment year 2000-01. We may point out that being aggrieved by the assessment order in respect of the assessment year 1998-99 dated 22.03.2001, the petitioner preferred an appeal being Appeal No. 2/2001-02 before the Commissioner of Income Tax (Appeals) sometime in April, 2001. During the pendency of the appeal for the assessment year 1998-99, the assessment in respect of the assessment year 2000-01 was completed under Section 143(3) on 27.02.2002, whereby the respondent No.1 followed the orders in respect of the assessment year 1998-99 and 1999-2000 and the deduction under Section 80IA was re-worked by taking a part of the fuel cost against the profits of the steam undertaking. The respondent No.1 also noted that the income tax liability on generation had to be grossed up on account of the State Electricity Boards' liability to bear the tax.

10. On 28.02.202, the Commissioner of Income Tax dismissed the appeal in respect of the assessment year 1998-99. Being aggrieved by the order passed by the Commissioner of Income Tax (Appeals) in respect of the assessment year 1998-99, the petitioner preferred an appeal before the Income Tax Appellate Tribunal (ITAT) being ITA 1377/Del/2002, sometime in April, 2002. A similar appeal was also filed by the petitioner before the ITAT in respect of the assessment year 1999-2000 being ITA No. 2188/Del/2002. We may also point out that by virtue of the minutes of meeting held on 13.09.2002, the Committee on Disputes had permitted the petitioner to pursue the appeals before the Tribunal. On 26.05.2004, the Income Tax Appellate Tribunal decided the appeals in favour of the petitioner and held that there was no basis to apportion the cost of fuel to the steam turbine undertakings. In the said order, the ITAT noted that it was the case of the Assessing Officer that the profits of each unit had to be determined independently as if such units were the only source of income of the assessee/ petitioner. The Tribunal observed that there was no dispute to such a submission and that, according to it, profits of the gas unit as well as the steam unit must be determined independently as the sole source of income of the assessee and consequently, the expenditure

incurred for the generation of electricity by the gas unit cannot be shifted to any other unit, even by the logic of the Assessing Officer. The Tribunal further held that for similar reasons, profit of the steam unit had to be determined independently on the basis of the expenditure incurred by such unit. Since the steam unit had not incurred any expenditure for acquiring the hot gas, the question of reducing the profits of such unit by any notional figure did not arise. Consequently, the Tribunal accepted the pleas of the petitioner and rejected those of the revenue.

11. We are not so much concerned about the merits of the decision but with the fact that the entire process of production of electricity by both the gas turbine and the steam turbine were examined threadbare at all stages – before the Assessing Officer, The Commissioner of Income Tax (Appeals) and the Income Tax Appellate Tribunal. The petitioner had clearly set out and explained the method of electricity generation by both the units and it is the Tribunal which held that it should not be regarded as an integrated unit but as two separate and independent units. This was also the stand taken by the Assessing Officer with regard to the nature of the two units being independent and not integrated.

12. Thereafter, on 23.09.2004, the respondent No.1 forwarded a letter to the Commissioner of Income Tax (Appeals) along with a copy of the purported inspection report which had been allegedly carried out on 02.09.2004 and to consider the same in the pending appeals of the petitioner for the assessment years 2000-01, 2001-02, 2002-03 and 2003-04. In this inspection report, it has been stated that the contention of the assessee (NTPC), that it has two separate units for generating electricity, cannot be accepted to be correct as the waste heat utilization plant is basically a dependent unit of the first plant, that is, the gas turbine plant and is completely dependent on its working. As per the report, "by no stretch of imagination, can it be inferred that these are two different units as the second unit i.e. the waste heat utilization plant is totally dependent on the first unit." It was further stated in the said report that the second plant cannot be said to be an identifiable undertaking separate and distinct from the existing business. The report, therefore, concluded by noting that it would not be correct to say that the assessee has two different units for generation of electricity and, therefore, the assessee is not right in

claiming deduction under Section 80IA on two different profits by showing two different P & L Accounts of these units.

13. The petitioner sent a response on 27.04.2005 to the inspection report and stated that there are no fresh facts in the report and that, in any event, the ITAT's order was applicable. The petitioner also submitted that mere dependence of one unit on the other did not mean that the steam undertaking was not an industrial undertaking for the purpose of Section 80IA of the said Act.

14. In the meanwhile, on 20.10.2004, the respondent No.1 applied to the Committee on Disputes for permission to file an appeal from the Tribunal's said order to this Court under Section 260A of the said Act. During the pendency of the application for permission to file an appeal, the respondent No.1 filed an appeal before this Court being ITA 756/2004. However, by an order dated 03.12.2004, this Court disposed of that appeal on the ground that since the High Powered Committee on Disputes had not granted permission till then, this Court was not inclined to entertain the petition at that stage. This Court, however, directed that it would be open to the revenue to apply for re-

filing of the appeal after the clearance is given by the High Powered Committee in favour of the revenue. The clearance was not given inasmuch as, on 08.06.2005, the Committee on Disputes rejected the application of the revenue. The relevant portion of the minutes of the meeting pertaining to the petitioner are as under:-

> "Meeting of the Committee on Disputes was held at 1030 hours on 08.05.2005 in the Committee Room, Cabinet Secretariat, Rashtrapati Bhavan, New Delhi. The items considered and the minutes thereon are as under:-

a) Item no. b)Case status	a) Appellant b) Respondent	Issue (s) Involved	a)Appl. Ref. No. b) Date c) appeal in	Appln against a) auth. Whose order is disputed b) order no. c) order date	a) Quantum Involved b) period Involved
1 NG	Central Board of Direct Taxes National Thermal Power Corporation Limited	Assessee has not debited the fuel cost utilized for generation of power in 16 units of various projects. Therefore, the AO calculated the fuel cost involved & debited it to the P&L account and reduced u/s 801 & 801A for the A.Y. 1998-99 and 1999-2000	UO Note No. 279A/CID/107/ 2004 13.12.2004 High Court	ITAT ITA No. 1377&2188/Del of 2002 26.05.2004	Amt – 54575.93 1998-2000

> The Committee heard the parties in detail w.r.t. the orders of the CIT (A), agenda note submitted by CBDT and the orders dated 26.05.2004 of the Delhi Bench of IT AT. The Committee noted that the contention of the D/o revenue is that the assessee has not debited the fuel cost utilized for generation of power in the units under reference and further that AO has appropriately calculated the fuel cost involved and debited it to the P&L A/c and reduced the deduction u/s 801 and 80-1 A. The Committee expressed the view that the ITAT has very appropriately observed that if the assessee had not set up the steam units

in their projects, such hot gas would have to be exposed to the open atmosphere and also that there is no evidence that such hot gas can be sold in the open market. Advanced technological innovations have prevented such hot gas going to waste, which can be utilized for generation of electricity. Since there is no evidence of any market for sale of such waste hot gas, the Committee did not find any merit in the contentions of the CBDT. The Committee accordingly decided not to accept the request of CBDT for giving clearance for filing an appeal in High Court against the orders of the ITAT."

15. From the above extract, it is apparent that the Committee on Disputes had agreed with the view taken by the Tribunal that if the petitioner had not setup the steam units in their projects, such hot gases would have to be released to the open atmosphere and secondly that there was no evidence that the hot gases could be sold in the open market. Since there was no evidence of any market for the sale of such hot gases, the Committee on Disputes did not find any merit in the contentions of the revenue. It is on this basis that the permission to file an appeal was rejected and clearance was not given. The matter, therefore, rested there.

16. It is then that on 03.02.2006, the impugned notice was issued to the petitioner accompanied by the purported reasons for issuing the same.

17. The petitioner objected to the impugned notice as also the reasons by virtue of his letter dated 12.06.2006. The objections were rejected by the respondent No.1 by an order dated 16.06.2006. Thereafter, *inter alia*, the present writ petition was filed by the petitioner, whereon, this Court, on 18.09.2006, issued notice to the respondents and directed that till further orders, the assessment order be not passed. The writ petition was ultimately admitted for hearing on 17.05.2007 when Rule DB was issued and it was directed that no final order shall be passed by the Assessing Officer till the disposal of the writ petition.

18. The learned counsel for the petitioner submitted that both the reasons for re-opening the assessment in respect of the assessment year 2000-01 are non-existent. First of all, we shall record his submissions with regard to the first reason. The learned counsel for the petitioner submitted that the petitioner had setup gas and steam undertakings from 01.08.1990 onwards. In the assessment proceedings for the assessment year 1998-99, which we have dealt with in detail above, the Assessing Officer had, after a detailed discussion, granted deduction under Section 80IA in respect of the separate profits of the gas and steam undertakings, though on the basis that they were integrated, he adjusted the quantum of

deduction. It was further submitted that this was also followed by the Assessing Officer in respect of the assessment year 1999-2000 and the assessment year 2000-01. The Tribunal reversed the findings of the Assessing Officer in respect of the assessment years 1998-99 and 1999-2000 and this, according to the learned counsel for the petitioner, had become final as the Committee on Disputes did not permit the department to file an appeal against the order passed by the Tribunal. Insofar as the assessment year 2000-01 is concerned, the Commissioner of Income Tax (Appeals) followed the Tribunal's order and reversed the findings of the Assessing Officer. According to the learned counsel for the petitioner this has also become final as the department had not filed any appeal.

19. It is contended that the Assessing Officer is now seeking to re-open the assessment for the assessment year 2000-01 on the ground that the steam undertaking is not a separate undertaking. But, according to the learned counsel, being aware of the existence of the two undertakings, the Assessing Officer had drawn the inference in the course of the regular assessment that the claim for deduction from the profits of the steam undertakings should be reduced on account of his understanding that the

fuel cost could not have been zero. However, the Assessing Officer now seeks to draw the inference that the two undertakings should be treated as one. It was contended that this clearly constituted an entire shift in the stand of the Assessing Officer from the stand taken by him in the course of the original assessment proceedings.

20. The learned counsel for the petitioner submitted that, in any event, the impugned notice was bad in law as there was no failure on the part of the petitioner to disclose fully and truly all material facts. It was contended that the reason for re-opening, as mentioned in the purported reasons, is that the combined cycle gas power stations are integrated undertakings and the steam turbine unit is completely dependent on the gas turbine unit. It was contended that these were the very same findings given by the Assessing Officer in the course of the regular assessment proceedings for the assessment year 1998-99 and which were followed in respect of the assessment year 2000-01. This was the very basis for curtailing the Section 80IA deduction eligible on the steam undertaking. It was also contended that the so-called reasons places reliance on the said inspection report but the Commissioner of Income Tax (Appeals), in respect of the assessment year 2000-01, held that there is nothing new in

the inspection report which differentiates the case from the assessment years 1998-99 and 1999-2000. Paragraph 3.11 of the order dated 04.05.2006 passed by the Commissioner of Income Tax (Appeals) in respect of the assessment year 2000-01 is as under:-

> "3.11 I have gone through the facts of the case, the submission made by the appellant and the decision of The ITAT, Delhi Bench in the case of the appellant for A.Y. 1998-99 & 1999-2000. It is an admitted fact that the facts of the case under appeal are same as for A.Y. 1998-99 & 1999-2000 for which ITAT has decided the issue. I have also considered the decision of Delhi High Court of not entertaining the appeal filed by the Income Tax Department, as the approval was not granted by the Committee on disputes. The Inspection Report of Addl CIT, Range 13, New Delhi dated 23rd September 2004 and the reply filed by the appellant dated 27th April 2005 were also considered. Para 3.7 on page 9 of this order details the contents of a brief provided by the AO given as annexure 'A' to letter F.No.CIT/Delhi-v/2004-05/646 dated 20.10.2004. This letter was addressed to the COD in order to obtain it's approval to file an appeal before the high court. This brief has discussed all the points that were mentioned in the inspections report mentioned above. However the COD did not accord approval to the AO for filing an appeal against the order of the ITAT. I have found that the facts of the case as mentioned in the inspection report were also before the COD when they withheld the approval for further appeal. There is nothing new which differentiates the facts of the case as such."

21. Thus, according to the learned counsel for the petitioner, the department had accepted the finding of the Commissioner of Income Tax (Appeals) as it had not filed any appeal before the Tribunal. Having done

so, there was no occasion for the department to have issued the impugned notice dated 03.02.2006.

22. The learned counsel for the petitioner referred to the decisions of this Court in the case of ***Sarthak Securities Co. Pvt. Ltd. v. Income Tax Officer : [2010] 329 ITR 110 (Delhi)*** and ***Commissioner of Income Tax v. Simbhaoli Sugar Mills Limited: [2011] 333 ITR 470 (Delhi)*** in support of his contention that the recorded reasons must state what material the assessee had failed to disclose and if there was no failure to disclose the material facts, re-opening was not justified at all.

23. The learned counsel for the petitioner also submitted that this was a case of change of opinion which was also not a permissible ground for re-opening an assessment already completed under Section 143(3) of the said Act. It was contended that in the course of the regular assessment proceedings for the assessment years 1998-99 to 2000-01, the Assessing Officer had taken the view that the undertakings, though separate, were integrated and that the expenses should be apportioned to the steam undertaking so as to reduce the Section 80IA deduction. In contrast, it has now been suggested by the Assessing Officer on the very same basis that

the undertakings are integrated to allow deduction under Section 80IA by clubbing the profits of steam and gas undertakings. This was clearly, according to the learned counsel for the petitioner, a case of change of opinion which is impermissible in law. He placed reliance on the following decisions:-

(i) ***CIT v. Kelvinator of India Ltd. : [2002] 256 ITR 1 (Del) (FB);***

(ii) ***CIT v. Kelvinator of India Limited : [2010] 320 ITR 561 (SC)***; and

(iii) ***Ritu Investments Private Limited v. DCIT: (2011) 51 DTR (Del) 162***

24. The next point urged by the learned counsel for the petitioner was that the Section 80IA deduction cannot be withdrawn mid-term inasmuch as it is only the first year of the deduction which is relevant. Once it is allowed in the first year, the subsequent years cannot be interfered with. As such, there is no escapement of income from assessment. It was contended by the learned counsel for the petitioner that the steam undertaking is setup from 01.08.1990 onwards and in the earlier years, deduction for the steam undertaking had been allowed to the assessee and,

therefore, could not be withdrawn for the subsequent years. Reliance was placed on the following decisions:-

(i) ***CIT v. Modi Industries Ltd: [2010] 48 DTR 364 (Del);***

(ii) ***Saurashtra Cement & Chemical Industries Ltd. v. CIT: [1980] 123 ITR 669 (Guj);***

(iii) ***CIT v. Paul Brothers: [1995] 216 ITR 548 (Bom);*** and

(iv) ***CIT v. Bhilai Engineering Corporation Pvt. Ltd: [1982] 133 ITR 687 (M.P)***

25. Lastly, it was contended by the learned counsel for the petitioner that the sanction required for issuance of a notice under Section 147/148 of the said Act after the period of four years was granted by the Commissioner of Income Tax in a mechanical fashion and without application of mind. The sanction was, according to the learned counsel, given in a proforma with the words "I am satisfied". It was contended that this was not sufficient to show application of mind on the part of the Commissioner of Income Tax. Reliance was placed on ***The Central India Electric Supply Co. Ltd v. ITO: [2011] 333 ITR 237 (Del)*** and ***Chhugamal Rajpal. v. S. P. Chaliha and Ors. (SC): [1971] 79 ITR 603 (SC)***.

26. Mrs. Prem Lata Bansal, the learned senior counsel appearing on behalf of the revenue, submitted that this was a case in which the proviso to Section 147 was attracted. She submitted that insofar as the assessment order 1998-99 is concerned, the Assessing Officer had considered the question of the two units, namely, the gas turbine unit and the steam turbine unit not from the standpoint of whether they were integrated or they were separate units, but only in the context of the fuel cost argument. The learned senior counsel submitted that the examination was not whether the units by themselves or as a whole were entitled to deduction under Section 80IA or not but from the angle of what would be the fuel cost of the steam unit, insofar as the hot waste gases were concerned. It was only the question of allocation of fuel cost which was considered by the Assessing Officer and the question of units being separate or integrated was not specifically examined by the Assessing Officer. Therefore, there is no question of there being any change of opinion. She also submitted that the impugned notice dated 03.02.2006 was necessitated because of the inspection report of September, 2004. According to her, the said inspection report brought out fresh factual material to indicate that the gas turbine unit and the steam turbine unit

were an integrated whole industrial undertaking and were not separate industrial undertakings or units. According to her, the inspection report threw light on the question as to whether the steam unit was merely an expansion of the gas unit or was an altogether separate unit. According to her, the report clearly indicated that the steam unit was entirely dependent on the gas unit and was, therefore, integrated with the gas unit and did not have an independent existence. According to her, this fact was not known to the Assessing Officer when he concluded the assessments for the assessment year 1998-99 or even for the assessment year 2000-01. She submitted that this was also not disclosed by the petitioner and, therefore, there was failure on the part of the petitioner to fully and truly disclose the material facts. As such, one of the conditions of the proviso to Section 147 got triggered. She submitted that the Commissioner of Income Tax (Appeals)' order in respect of the relevant assessment year as also the Income Tax Appellate Tribunal's orders in respect of the assessment years 1998-99 and 1999-2000 were before the inspection of September, 2004. Moreover, insofar as the opinion of the Committee on Disputes is concerned, the issue before it was only with regard to the allocation of fuel cost between the two units. She submitted that the issue whether the

two units were separate or integrated was not before the Committee on Disputes and, therefore, it would be wrong to say that the latter issue had attained finality. According to her, the only issue that had attained finality was with regard to the allocation of fuel cost and not the question of whether the two units were separate or integrated. She also referred to the assessment order as well as the order of the Commissioner of Income Tax (Appeals) for the assessment year 2004-05, copies of which were handed over to us in the course of arguments, to submit that in the earlier round the issue was with regard to fuel cost, whereas in the assessment year 2004-05, the issue was whether the two units were independent or one integrated unit. She also referred to the Committee on Disputes' opinion pertaining to the assessment year 2004-05 which granted permission for appeal to the Income Tax Appellate Tribunal. Therefore, according to her, it was an entirely new issue which had not been examined in the earlier round of assessment and, therefore, there was no question of change of opinion. She also submitted that the fresh examination was necessitated because of the new facts which were revealed in the inspection report of September, 2004 which ought to have been brought to the notice and disclosed by the petitioner at the time of the original

assessment but the petitioner had failed to disclose the same. Consequently, she submitted that the ingredients of the proviso to Section 147 of the said Act were clearly satisfied and, therefore, the impugned notice dated 03.02.2006 was not without jurisdiction and was also within time.

27. She also submitted that the other condition of income having escaped assessment has also been satisfied in the present case and she placed reliance on Explanation 2(c)(i), (iii) and (iv). She also submitted that Explanation 1 to Section 147 also made it clear that mere production of books of accounts etc. did not necessarily mean that there was disclosure on the part of the assessee. She reiterated that it was only on inspection that it was found that the steam unit and the gas unit were an integrated whole.

28. She also submitted that at the time of issuance of a notice under Section 147/148 of the said Act, only a prima facie view has to be taken and it is obviously not a final view. The final view would only emerge when the assessment order is passed. Therefore, she submitted that there was no cause for any interference with the notice under Section 148 which

is impugned in the present petition. She referred to ***Raymond Woollen Mills Ltd v. ITO & Ors.: [1999] 236 ITR 34 (SC)***, wherein it was observed that it is only to be seen whether there was, *prima facie*, some material on the basis of which the department could re-open a case. The Supreme Court further observed that sufficiency or correctness of the material is not a thing to be considered at that stage. She then referred to ***Ess Ess Kay Engineering Co. P. Ltd v. Commissioner of Income Tax: (2001) 247 ITR 818 (SC)***, wherein the Supreme Court observed that the Income Tax Officer is not precluded from re-opening of the assessment of an earlier year on the basis of his findings of fact made in respect of fresh materials in the course of assessment of the next assessment year. The learned senior counsel then referred to ***Diwakar Engineers Ltd v. Income Tax Officer: [2010] 329 ITR 28 (Del)***, wherein it was observed that at the stage of issuing notice under Section 148 it was not necessary that the materials must be extensive and detailed. The court also felt that one of the methods by which materials could come into the possession of the Assessing Officer was by the assessment proceedings in subsequent assessment years. A reference was also made to ***Phool Chand Bajrang***

Lal & Anr. v. ITO & Anr. : [1993] 203 ITR 456 (SC), wherein the Supreme Court observed as under:-

> "Acquiring fresh information, specific in nature and reliable in character, relating to the concluded assessment which goes to expose the falsity of the statement made by the assessee at the time of original assessment is different from drawing a fresh inference from the some facts and material which was available which the Income Tax Officer at the time of original assessment proceedings. The two situations are distinct and different. Thus, where the transaction itself on the basis of subsequent information, is found to be a bogus transaction, the mere disclosure of that transaction at the time of original assessment proceedings, cannot be said to be disclosure of the "true" and "full" facts in the case and the Income Tax Officer would have the jurisdiction to reopen the concluded assessment in such a case."

29. Mrs. Bansal also placed reliance on ***Rakesh Agarwal v. ACIT: [1996] 221 ITR 492 (Del)*** to submit that embedded material may not be considered as disclosure. In the said decision, this Court had come to the conclusion that mere filing of documents in that case cannot be deemed to be a disclosure of all the material facts particularly on the ground that what might have been discovered by the Assessing Officer cannot be construed as a disclosure in terms of Section 147 of the said Act. Mrs Bansal also referred to a decision of this Court in the case of

Consolidated Photo and Finvest Ltd v. ACIT: [2006] 281 ITR 394 (Del),

wherein this Court observed as under:-

> "The principle that a mere change of opinion cannot be a basis for reopening computed assessments would be applicable only to situations where the assessing officer has applied his mind and taken a conscious decision on a particular matter in issue. It will have no application where the order of assessment does not address itself to the aspect which is the basis for reopening of the assessment, as is the position in the present case. It is in that view inconsequential whether or not the material necessary for taking a decision was available to the assessing officer either generally or in the form of a reply to the questionnaire served upon the assessed. What is important is whether the assessing officer had based on the material available to him taken a view. If he had not done so, the proposed reopening cannot be assailed on the ground that the same is based only on a change of opinion."

The decision in ***Honda Siel Power Products Ltd v. DCIT: [2012] 340 ITR 53*** was also referred to by Mrs Bansal to explain what is the meaning of the expression "disclose fully and truly all material facts" appearing in Section 147 of the said Act. In that decision, this Court observed as under:-

> "12. The law postulates a duty on every assessee to disclose fully and truly all material facts for its assessment. The disclosure must be full and true. Material facts are those facts which if taken into accounts they would have an adverse affect on assessee by the higher assessment of income than the one actually made. They should be proximate and not have any

> remote bearing on the assessment. Omission to disclose may be deliberate or inadvertent. This is not relevant, provided there is omission or failure on the part of assessee. The latter confers jurisdiction to reopen assessment."

30. Mrs Bansal submitted that the question of change of opinion would arise only when the Assessing Officer had formed an opinion and was now trying to alter that opinion. She placed reliance on ***Dalmia Cement Pvt. Ltd v. CIT: WP(C) 6205/2010*** decided on 26.09.2011 by a Division Bench of the Delhi High Court. The learned counsel also placed reliance on the decision in ***Indian Hume Pipe Co. Ltd v. ACIT: WP No. 1017/2011*** decided on 08.11.2011 by a Division Bench of the Bombay High Court. The Bombay High Court observed that the basic principle laid down by the Supreme Court was whether the assessee had disclosed the primary facts which were necessary for assessment, fully and truly. The court observed that if the assessee had done so, the Assessing Officer was not entitled to a mere change of opinion to commence proceedings for re-assessment. However, the court also observed that mere production of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer does not

necessarily amount to disclosure within the meaning of Proviso to Section 147.

31. In rejoinder, the learned counsel for the petitioner submitted that in the factual backdrop of the present case, there was nothing in the decisions which were cited by the learned counsel for the revenue which would militate against the case of the petitioner. It was submitted that in the present case the facts were the same and it was only that another inference was being drawn on the basis of the same facts. Such a situation clearly meant that there was only a change of opinion. Even the so-called inspection report did not reveal anything new. The facts were the same. It was only a new way to look at the very same facts.

32. It was submitted by the learned counsel for the petitioner that each case has to be judged on its own facts. He submitted that even in the recorded reasons, there is no indication as to what was the failure on the part of the petitioner and what did the petitioner fail to disclose. Unless and until it is made clear that there was a failure and what was that failure, assessment cannot be re-opened with the aid of Section 147/148 of the said Act. It was contended that the Assessing Officer was fully aware of

the entire facts and methods of production and the manner in which the two units operated. He drew one set of inferences at the time of the original assessment and is now seeking to draw another set of inferences by issuing the impugned notice. This is nothing but a mere change of opinion based on the very same facts. And, that is impermissible in law.

33. It was contended that the learned counsel for the revenue had cited some decisions which have been noticed above, wherein facts discovered in a subsequent assessment year could be the basis in re-opening of an assessment completed in respect of an earlier assessment year. But, according to the learned counsel for the petitioner, those decisions are not at all relevant in the present factual matrix. This is so because the assessment order in respect of the assessment year 2004-05 was issued on 27.02.2006, whereas the impugned notice had already been issued on 03.02.2006. Therefore, the assessment order for the assessment year 2004-05 could not have been the basis for issuing the notice and that is why, according to the learned counsel for the petitioner, the assessment order for the assessment year 2004-05 is not even mentioned in the recorded reasons. The permission granted by the Committee on Disputes in respect of the assessment year 2004-05 is, therefore, of no consequence.

The learned counsel for the petitioner submitted that the jurisdictional question has to be decided and that mere escapement is not sufficient. The case of ***Diwakar Engineers Ltd*** *(supra)* was distinguished by stating that in that case, details had not been provided by the assessee despite enquiry. Therefore, it was not a case of full and true disclosure. Once again, the learned counsel reiterated that each case has to be decided on its own facts. With regard to ***Phool Chand Bajrang Lal*** *(supra)*, the learned counsel submitted that the case was entirely distinguishable inasmuch as in that case there was a cash loan which later turned out to be false and, therefore, re-opening of the assessment was sustained. He submitted that the facts are entirely different in the present case. In ***Raymond Woollen Mills Ltd*** *(supra)* also, there was a clear finding of failure to disclose, which is not the case in the present petition. As regards ***Consolidated Photo and Finvest Ltd*** *(supra)*, the learned counsel for the petitioner submitted that that case was also distinguishable on its own facts. In that case certain expenses had been claimed. Subsequently, it was found that they were personal expenses and ought to have been disallowed. The facts in the present case are entirely different. As regards ***Honda Siel Power Products Ltd*** *(supra)*, the learned counsel for the petitioner

submitted that in that case the petitioner had accepted and admitted that he did not give the details in respect of the tax free income in the context of Section 14A of the said Act. Therefore, that case is also decided on an entirely different set of facts.

34. As far as the principles of law set out in the decisions cited by the learned counsel for the revenue are concerned, it was submitted by the learned counsel for the petitioner, no exception can be taken in respect of that. However, what must be seen is whether the factual matrix of the case fits in within the principles of law indicated therein. He submitted that the impugned notice was clearly time barred inasmuch as the pre-conditions for invoking the proviso to Section 147 had not been satisfied. In the present case, there was no failure on the part of the petitioner to fully and truly disclose all material facts and there was a clear-cut change of opinion insofar as the revenue was concerned. Even the escapement of income from assessment has not been indicated. Thus, according to the learned counsel for the petitioner, the impugned notice dated 03.02.2006, insofar as the first reason indicated therein is concerned, is liable to be set aside.

35. Having considered the factual background and the arguments advanced by the learned counsel for the parties as also the decisions referred by them in great detail, we are of the view that the plea advanced by the learned counsel for the petitioner requires acceptance. This is so because it is an admitted position that the impugned notice dated 03.02.2006 was issued beyond the period of four years from the end of the relevant assessment year i.e., from the end of 31.03.2001. In order that such a notice could be sustained in law, the ingredients and pre-conditions set out in the proviso to Section 147 have to be satisfied. Section 147, as it stood at the time of issuance of the impugned notice, is as under:-

> "147. If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year) :
>
> **Provided** that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has

escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year.

Explanation 1.—Production before the Assessing Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of the foregoing proviso.

Explanation 2.—For the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment, namely:—

(*a*) where no return of income has been furnished by the assessee although his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the maximum amount which is not chargeable to income-tax ;

(*b*) where a return of income has been furnished by the assessee but no assessment has been made and it is noticed by the Assessing Officer that the assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the return;

(*c*) where an assessment has been made, but—

(*i*) income chargeable to tax has been under-assessed; or

(*ii*) such income has been assessed at too low a rate; or

(*iii*) such income has been made the subject of excessive relief under this Act; or

(*iv*) excessive loss or depreciation allowance or any other allowance under this Act has been computed.]"

The proviso is couched in negative terms. It states that where an assessment, *inter alia*, under Section 143(3) has been made for the relevant assessment year "no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year." There is, however, an exception and that begins with the words "unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year." Therefore, no action under Section 147 can be taken beyond the said period of four years unless and until the conditions precedent mentioned in the proviso are satisfied. The first condition is that income chargeable to tax must have escaped assessment. The second condition is that such escapement from assessment must be by reason of failure on the part of the assessee to, *inter alia*, disclose fully and truly all material facts necessary for his assessment for that assessment year. If either of these two conditions is missing, the exception to the bar setup in the proviso, does not get

triggered. The consequence being that the assessment cannot be re-opened.

36. In the present case, we find that the whole issue is with regard to the method of production and the manner in which electricity is generated. The entire process of generation of electricity, both by the gas turbine unit and the steam turbine unit, has been explained by the petitioner in great detail in the assessment proceedings for the assessment year 1998-99 which has been taken notice of by the Assessing Officer. He was fully aware that there is a gas turbine unit which generates electricity and which has a waste product which is in the form of hot waste gases. It is through the technology of the waste heat recovery boiler that these hot waste gases are utilized for driving the steam turbine which, in turn, generates additional electricity. So both the gas turbine as well as the steam turbine generate electricity independently. It is another matter that the waste product of the gas turbine is utilized as the only input for driving the steam turbine.

37. Although the learned counsel for the revenue was at pains to try to explain that the focus of the Assessing Officer was on the fuel cost issue

and not on the issue of whether the two units were separate or integrated, we are not impressed by that argument. This is so because whatever may have been the focus of the Assessing Officer, the matter has to be looked at from the standpoint of the assessee/ petitioner. The petitioner had disclosed fully and truly the entire process of manufacture and generation of electricity by the gas turbine unit as well as by the steam turbine unit. It was not as if it was a fact or a figure hidden in some books of accounts which the Assessing Officer could have, with due diligence, discovered but had not done so. The Assessing Officer had asked specific queries with regard to the manner of functioning of the two units and the petitioner had provided detailed answers. All facts were staring the Assessing Officer at his face. He could have drawn his own inferences and, in fact, he did by treating them as separate units. On the very same facts, he is now trying to draw a different set of inferences which is nothing but a mere change of opinion. The inspection report of September, 2004 does not indicate anything new. While considering the fuel cost argument in the earlier assessment year, when the matter travelled right up to the Tribunal, the entire factual position was examined by the Assessing Officer, the Commissioner of Income Tax (Appeals) as

well as by the Tribunal and also by the Committee on Disputes and the two units were treated as separate units. We have already extracted the relevant portion of the Tribunal's order which notices the same. Therefore, in our view, this is not a case where the assessee/ petitioner can be said to have failed to disclose fully and truly all material facts necessary for assessment in respect of the assessment year 2000-01. Thus, this by itself, is sufficient for us to conclude that the exception carved out in the proviso to Section 147 is not attracted and, therefore, there is a bar from taking action under Section 147 inasmuch as the period of four years has expired. The impugned notice dated 03.02.2006 is, therefore, liable to be quashed on this ground.

38. We now come to the second purported reason for re-opening the assessment which pertains to taxability of income tax recoverable by the petitioner from the State Electricity Boards. It is stated in the recorded reasons that as per tariff notification issued by the Government of India the incidence of Income Tax on Income from generation of electricity is recoverable from the customers of NTPC, who are the State Electricity Boards. According to the recorded reasons, the amount of income tax

recoverable by NTPC from the State Electricity Boards, *inter alia* for the assessment year 2000-01, have not been fully reported by NTPC Limited as revenue receipts and instead major portions of such amounts had been kept out of the credit side of the Profit & Loss Account. This, according to the respondent No.1, resulted in the income tax recoverable from the customers of NTPC escaping assessment due to the reason of the failure on the part of the assessee to disclose fully and truly all material facts necessary for its assessment for the assessment year in question.

39. The learned counsel for the petitioner submitted that, first of all, no income had escaped assessment. It was contended that the petitioner had paid tax on the generation income by grossing up the rate of tax instead of grossing up the income. The rate of grossed up tax is 62.60162% as against the normal rate of 38.50% [35% tax + 10% surcharge]. It was also contended that there was no failure to disclose material facts inasmuch as the figures which have been referred to by the respondent No.1 in the recorded reasons were all taken from the audited accounts and, in any event, the respondent No.1 has not alleged as to which material fact was omitted to be disclosed. It was also contended that there was due

application of mind on this issue at the stage of the original assessment itself. In fact, there was a reference to the assessment order for the assessment year 2000-01, wherein the Assessing Officer observed as under:-

> "Out of this ₹ 670,67,20,000/- is non-generation income as shown in the return. Hence, ₹ 3163,97,88,398 - ₹ 670,67,20,000/- i.e. ₹ 2493,30,68,398/- represents the generation profit which has to be grossed up to account for tax on tax on this profit."

40. Thus, the issue of grossing up was also considered by the Assessing Officer at the time of the original assessment. It was contended that for all these reasons, there was no occasion for re-opening of the assessment. On the other hand, the learned counsel for the revenue supported the recorded reasons and submitted that the manner in which the figures have been displayed is not correct and that by itself would lead to a wrong conclusion.

41. Having considered the arguments advanced by the counsel for the parties, we are of the view that here, too, the submissions of the petitioner need to be accepted. The learned counsel for the petitioner, in the course of arguments, submitted the actual figures with regard to the assessee's

method of grossing up the rate of tax and the department's proposed method of grossing up of income. The same are as under:-

"(Assessee's method – Grossing up of rate of tax (38.50%)

(₹ in crores)

Generation income as assessed by the AO		2493.31
Normal rate of tax	38.50%	
As the tax has to be borne by the customer, it has to be "grossed up" on tax on tax basis (38.50 x 100/61.50)	62.60162%	
Grossed up tax payable by NTPC on the generation income		1,560.85
The said grossed up tax of ₹ 1,560.85 crores is recoverable from the customer. (What is shown as recoverable from the customer in the balance sheet is a lesser figure of ₹ 1345.50 crores worked out on a provisional basis at the time of finalizing the accounts)		
Add: Tax on non-generation income of ₹ 670.67 crores at the normal rate of tax of 38.50%		258.20
Total tax payable by NTPC as per the assessment order		1819.05

(Department's method – Grossing up of income):

(₹ in crores)

Generation income as assessed by the AO	2493.31

Add: Amount of tax on generation income recoverable from the customer (the amount shown as recoverable in the balance sheet is lesser figure of ₹ 1345.50 crores worked out on a provisional basis at the time of finalizing the accounts)		1,560.85
Generation income to be taxed		4054.16
Normal rate of tax	38.50%	
Tax payable by NTPC on the generation income		1,560.85
Add: Tax on non-generation income of ₹ 670.67 crores at the normal rate of tax of 38.50%		258.20
Total tax payable by NTPC as per the assessment order		1819.05"

It is clear that by virtue of either method, the total tax payable by NTPC, as per the assessment order would come to ₹ 1819.05 crores. Therefore, this is a clear case where no income has escaped assessment. As such, the pre-conditions for triggering the exception in the proviso to Section 147 are not satisfied. Thus, on this ground also, the impugned order is liable to be set aside.

42. No other reasons have been indicated in the recorded reasons. As such, the writ petition is allowed and the impugned notice dated

03.02.2006 is quashed and so also all proceedings pursuant thereto. The parties shall bear their own costs.

BADAR DURREZ AHMED, J

VEENA BIRBAL, J

JANUARY 10, 2013
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