IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

ITA No.151 of 2015 (O&M)
Date of Decision: 14.02.2018

The Commissioner of Income Tax, Faridabad .....Appellant

versus

M/s NHPC Ltd. .....Respondent

CORAM: HON'BLE MR.JUSTICE S.J.VAZIFDAR, CHIEF JUSTICE
HON'BLE MR. JUSTICE AVNEESH JHINGAN

Present:- Mr.T.K.Joshi, Senior Standing Counsel
for the appellant(s)- Revenue.

Mr. Ved Jain, Advocate for the respondent (s).

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S.J.VAZIFDAR, CHIEF JUSTICE (ORAL)

The appeal is against the order of the Tribunal upholding the decision of the CIT (Appeals) which allowed the appellant's appeal against the order of the Assessing Officer. The matter pertains to the assessment year 2001-02. The Assessing Officer had added an amount of Rs.131.81 crores on account of advance against depreciation which the CIT(A) deleted.

2. According to the appellant, the following substantial questions of law arises:-

> *"1. Whether, on the facts and in circumstances of the case and in law, the Hon'ble ITAT was right in law in dismissing appeal of the Revenue observing that 'in view of categorical finding of the Supreme Court we hold that the CIT(A) was correct in holding that advance against depreciation cannot be added under the computation of the normal*

income', whereas the Hon'ble Supreme Court in its decision dated 05.01.2010 has held that the 'advance against depreciation' is 'income received in advance', thus making the said income subject to 'Charge' under Chapter-II, as business income under Chapter-IV-D read with sub clause (i) of sub-Section 24 of Section 2 of the Income Tax Act?"

2. Whether, on the facts and in circumstances of the case and in law, the Hon'ble ITAT was right in law in deleting the addition of Rs.133,81,00,000/- made by the Assessing Officer under Section 143 (3) (and not under Section 115JB) on account of "Advance Against Depreciation" ignoring the provisions of Section 2(24) read with Section 28 of the Income Tax Act, 1961, which provides that "income" includes profits and gains and the profits and gains of any business or profession carried on by the assessee at any time during the previous year is taxable?"

The decision regarding question 2 follows the decision on question 1.

3. In our view, the matter is covered in favour of the respondent assessee by the judgment of the Supreme Court in the assessee's case *National Hydroelectric Power Corp. Ltd. v. Commissioner Of Income-Tax 2010(320) ITR 374*. The facts in this appeal are identical to the facts in the case before the Supreme Court.

The assessee sells electricity to the State Electricity Board, Discoms etc. The tariff is determined and identified by the Central Electricity Regulatory Commission. The tariff considers *inter alia* the Advance Against Depreciation (AAD). The question is whether the AAD

incorporated in the tariff constitutes income of the year in which it is received or not? In other words, the question is whether the amounts received as an advance which are not due in the relevant accounting year constitutes income of that accounting year. The Supreme Court held that :-

> *"Since the amount of AAD is reduced from sales, there is no debit in the profit and loss account. The amount did not enter the stream of income for the purposes of determination of net profit at all, hence clause (b) of Explanation-I was not applicable. Further, "reserve" as contemplated by clause (b) of the Explanation-I to Section 115JB of the 1961 Act is required to be carried through the profit and loss account. At this stage it may be stated that there are broadly two types of reserves, viz, those that are routed through profit and loss account and those which are not carried via profit and loss account, for example, a capital reserve such as share premium account. AAD is not a reserve. It is not appropriation of profits. AAD is not meant for an uncertain purpose. AAD is an amount that is under obligation, right from the inception, to get adjusted in the future, hence, cannot be designated as a reserve. AAD is nothing but an adjustment by reducing the normal depreciation includible in the future years in such a manner that at the end of useful life of the plant (which is normally 30 years) the same would be reduced to nil. Therefore, the assessee cannot use AAD for any other purpose (which is possible in the case of a reserve) except to adjust the same against future depreciation so as to reduce the tariff in the future years. As stated above, at the end of the life of the plant AAD will be reduced to nil. In fact, Schedule XII-A to the balance sheet for Financial Year 2004-2005 onwards indicates recouping. In our view, AAD is "income received in advance". It is a timing difference. It represents adjustment in future which is inbuilt in the mechanism notified on 26-5-1997. This adjustment may take place over a long period of time. Hence, we are of the view that AAD is not a reserve."*

4. Although the Supreme Court had in that case considered the effect of Explanation-I to Section 115 JB, the observations apply equally to the question before us, namely, whether AAD constitutes income.

Although in the context of Explanation-I to Section 115JB, the Supreme Court categorically held that AAD "did not enter the stream of income for the purposes of determination of net profit at all". It is clear, therefore, that AAD was held not to constitutes income of the year in question. Further the Supreme Court also held that AAD is income received in advance. In other words, it is not income received for the relevant accounting year. It is in that context that the Supreme Court observed that there is a timing difference and that it represents the adjustment in future and that it is therefore not even carried through the profit and loss account.

5. In these circumstances, the questions are answered against the appellant and in the favour of the respondent-assessee.

The appeal is, therefore, dismissed.

(S.J. VAZIFDAR)
CHIEF JUSTICE

(AVNEESH JHINGAN)
JUDGE

14.02.2018
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Whether speaking/reasoned	Yes
Whether reportable	Yes