IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 23.04.2025

\+ **ITA 260/2024**

PR. COMMISSIONER OF INCOME TAX-4, NEW DELHI ..... Appellant

Versus

NTPC VIDYUT VYAPAR NIGAM LTD. ..... Respondent

Advocates who appeared in this case:

For the Appellant : Mr Shlok Chandra, senior standing counsel with Ms Naincy Jain and Ms Madhavi Shukla, Advocate

For the Respondent : Mr Ved Jain and Mr Nischay Kantoor, Advocates.

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HON'BLE MR. JUSTICE VIBHU BAKHRU
HON'BLE MR. JUSTICE TEJAS KARIA

JUDGMENT

VIBHU BAKHRU, J.

1. The appellant [**Revenue**] has filed the present appeal impugning an order dated 31.07.2023 [**impugned order**] passed by the learned Income Tax Appellate Tribunal [**ITAT**] in ITA No.145/Del/2020 in respect of assessment year [**AY**] 2015-16. The said appeal was preferred by the respondent [**Assessee**] impugning an order dated 18.11.2019 passed by the Principal Commissioner of Income Tax [**PCIT**] under Section 263 of the Income Tax Act, 1961 [**Act**].

QUESTIONS OF LAW

2. In the aforesaid context, the Revenue has projected following questions of law for consideration of this court:

> "A. Whether on the facts, circumstances and law of the case, the Hon'ble ITAT was justified in holding that no addition of Rs.42,16,04,786/- is called for on account of sale of fly ash and cenosphere?
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> B. Whether on the facts, circumstances and law of the case, the Hon'ble ITAT was right in accepting the prevalence of Gazette Notification issued by the Ministry of Environment and Forest over the provision of the Income tax Act 1961?
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> C. Whether on the facts, circumstances and law of the case, the Hon'ble ITAT was correct in ignoring the decision of the Supreme Court in the case of *Tuticorin Alkali Chemicals vs. Commissioner of Income tax: 141 CTR 387 (SC)* wherein it has been held "it is well settled that tax is attracted at the point when the income is earned. Taxability of income is not dependent upon its destination or the manner of its utlilisation. It has to be seen whether at the point of accrual, the amount is of revenue nature…."?"

FACTUAL CONTEXT

3. The respondent [**Assessee**] is a public sector company and a wholly owned subsidiary of National Thermal Power Corporation Limited [**NTPC**]. The Assessee is, *inter alia*, engaged in the business of trading energy. During the relevant year, it was also engaged in trading fly ash and related products.

4. The Assessee filed its revised return of income for the financial year [**FY**] relevant to AY 2015-16 on 15.06.2016, declaring a profit of ₹98,84,52,500/-. The Assessee's return was picked up for scrutiny and

the assessment proceedings culminated in an order dated 23.12.2017 passed under Section 143(3) of the Act, whereby the Assessee's income was assessed at ₹1,36,14,76,500/- and a demand of ₹25,49,58,670/- was raised.

5. The Assessee appealed the said decision before the Commissioner of Income Tax (Appeals) [CIT(A)], which was allowed by an order dated 18.11.2019 and the additions made by the AO to the declared income, were deleted.

6. However, thereafter, the PCIT invoked the provisions of Section 263 of the Act and made a further addition of ₹42,16,04,786/- on account of sale of fly ash and cenosphere.

7. The Assessee appealed the said decision before the learned ITAT, which was allowed by the impugned order.

8. The Assessee was handed over fly ash, a product of the thermal coal plants, generated by its holding company NTPC. The same was to be utilised for specific purposes: utilization for development of infrastructure, and promotion and facilitation activities for fly ash utilization. The Assessee claimed that the proceeds collected from sale of fly ash were credited to a separate earmarked account [**fly ash utilisation account**] and the entire amount was used exclusively for the purpose of utilization of the fly ash for development of infrastructure and/ or for specified purposes. The expenses incurred by the Assessee were debited to the said fly ash utilisation account and not to the Assessee's profit and loss account.

9. The Assessee also explained that the said activities were undertaken in view of the Notification dated 03.11.2009 issued by the Ministry of Environment and Forests, Government of India, regarding the utilization of fly ash.

10. The aforesaid Notification was issued under Sections 3 and 5 of the Environment (Protection) Act, 1986. The Government of India, Ministry of Environment and Forests had issued a notification dated 14.09.1999 restricting the excavation of top soil for manufacture of bricks and promoting the utilization of fly ash in the manufacture of building materials and in construction activity within a specified radius of fifty kilometres from coal or lignite based thermal power plants. The object of the same was to conserve the top soil and minimize environment pollution.

11. The aforesaid notification requires all thermal plants to utilize the fly ash generated from the power plants in specified manner. Article 2 of the said notification is set out below:

> "**2. Utilisation of ash by Thermal Power Plants.**
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> All coal or lignite based thermal power plants shall utilise the ash generated in the power plants as follows:-
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> (1) Every coal or lignite based thermal power plant shall make available ash, for at least ten years from the date of publication of this notification, without any payment or any other consideration, for the purpose of manufacturing ash-based products such as cement, concrete blocks, bricks, panels or any other material or for construction of roads, embankments, dams, dykes or for any other construction activity.

(2) Every coal or lignite based thermal power plant commissioned subject to environmental clearance conditions stipulating the submission of an action plan for full utilisation of fly ash shall, within a period of nine years from the publication of this notification, phase out the dumping and disposal of fly ash on land in accordance with the plan. Such an action plan shall provide for thirty per cent of the fly ash utilisation, within three years from the publication of this notification with further increase in utilisation by atleast ten per cent points every year progressively for the next six years to enable utilisation of the entire fly ash generated in the power plant atleast by the end of ninth year. Progress in this regard shall be reviewed after five years.

(3) Every coal or lignite based thermal power plant not covered by para (2) above shall, within a period of fifteen years from the date of publication of this notification, phase out the utilization of fly ash in accordance with an action plan to be drawn up by the power plants. Such action plan shall provide for twenty per cent of fly ash utilization within three years from the date of publication of this notification, with further increase in utilization every year progressively for the next twelve years to enable utilisation of the entire fly ash generated in the power plant.

(4) All action plans prepared by coal or lignite based thermal power plants in accordance with sub-para (2) and (3) of para 2 of this notification, shall be submitted to the Central Pollution Control Board, concerned State Pollution Control Board/Committee and concerned regional office of the Ministry of Environment and Forests within a period of six months from the date of publication of this notification.

(5) The Central and State Government Agencies, the State Electricity Boards, the National Thermal Power Corporation and the management of the thermal power plants shall facilitate in making available land, electricity and water for manufacturing activities and

provide access to the ash lifting area for promoting and setting up of ash-based production units in the proximity of the area where ash is generated by the power plant.

(6) Annual implementation report providing information about the compliance of provisions in this notification shall be submitted by the 30th day of April every year to the Central Pollution Control Board, concerned State Pollution Control Board/Committee and the concerned Regional Office of the Ministry of Environment and Forests by the coal or lignite based thermal power plants."

12. The said Notification dated 14.09.1999, as amended by a Notification dated 27.08.2003, which expressly provided that all coal or lignite based thermal power plants would be free to sell fly ash to user agencies subject to certain conditions including that pond ash be made available free of any charge on as is where is basis to manufacturers of bricks, blocks or tiles, farmers and the Central and State road construction agencies, Public Works Department, and to agencies engaged in backfilling or stowing of mines. At least 20% of dry ESP fly ash was required to be made available free of charge to units manufacturing fly ash or clay-fly ash bricks, blocks and tiles. It further provided that all coal or lignite based thermal power plants are required to achieve a target of fly ash utilization as stipulated in the said notification. The target of using at least 50% fly ash generation was require to be achieved in the first year and the target of 100% utilization of fly ash was require to be achieved within five years from the date of notification.

13. The said notification was further amended by a Notification dated 03.11.2009. Paragraph 6 of the Notification dated 03.11.2009 reads as under:

> "(6) The amount collected from sale of fly ash and fly ash based products by coal and/or lignite based thermal power stations or their subsidiary or sister concern units, as applicable should be kept in a separate account head and shall be utilized only for development of infrastructure or facilities, promotion and facilitation activities for use of fly ash until 100 percent fly ash utilization level is achieved; thereafter as long as 100% fly ash utilization levels arc maintained, the thermal power station would be free to utilize the amount collected for other development programmes also and in case, there is a reduction in the fly ash utilization levels in the subsequent year(s), the use of financial return from fly ash shall get restricted to development of infrastructure or facilities and promotion or facilitation activities for fly ash utilization until 100 percent fly ash utilisation level is again achieved and maintained."

ASSESSEE'S CASE

14. The Assessee claimed that it had deposited the entire sale proceeds of fly ash, which was received from NTPC in a fly ash utilization fund and had also furnished the same. It was Assessee's claim that the credit balance available of the fund was transferred to its holding company (NTPC) at the end of the relevant financial year. In the aforesaid context the Assessee claimed that it had not earned any income.

REASONS & CONCLUSION

15. At the outset, it is relevant to refer to fly ash utilization fund as set out in the impugned order. The same is reproduced below:

"As at	31.03.2015	31.03.2014
Ay per last financial statements	3,26,23,01,631	2,34,93,34,677
Add: Transfer from sales (Note 18)	87,42,34,784	1,22,55,13,224
Add: Transfer from other Income (Note 19) (Net of tax)	20,77,17,705	
Transfer from reserve and surplus (Note3) (Net of tax)	-	17,01,18,785
Less: Utilized during the year		
Capital expenditure (Note 10)	-	49,15,087
Cost of fly ash/ash products (Note 21)	2,23,11,593	2,89,05,770
Employee benefits expense (Note 22)	4,02,19,471	5,73,27,339
Administration & other expenses (Note 24)	4,28,91,315	5,13,13,853
Fly ash utilization expenses incurred by holding company	34,72,07,619	34,02,03,007
	45,26,29,998	48,26,65,056
Net Fly ash utilization fund	3,89,16,24,122	3,26,23,01,631
Less: Fly Ash Fund Transferred to NTPC Limited	3,89,16,24,122	-
Total	-	3,25,23,01,631"

16. The said fund indicates that the balance of ₹3,89,16,24,120/- which was available in the fund as on 31.03.2015 was transferred to NTPC.

17. Mr Chandra, the learned counsel for the Revenue referred to the aforementioned fly ash utilization fund and submitted that the Assessee

had debited cost of fly ash products amounting to ₹2,23,11,593/-; cost of employee benefits expense amounting to ₹4,02,19,471/- and administration and other expenses amounting to ₹4,28,91,315/- to the fund. He contended that the Assessee had, thus, recovered part of its general expenses from the sale proceeds of fly ash and therefore, could not claim that it had not earned any income. He contended that the sale proceeds were required to be accounted for and such expenses which were otherwise allowable under the Act were required to be debited for determining the assessable income. He contended that the learned PCIT had examined the record and concluded that the Assessee's income from sale of fly ash was not included in the total income chargeable to tax.

18. Mr Jain, learned counsel appearing for the Assessee contended that the Assessee had produced all relevant material to establish that it had not included the expenses that were debited to the fly ash utilization fund as a part of its general expenses and thus same were not claimed as a deduction from the Assessee's taxable income. It was reiterated that the expenses debited to the fly ash utilization fund had been credited in their respective heads, thus reducing the amount of expenses that were claimed for the purpose of calculating the taxable income of the Assessee. In the aforesaid context, this court had called upon the Revenue to produce all relevant records that were furnished before the concerned authorities. Mr Chandra had sought and was granted time to produce the relevant records on more than one occasion, but the Revenue did not file the said records. He finally reported that the said

record was not available and all record that was available has been filed with the present appeal.

19. However, the Assessee produced a printed copy of the schedules to its final account, which clearly established that the expenses booked by the Assessee in its nominal accounts, were reduced to the extent of the expenses that were transferred to the fly ash utilization fund.

20. At this stage it is also relevant to note that there is no dispute as to the following facts:

(a) that the fly ash was provided to the Assessee by NTPC for utilizing the same as required by the notification issued by the Central Government under the Environment (Protection) Act, 1986;

(b) that part of the funds realized from sale of fly ash was in fact used for specified activities and the Assessee derived no benefit from any development activities undertaken from the sale proceeds of fly ash;

(c) that the infrastructure or facilities that were developed did not belong to the Assessee;

(d) that the Assessee had recovered the expenses that were attributable for carrying on the activities for sale of fly ash and for utilizing the same for specified purposes from the fly ash utilization fund; and,

(e) that the balance amount available in the fly ash utilization fund was made over to NTPC.

21. It is clear from the above that there is no question of the Assessee having earned any income. The fly ash did not belong to the Assessee, but to its holding company – NTPC. The Assessee had only sold the fly ash and utilized part of the funds as mandated and made over the balance funds to NTPC.

22. In the given facts, we do not find any infirmity with the decision of the learned ITAT that the Assessee had not earned any income on account of sale of fly ash, which was provided by NTPC. In ***Commissioner of Income-Tax v. New Horizon Sugar Mills Pvt. Ltd.: (2000) 244 ITR 738***, the Madras High Court had upheld the decision of the learned ITAT holding that the amount set apart towards Molasses Storage Reserve Fund is required to be excluded from the total income of the assessee. The said decision was rendered bearing in mind the Molasses Control (Amendment) Order dated 06.02.1972, which required that the amount for construction of molasses storage tank was to be kept separately. The assessee had no power to spend the said amount, the same was required to be spent only in accordance with the directions issued by the Government. The appeal preferred against the said order was also dismissed by the Supreme Court, in view of the orders passed in similar matter permitting the Revenue to withdraw the appeals.

23. In the facts of the present case as well, the Assessee was not free to utilize the sale proceeds of fly ash as the same was required to be used for specified purposes, which as stated above, did not result in the Assessee acquiring any asset.

24. In view of the above, we find no infirmity with the decision of the learned ITAT. No substantial questions of law arise for consideration of this court. The appeal is, accordingly, dismissed.

VIBHU BAKHRU, J

TEJAS KARIA, J

APRIL 23, 2025
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