IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA 'B' BENCH, KOLKATA

(Before Sri J. Sudhakar Reddy, Accountant Member & Sri Aby T. Varkey, Judicial Member)

I.T.A. No. 2349/Kol/2019
Assessment Year: 2007-08

DCIT, Circle-7(1), Kolkata……Appellant

Vs.

M/s. Haldia Petrochemicals Ltd……Respondent
[PAN: AAACH 7360 R]

I.T.A. No. 2281/Kol/2019
Assessment Year: 2007-08

M/s. Haldia Petrochemicals Ltd……Appellant
[PAN: AAACH 7360 R]

Vs.

ACIT, Circle-7(1), Kolkata……Respondent

Appearances by:

Sh. Imokaba Jamir, CIT, appeared on behalf of the Revenue.

Sh. Harakamal Chakravorty, A/R, appeared on behalf of the Assessee.

Date of concluding the hearing : February 18th, 2021
Date of pronouncing the order : April 21st, 2021

ORDER

Per J. Sudhakar Reddy, AM:

These are cross appeals directed against the order of the Learned Commissioner of Income Tax (Appeals)-11, Kolkata [hereinafter the "CIT(A)"], passed u/s. 250 of the Income Tax Act, 1961 (the 'Act'), dated 31.07.2019 for the Assessment Year 2007-08.

2. The assessee is a public sector undertaking M/s. HPL Cogeneration Ltd. (hereinafter 'HPLCL'). It filed its return of income u/s 139 of the Act for the AY 2007-08 on 30.10.2007. It declared book profit u/s 115JB of the Act.

2.1. HPLCL was amalgamated with Haldia Petrochemicals Limited (hereinafter 'HPL") with effect from 01.04.2008 vide order dated 22.09.2009. This appeal is filed by HPL.

3. We shall now take up the assessee's appeal.

ITA No. 2281/Kol/2019

The grounds of the appeal read as follows:

"1(a) That the Ld. CIT(A) erred in law and facts in upholding addition of Rs 11,40,60,203/- out of Rs 34,55,60,203/ as additional income of the Appellant under the normal provision of the income Tax Act and also under section 115JB.

1(b) The Ld.CIT(A) further erred in failing to appreciate that even otherwise no addition could have been made u/s 115JB when the accounts have been audited and approved in the AGM.

2. That the Ld. CIT(A) erred in law and facts in disallowing expense of Rs. 23,57,810/- under the normal provision of the Income Tax Act in respect of payment to Nuovo Pignone on purported ground of prior period expenses."

4. After hearing rival contentions, perusing the papers on record and the orders of the authorities below as well as the case law cited we hold as follows.

4.1. On ground nos. 1 & 2 the ld. CIT(A) from para-5.2 to 5.5 held as follows:

"5.2. I have carefully considered the issue at hand. The appellant has declared to have earned an amount of Rs.1,37,86,20,277/- as facilitation charges from HPL. At that time, the appellant was known as HPCL Later it got merged with HPL and is now known as HPL or Haldia Petrochemicals Ltd. The TD5 deducted by HPL on payments made to the appellant, i.e. HPCL, indicated that the appellant had earned Rs.1,72,41,80,480 from HPL. Thus, there was a difference of Rs.34,55,60,203 between the income declared by the appellant and that which was apparent from TDS deducted. The Id. AO called for the appellant's explanation and reconciliation and, stating that the appellant failed to do so, he added back the differential amount of Rs. 34,55,60,203. The Id. AR, during the appellate proceedings challenged the AO's act stating that the appellant had submitted the reconciliation before the Id. AO but he has simply ignored it. Necessary evidence in the form of the office stamp of the Id. AO dated 15.12.2009, on the copy of letter submitted by the appellant on this issue was also produced. Further, during the remand proceedings the present AO accepted that a reconciliation submitted by the appellant was on record. Thus, it is noted that the Id. AO made an incorrect statement that the appellant had failed to explain the difference.

5.3. As for the difference between the figures in the books of the appellant and that derived from the TDS made on payments made to the appellant, it was explained by the Id. AR that there were certain disputes related to refund of Corporation Tax which the appellant was supposed to refund to HPL. The dispute was sorted out towards the end of March 2007 and the appellant issued a credit note to HPL as such the amount payable by HPL to the appellant got reduced by Rs. 34,55,60,203. But by the time the dispute was settled, TDS had already been deducted by HPL and deposited in the Government Account.

I find that there is a note prepared by HPL on amounts receivable from and payable to the appellant. The note enlists the following:

Corporate Tax refundable by the appellant to HPL	*:*	*Rs. 38.67 crores*
Interest on Corporate tax refundable by the appellant to HPL	*:*	*Rs. 4.20 crore*
Interest on delayed payment payable by HPL to the appellant	*:*	*Rs. 19.71 crore*
Net amount payable the appellant to HPL on 31.03.2007	*:*	*Rs. 23.15 crore*

5.4. In the reconciliation statement filed by the appellant, the following has been mentioned:

Reconciliation of Conversion (Facilitation) charges as shown in Audited Accounts of HPCL vs. as shown by HPL.

As per Audited Accounts of HPLCL	*:*	*Rs. 1,37,86,20,277*
Add: Credit note towards Corporate Tax refund considered byHPL in AY 2008-09	*:*	*Rs. 38,67,00,000*
Less: Fuel savings claim and other debit notes considered by HPLIn AY 2008-09	*:*	*Rs. 4,11,39,797*
As per TDS certificate received from HPL	*:*	*Rs. 1,72,41,80,480*

5.5. On a comparison of the two figures, i.e. the one which is a note on disputed amount and the reconciliation statement, I find there are two differences:

(a) The interest receivable by the appellant on late payment at Rs. 19.71 crores has not been incorporated in the reconciliation statement,

(b) The value of fuel savings and other debits at Rs. 4.11 crore was not a part of the dispute.

Therefore, I reject the reconciliation statement and adopt the figure of Rs. 23.15 crore payable by the appellant to HPL as on 31.03.2007. Thus, in my view, the disputed amounts, which allegedly caused the difference of Rs. 34,55,60,203 can explain an amount of Rs. 23,15,00,000 only. As a result, an amount of Rs. 11,40,60,203 still remains unexplained. The Id. AO is directed to delete the addition made by him on this account and add back a sum of Rs. 11,40,60,203 to the taxable income of the appellant. This ground of appeal is partly allowed."

4.2. The assessee has demonstrated before us that interest on delayed payment payable by HPL to HPLCL has been offered to tax under the head 'other income'. This amount is reflected in the annual accounts of the assessee under the head "miscellaneous income". The ld. CIT(A) has, in our opinion, committed a mistake on fact by not considering the fact that the assessee had already offered the said interest income to tax under the head "other income".

4.3. In this case an amount of ₹19.71 crores was interest receivable on delayed payment by HPL and an amount of ₹4.20 crores was interest payable to HPL on excess corporate tax collected and both were not part of facilitation charges. The reconciliation statement was for the facilitation charges. Interest does not form part of facilitation charge. The interest transactions were duly accounted for by the assessee. As per the audited accounts of HPLCL, income from facilitation charges was disclosed as ₹137,86,20,277/-. ₹4,11,39,797/- was an amount of debit notes on fuel savings which was not considered by HPL, while deducted TDS. Further, HPLCL had to pay HPL corporate tax to the tune of ₹38.67 crores. This was considered by HPL in the next phase of 2009. Thus these factors are taken into consideration by the ld. CIT(A).

Enhancing the income of the assessee by an amount of ₹11.40 crores both are normal provisions as well as u/s 115JB of the Act is without proper analysis of the facts and figures is wrong. Hence, we delete this addition to the extent confirmed by the ld. CIT(A).

4.4. Ground no. 2 of the assessee's appeal is against the ld. CIT(A) confirming part addition on reimbursement of expenses paid to 'Nuovo Pignone' on the ground that the invoices do not pertain to March, 2006 and they are prior period expenses.

4.5. The assessee has during the year paid an amount of ₹36,62,848/- to Nuovo Pignone as reimbursement of expenses. The AO disallowed this expenditure u/s 40(a)(i) of the Act, for the reason that the assessee has not deducted tax at source on this amount of reimbursement of expenditure.

4.6. On appeal, the ld. CIT(A) applied the propositions of law laid down by the jurisdictional High Court and held that the disallowance u/s 40(a)(i) of the Act was bad in law, as no tax need to be deducted at source for reimbursement of expenditure.

4.7. While upholding so, the ld. CIT(A) was of the opinion that the invoices dated 06.03.2006 and 16.03.2006 amounting to ₹23,57,810/- pertained to March 2006 and hence are not expenditure of current year and cannot be allowed for the AY 2007-08. Aggrieved by this order, both the Revenue as well as the assessee are in appeal before us.

4.8. The submission of the assessee is that the liability of the assessee on these reimbursement of expenditure, has crystallized during the AY 2007-08 and hence, is allowable during the year. It was argued that the assessee submitted the invoices pertaining to the month of March 2006, during the month of April 2006 and it was only after receipt and subsequent scrutiny of these invoices, the assessee acknowledged its allowability for reimbursement. Thus he submits that these are not prior period expenditure. Moreover, he submits that the ld. CIT(A) could not have made this disallowance as eleven years have elapsed from the date of the assessment year.

4.9. The ld. D/R on the other hand submitted that the ld. CIT(A) has recorded a detailed finding on this issue. He referred to the chart at page-22 of the order of the ld.

CIT(A) and submitted that these expenses can be allowed in the AY 2006-07 and not in the AY 2007-08.

4.10. After hearing rival contentions we find that certain invoices were raised on the assessee during 06.03.2006 and 16.03.2006. The issue is whether these are prior period expenditure. The assessee is a public sector undertaking. Its accounts are audited by the Comptroller and Auditor General (hereinafter 'C&AG'). Prior period expenditure is normally classified as 'Prior Period' by both the statutory debtor and the C&AG. The assessee submits that these expenditures crystallized during the current assessment year. This fact has been accepted by both the statutory auditor and the C&AG. Keeping the view taken by the statutory auditor and C&AG we hold that this expenditure cannot be classified as prior period expenditure. The bills of March 2006 were received and approved in the next financial year. Thus the disallowance as confirmed by the ld. CIT(A) is hereby deleted and this ground is allowed.

5. Now we take up the Revenue appeal in **I.T.A. No. 2349/Kol/2019**. There is a delay of 04 days in filing of this appeal. After perusing the condonation petition, we condone the delay and admit this appeal.

5.1. Grounds of the appeal are as follows:

> *"(a) That on the facts and circumstances of the case, the Ld. CIT(A) has erred in law as well as in facts in considering the interest income Rs. 3,60,90,793/- as "income from business and profession" instead of "income from other sources".*
>
> *(b) That on the facts and circumstances, the Ld. CIT(A) has erred in law as well as in facts allowing an amount of Rs. 23,15,00,000/- out of Rs. 34,55,60,203/- towards difference between income shown as facilitation charges shown in the income tax return and income. shown in TDS certificate and also allowing the same in computing book profit u/s 115JB.*
>
> *(c) That on the facts and circumstances, the Ld. CIT(A) has erred in law as well as in facts allowing an amount of Rs. 13,05,038/- out of Rs. 36,62,848/- u/s 40(a)(i) in respect of payment to Nuo Pignone.*
>
> *(d) That on the facts and circumstances of the case, the Ld. CIT(A) has erred in law as well as in facts allowing an amount of Rs. 1,54,61,748/- by wrongly considering that the income did not arise due to trading of power.*
>
> *(e) That the appellant craves liberty to add, alter, amend or modify any or all grounds of appeal at or before the time of hearing of the appeal."*

5.2. On ground no. 1, we find that the ld. CIT(A) has followed the decision of his predecessor for the AY 2006-07 on identical facts and held that the income in question is assessable under the head 'income from business' and not under the head 'income

from other sources'. On a query from the Bench the ld. Counsel for the assessee submitted that, this decision of the ld. CIT(A) on this issue for the AY 2006-07 was accepted by the Revenue and no further appeal was filed before the Tribunal. The ld. D/R could not controvert these submissions of the assessee.

5.3. As the ld. CIT(A) has followed the propositions of law and decision of the ITAT on identical facts in the assessee's own case for the AY 2006-07 and as that order had become final, we do not see any reason to interfere in this decision of the ld. CIT(A) on this issue as to whether, the income in question is taxable under the head 'income from business' or under the head 'income from other sources'. In the result, this finding of the ld. CIT(A) is upheld and ground no. 1 of the Revenue is dismissed.

5.4. Ground no. 2 is on the issue of determination of computation of facilitation charges. We have dealt with this issue while disposing off ground no. 1 and 2 of the assessee's appeal. Consistent with the view taken therein we dismiss this ground of the Revenue.

5.5. Ground no. 3 is against the decision of the ld. CIT(A) in deleting the disallowance u/s 40(a)(i) of the Act. The undisputed fact is that the payment in question is reimbursement of expenditure. The ld. CIT(A) followed the propositions of law laid down by the jurisdictional High Court on this issue and held that no tax needed to be deducted at source, when it is a reimbursement of expenditure. Hence, we find no infirmity in the same.

5.6. Hence we dismiss this ground of the Revenue.

5.7. Ground no. 4 is on the issue of income from trading. Here also the ld. CIT(A) has followed the order of his predecessor for the AY 2006-07 on identical facts and held that the action of the AO in estimating the profit of ₹1,58,78,472/- as earning from credit activity is factually incorrect. The ld. CIT(A) has verified the copies of the electric bills raised by West Bengal State Electricity Board and factually came to a conclusion that these bills were raised only on HPL. These factual findings could not be controverted by the ld. D/R. It is also submitted before us that the Revenue had accepted this particular finding of the ld. CIT(A) for the AY 2006-07 and has not preferred an appeal before the ITAT. Under these circumstances that finding of fact has become final. The ld. CIT(A) has

in the impugned order followed the order and propositions laid down by his predecessor for the AY 2006-07. We find no infirmity in the same. Hence, we uphold the order of the ld. CIT(A) and dismiss ground no. 4 of the Revenue.

5.8. Ground no. 5 is general in nature.

6. In the result, the appeal filed by the assessee is allowed in part and the appeal filed by the Revenue is dismissed.

Kolkata, the 21st April, 2021.

Sd/-	Sd/-
[Aby T. Varkey]	[J. Sudhakar Reddy]
Judicial Member	Accountant Member

Dated: 21.04.2021

Bidhan (P.S.)

Copy of the order forwarded to:

1. ***DCIT, Circle-7(1), Kolkata***
2. ***M/s. Haldia Petrochemicals Ltd., 1, Auckland Place, Kolkata-700 017.***
3. ***ACIT, Circle-7(1), Kolkata.***
4. CIT(A)- 11, Kolkata (sent through mail)
5. CIT-
6. CIT(DR), Kolkata Benches, Kolkata. (sent through mail)

True copy

By order

Assistant Registrar
ITAT, Kolkata Benches