

Fit for publication in 17

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IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH "VI-B" DELHI)

BEFORE SHRI I.P. BANSAL AND SHRI R.C. SHARMA

Misc.Appli. No. 637(Del)04
(In ITA Nos. 1377 & 2188(Del)02)
Asstt.years: 1998-99 and 1999-2000

Addl.Commissioner of I. Tax, National Thermal Power Corporation
Range 13, New Delhi. V. Ltd., New Delhi.

(Applicant)

(Respondent)

Applicant by: Y.S. Kakkar, DR

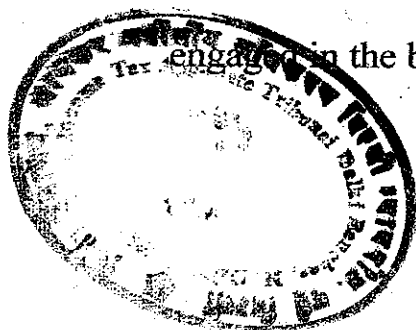
Respondent by: S/Shri S.E. Dastur, Adv. & Ved Jain, CA

ORDER

PER I.P. BANSAL, J.M.

Vide misc. application filed as above the department has claimed that there are certain mistakes crept in the order of the Tribunal which requires rectification.

2. The concerned appeal was decided by the order of this Tribunal dated 26.5.2004 in ITA Nos. 1377 & 2188(Del)02 in respect of assessment years 1998-99 and 1999-2000.
3. The issue in respect of which rectification has been sought is regarding part disallowance of deduction under sections 80 I/80 IA. The assessee is engaged in the business of generation of electricity at various places by using

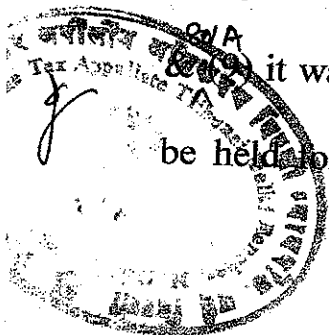


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coal and gas. The dispute is in respect of units generating electricity by using gas. During the course of assessment proceedings AO noticed that some of the units had shown fuel cost while other units were showing no cost of fuel. It was explained that in gas turbines which uses gases for generation of electricity the natural gas after mixing with air is burnt in the gas combustion to produce gases at a very high temperature and these gases are then used to run gas turbines for generation of electricity. After this cycle, the exhaust hot gases released 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 used 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. The steam turbine does not consume any fuel except waste hot gases of gas turbine. Thus it was explained that for generating electricity from steam turbine there was no cost of fuel. However, the AO was of the view that such released hot gas were value added product received from gas units and the same was not an ordinary air. The steam generated by hot gas has a value and it should take into account the cost of fuel involved in its generation. The waste hot gas used by the assessee has commercial utility and, therefore, it cannot be said that it is not a marketable product. Reference was also made to the

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provisions of section 80 I(6) according to which the profits of each industrial undertaking have to be determined as such unit is the only source of income of the assessee. Reference was also made to section 80 I (9) according to which where any valuable item is transferred from one unit to another unit then its market value should be taken into consideration. On these basis AO proceeded to estimate the value of hot gas used in the steam unit and accordingly the claim of assessee regarding deduction u/ss 80 I/80 IA was reduced. An appeal was filed before CIT(A) who also upheld the reduction of deduction. Aggrieved assessee filed an appeal before the Tribunal which has been decided by the Tribunal by the afore-mentioned order dated 26.5.2004. The submissions made before AO and CIT(A) were reiterated. It was pointed out that hot gas released by gas units was a waste gas which could neither be transported nor stored nor sold in the market and it had to be exposed to open atmosphere if not utilized for generation of electricity in steam turbine. Certificate from Department of Mechanical Engg., IIT, Delhi dated 9.3.2000 was also produced in which it was certified that exhaust gases were of much low pressure and had no combustible matter and are of no utility in any other application. With regard to applicability of section 80 I(6) it was submitted that the goods which have been referred therein must be held for the purpose of eligible business and there must be transfer of



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goods either by eligible business to another business or by other business to eligible business and also the consideration for transfer as recorded in the accounts does not correspond to the market value of such goods on the date of transfer. It was submitted that there was no market value of such released hot gas, therefore, the question of reducing value by notional value does not arise. Referring to section 80 I(6) it was pleaded that the cost of gas unit cannot be disturbed by shifting part of the cost to other unit. It was pointed out that what would happen in a verse situation that where gas unit had huge profit and steam unit had shown huge losses. In that situation the department would not shift the operation of gas unit to steam unit invoking such provision. On the other hand, the Id. DR had relied on the orders of AO and CIT(A). After considering the submissions of both the parties as per para 8 Tribunal held that no expenditure was incurred by the assessee for hot gases utilized in steam turbine and, therefore, there is no question of debiting any amount on account of such notional expenses and hot gas was freely available to the steam unit and if the assessee has not set up the steam unit such hot gas would have to be exposed to open atmosphere. There is no evidence on record that such hot gas can be sold in the open market. Due to advanced technology only the gas which was going waste could be utilized for generating electricity. Thus it was held that no portion of expenditure

incurred by the gas unit can be allocated to steam unit. Applicability of section 80 I(6) as well as 80 I(8) and 80 IA(9) was also considered in paras 9 & 10 and it was held that no help can be derived by the revenue from these sections to make the case of AO acceptable and it was held that the course adopted by the AO for shifting the portion of the expenses incurred by gas unit to the steam unit was not permissible in law and, therefore, cannot be approved. Thus the AO was directed to allow deduction under sections 80 I and 80 IA without allocating any expenditure of gas unit to steam unit. It is against these findings of Tribunal department has filed the misc.application contending therein that the order of the Tribunal suffers from infirmities of fact and in law and, therefore, needs to be reviewed by hearing misc. application.

4. It is pointed out in the misc.application that the order of the Tribunal is infirm because it proceeded to determine the profits as per commercial accounting practice. According to the department such observations are wrong as profits and gains in the industrial undertaking should be determined as per Income Tax Act and not as per commercial accounting practice. It is pointed out that the sister units (gas unit) had spent substantial amount to obtain natural gas from which hot gas was derived and it was made freely available to sister unit and thus steam unit was able to generate crores of



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income. It is also pointed out that the fuel cost of steam unit was indirectly met by gas unit. It is pointed out that in fact gas turbine and steam turbine are one integrated unit as steam turbine being completely dependable for fuel upon gas turbine without which it was not capable of production of electricity. Reference has been made to various decisions which include decision of NTPC Ltd. and it is mentioned that the present order of the Tribunal is contrary to that. It is further mentioned in the application that Tribunal is wrong in holding that there is no market value for hot gas and Tribunal is also wrong in holding that provisions of section 80 I(6), 80 I(8) and 80 IA(9) are not applicable to the facts of the case. It is also mentioned that there being no reference of certificates produced by the assessee from IIT, Delhi which constituted additional evidence. On these grounds it is prayed in the misc.application that suitable modification of the order should be done.

5. The Id. DR, reading from the contents of misc.application pleaded that there are certain infirmities in the order of the Tribunal which are required to be reviewed and thus she pleaded that suitable modification of the order of the Tribunal should be made.

6. On the other hand, learned counsel for the assessee contended that all the aspects have been considered by the Tribunal on merits and after



considering various contentions, position of law and provisions of statute Tribunal has come to the conclusion that allocation of expenses as done by the AO was not warranted as the same was against the provisions of law. There was no fuel cost to the steam unit and whatever cost of fuel was that was pertaining to gas unit. Thus firstly, he contended that when a conscious decision has been taken by the Tribunal, the same cannot be said to be liable for rectification as scope of power u/s 254(2) is very limited. The mistake u/s 254 is a mistake which is obvious or patent only. The mistake which requires to be established by arguments and on long run process of reasoning on points on which there may be conceivable to views cannot be a mistake apparent from record within the meaning of section 254. For this purpose he relied on the following decisions:-

1. Abbey Chemical(P)Ltd. vs. ITO [2005] 94 TTJ (Ahd)275;
2. Karan and Co. v. Income Tax Appellate Tribunal [2002] 253 ITR 131(Del).

7. Further he submitted that the department had filed an appeal before the Hon'ble Delhi High Court raising therein similar contentions which have been raised in MA and the said appeal of the department has been dismissed by the Hon'ble High Court vide its order dated 3.12.2004 on the ground that

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no clearance from High Power Committee on Dispute was produced to contest the appeal.

8. He further pointed out that the department had sought permission from High Power Committee on Dispute to contest the appeal against the above mentioned order of the Tribunal where request for permission has been rejected by Committee on Dispute on 8.6.2005 with the following observations:-

“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 ITAT. 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 80 IA and 80 IA. 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.”

9. He further referring to the misc.application filed by the revenue pointed out that what is being sought by the revenue is review of the order which is not permissible under the provisions of section 254(2) of the Act.

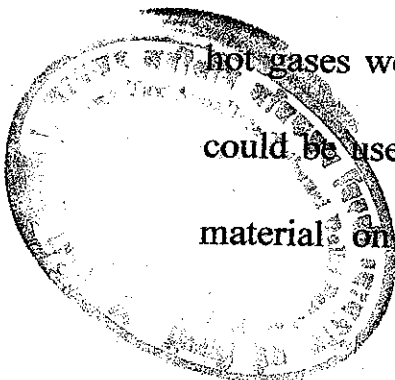
He referred to the following paras of misc.application to show that the department too in its own view seeking review of the Tribunal order:-

“By this misc.application it is to bring to the kind notice of the Hon’ble ‘B’ Bench ITAT that the order passed by the Hon’ble Bench suffers from the following infirmities on facts and in law and, therefore, needs to be reviewed by hearing this miscellaneous application.

Hon’ble Bench’s order is infirm in facts and in law in holding a view based on a letter wrongly quoted as letter written by the Secretary (Revenue) which is factually incorrect and needs to be reviewed on correct facts.”(emphasis is ours)

Thus he pleaded that the misc.application filed by the revenue deserves to be dismissed.

10. We have carefully considered the rival submissions in the light of material placed before us. We have carefully gone through the order of the Tribunal. While deciding the issue Tribunal has taken into consideration all the factors based upon which the department has made allocation of expenses. All the aspects have been considered. It was observed that the hot gases were waste products and by using advanced technology the same could be used to generate electricity. It is also observed that there was no material on record that released hot gas was a marketable product.



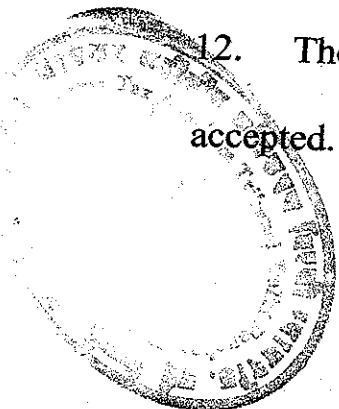
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Provisions of section 80 I(6), 80 I(8) and 80 IA(9) are referred to in the order and after discussing these provisions the view has been expressed that the same cannot be applied to support the allocation of expenses as done by the AO. According to the department these findings of the Tribunal are contrary to law. In the entire misc.application it has not been specifically pointed out that which is the particular mistake which has crept in the order of the Tribunal. The mistakes which have been pointed out by the department may constitute an error in the judgment but that does not become error in the decision itself to describe the same as "mistake" within the meaning of section 254(2). Thus we are of the opinion that there is no mistake in the order of the Tribunal to fall within the purview of section 254(2) and what the department is seeking from the Tribunal is the review of its order which according to well established law, is not permissible under the provisions of section 254(2) of the Act. Thus the application filed by the department deserves to be dismissed.

11. There is one more aspect of the matter that similar submissions were made by the department while seeking permission from Committee on Dispute to contest the appeal filed in Hon'ble High Court against the aforementioned order of the Tribunal. The relevant observations of Committee on Dispute have already been reproduced in the above part of this

order. The Committee has also observed that there is no evidence to substantiate the fact that such waste hot gas can be sold in the open market and thus there is no merit in the contention of the department that such allocation of expenses could be made. It is in this situation, the request to contest the appeal by the Department before the Hon'ble High Court against the above-mentioned order of the Tribunal was rejected. Thus in view of subsequent development also the department is precluded from contesting this misc.application as if the present misc. application is contested by the revenue even after the rejection of its request by High Power Committee on Dispute to contest the very issue in further appeal, it will tantamount to do a thing indirectly which is not permitted to be done directly. In this regard the proposition of law is well settled that what cannot be done "per directum" is not permissible to be done "per obliquum", meaning thereby whatever is prohibited by law to be done, cannot legally be effected by an indirect and circuitous contrivance on the principle of "quando aliquid prohibetur, prohibetur at omne per quod devenitur ad illud". In this manner also the application filed by tax revenue is liable to be rejected.

12. Therefore the misc.application filed by the revenue cannot be accepted.



13. In the result, the misc.application is dismissed.

Order pronounced in the open court on... 10/08/2007.

(R.C. Sharma)
Accountant Member

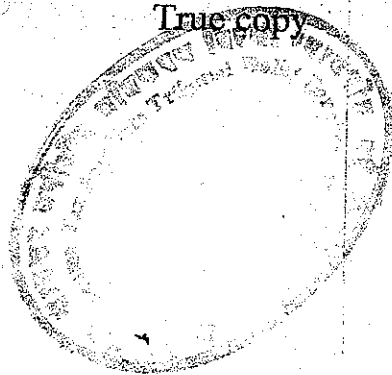
(I.P. Bansal)
Judicial Member

Dated: 10.08.2007

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copy forwarded to:

- 1. ACIT, Range 13, New Delhi.
- 2. National Thermal Power Corporation
- 3. CIT(A)
- 4. DR



By order

Dy. Registrar

Assistant Registrar
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 Delhi. India
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 Delhi. India