Serial Nos. 03-06
Regular List

HIGH COURT OF MEGHALAYA
AT SHILLONG

WP(C) No. 345 of 2019 with
MC (WPC) No.208/2019
WP(C) No. 346 of 2019 with
MC (WPC) No.209/2019
WP(C) No. 347 of 2019 with
MC (WPC) No.210/2019
WP(C) No. 348 of 2019 with
MC (WPC) No.211/2019

Date of order: 31.08.2022

M/s North Eastern Electric Power Corporation	vs.	Principal Commissioner of Income Tax, Shillong & Anr.

Coram:
Hon'ble Mr. Justice Sanjib Banerjee, Chief Justice
Hon'ble Mr. Justice W. Diengdoh, Judge

Appearance:
For the Petitioner : Mr. V. Jain, Adv. with
Mr. S. Jindal, Adv

For the Respondents : Dr. N. Mozika, ASG with
Ms. K. Gurung, Adv.
Ms. A. Pradhan, Adv.

i) Whether approved for reporting in Law journals etc.: Yes

ii) Whether approved for publication in press: Yes/No

JUDGMENT: (per the Hon'ble, the Chief Justice) (Oral)

Out of the four writ petitions carried to this Court on the same fundamental aspect pertaining to notices for reassessment in respect of four assessment years, the last two petitions – pertaining to assessment years 2015-16 and 2016-17 – are sought to be withdrawn. Accordingly, WP (C) No.347 of 2019 and WP (C) No.348 of 2019 along with MC (WPC) No.210

of 2019 and MC (WPC) No.211 of 2019 are dismissed as not pressed without going into the merits thereof.

2. It is made clear that the failure to pursue the petitions and their resultant dismissal will not prejudice the petitioning assessee in any other proceedings pending or that may be instituted in accordance with law.

3. The short consideration pertaining to the two earlier writ petitions which cover assessment years 2012-13 and 2013-14 revolves round the interpretation of Section 147 of the Income-Tax Act, 1961 as its stood prior to its 2021 amendment.

4. At the outset, it is necessary to see the material part of the relevant provision and the applicable proviso:

> "***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... 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."*

5. The matter requires a bit of facts to be stated. The petitioning assessee is a public sector undertaking functioning under the Ministry of

Power. The petitioner distributes power to the States in the North-East or to the State Electricity Boards. The petitioner asserts that the petitioner does not indulge in retail distribution or sale or distribution of electricity to private parties. The matter pertains to the interest and delayed payment surcharge on account of the failure of the buyers of electricity from the petitioner to pay the principal dues in time. There is no dispute that the rates of tariff and the delayed payment surcharge, including interest, are set by a statutory authority and the petitioner has no latitude to alter the rates by private negotiation nor is it the Department's case that the rates are privately arrived at.

6. The problem that has arisen is because of the consistent practice of the clients of the assessee in this case in making delayed payments and failing, more often than not, to pay the delayed payment surcharge or interest on account of the delay. The general accounting policy followed by the assessee is the mercantile system. However, when it comes to delayed payment surcharge or interest for delayed payment, the accoounting is on cash basis and not on accrual.

7. The petitioner assessee justifies the dual or mixed mode of accounting, so to say, by relying on a letter issued by the Ministry of Power on August 19, 2003 to the following effect:

> "Please refer to the discussions at the Audit Committee meeting of NEEPCO with regard to the treatment to be made of surcharge being billed to SEBs. It was mentioned by me that there is a need

to re-orient the accounting policy in line with the accounting standards being followed by other CPUs of this Ministry in order to avoid the situation of a book loss due to write-off of surcharge, as in the current year, in addition to maintaining consistency. The Statutory Auditor, present in the meeting, agreed with the above view. It was, therefore, decided that the accounting procedure followed in other CPSUs under MOP will also be adopted in NEEPCO as well, even if it requires amendment to the accounts.

2. In this connection, I have spoken to Director (Finance), NTPC, Director (Finance), PGCIL and ED (Finance), NHPC about the above issue. All have confirmed that surcharge, post securitisation, is being accounted for on cash basis in their respective organisations, as against the accrual basis in NEEPCO.

3. In light of the above, I request you to record the decision of the Audit Committee that the annual accounts be modified so as to account for the surcharge on cash basis, with a corresponding disclosure in the schedule."

8. The two surviving petitions arise out of a common set of reasons asserted by the Department in an originally undated order passed under Section 147 of the Act prior to its 2021 amendment that was subsequently forwarded to the assessee under a cover of a letter dated March 26, 2019. It may be pertinent to quote the entirety of the reasons indicated for reopening or reassessment under Section 147 of the Act except the table that appears at paragraph 1.2 thereof which may not be relevant in the context of the discussion:

"Reason(s) for Reopening/Reassessment u/s 147 of the IT Act 1961, where income has escaped assessment:

1.1. Pursuant to order passed u/s 263 by the Ld PCIT for the AY 2014-15 regarding the assessee accounting for "interest on debtors" on cash basis instead of accrual basis, the audited accounts of the assessee were perused off the official website "www.neepco.co.in/reports/annual-reports". It is observed that the same issue persists from before AY 2012-13 up to the current AY. However, since the Act restricts reopening of cases beyond six

years, focus is placed on cases for the AYs after 2011-12, i.e. from AY 2012-13 to AY 17-18.

1.2. ...

1.3. In view of the discrepancies noticed on the basis of the issue raised by the Ld PCIT vide his order dated 12.12.2018 for the AY 2014-15, it is confirmed that the assessee has accounted for the interest income on cash basis (as disclosed in its notes to the audited accounts), instead of accrual basis.

1.4. Therefore, there exists sufficient reason to believe that income of at least Rs.286.41 crores (as computed above at a conservative rate of 10%) has escaped assessment for the abovementioned AYs.

1.5. Accordingly, it is proposed to reassess the income of the assessee for the AYs 2012-13, 2013-14, 2015-16 and 2016-17 by issuing notices u/s 148. However, since the cases for AYs 2012-13 and 2013-14 exceed the four years' limitation provided in the Act, it is, therefore, placed before the Pr. CIT for kind approval u/s 151(1) of the Act."

9. What strikes at first blush is that the only reason to reopen the assessment or to reassess the income for the relevant assessment years appears to be based on an order passed in suo motu review proceedings under Section 263 of the Act by a Principal Commissioner of Income-Tax pertaining to assessment year 2014-15. It is plain to discern that the relevant PCIT took a view that if the accounting methodology followed is the mercantile or accrual basis, in respect of certain items of income the assessee could not resort to the cash or realisation basis and defer its tax liability on such selected items of income till the time of receipt thereof.

10. The petitioner asserts that given the nature of its operations, it has per force to continue supplying electricity to its clients even if payments are not made in time. Further, even when bills are raised and there can be no

dispute as to the quantum due and owing to the petitioner, cash-strapped State governments and State Electricity Boards make unusual requests for deferment of payment or waiver of the delayed payment surcharge or interest or the like and there are occasions when high authorities intervene. The petitioner claims that it does not have the choice to disconnect the supply of electricity in a coercive attempt to realise its dues.

11. According to the petitioner, the differential treatment of accounting in respect of delayed payment surcharge and interest is a consistent practice which has been followed since or about 2003 after receipt of the aforesaid letter from the Union Ministry of Power. The petitioner submits that it is also evident that other Central PSUs follow the same practice, particularly power generation and power distribution companies. The petitioner claims that since the petitioner's accounts for the corresponding financial years have been audited by the office of the Auditor and Accountant General, no less, there cannot be any allegation of the accounts being fudged or payments being received without being reflected in the accounts.

12. The petitioner relies on the proviso to Section 147 of the Act to submit that though the considerations for assessing or reassessing income in any assessment year may be different if the notice under Section 148 has been issued within four years of the relevant assessment year, by virtue of the proviso to Section 147 of the Act, if a reassessment is attempted in

respect of the income for any assessment year after the expiry of four years from the end of the relevant assessment year, the applicable condition in this case that the Department would require to meet would be that "income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee ... to disclose fully and truly all material facts necessary for his assessment, for that assessment year:"

13. The parties are in agreement that the two other conditions in the relevant proviso do not apply in this case.

14. Thus, though an assessing officer may have reasons to believe that any income chargeable to tax had escaped assessment on some other basis within the permissible four years' time-limit, for the period beyond four years from the end of the relevant assessment year there has to be some degree of failure on the part of the assessee. To be more precise, the failure, in the present case, that would entitle the assessing officer to reassess the already assessed income would have been the non-disclosure by the assessee of all material facts necessary for the assessment of tax payable for the relevant assessment year.

15. Since the issue is confined only to delayed payment surcharge and interest on account of delayed payment, once it appears that the audited accounts of the assessee and the notes accompanying the same clearly and loudly spelt it out that income on account of delayed payment surcharge and interest on delayed payment were accounted for on cash basis and not on

accrual basis, it cannot be said that there was any failure on the part of the assessee to fully and truly disclose material facts necessary for the assessment.

16. Indeed, as would be evident from one of the orders passed in course of the assessment proceedings, additional details had been sought from the assessee by the assessing officer and the assessment concluded thereupon. It is elementary that the expression, "reason to believe", appearing in Section 147 of the Act does not give authority to the relevant assessing officer to take a different view on a matter which has been previously considered in course of the original assessment. A change of opinion is not permissible under colour of "reason to believe". This would apply more so in respect of a notice seeking to reopen the matter pertaining to an assessment year more than four years after the end of the relevant assessment year. The orders issued under Section 147 of the Act in respect of assessment years 2012-13 and 2013-14 would not pass muster or stand scrutiny under the proviso to Section 147 of the Act. As a consequence, the corresponding notices issued under Section 148 of the Act are unsustainable.

17. In such view of the matter, the relevant notices issued under Section 148 of the Act for assessment years 2012-13 and 2013-14 are set aside and WP (C) No.345 of 2019 and WP (C) No.346 of 2019 succeed, inter alia, inasmuch as there is no allegation in the orders passed under

Section 147 of the Act that any material fact had been suppressed or not disclosed by the assessee. Indeed, what may have happened is that at the time of passing the assessment orders in respect of assessment years 2012-13 and 2013-14, the relevant assessing officer(s) must have noticed the special treatment in the accounts of the delayed payment surcharge and the interest and, upon perceiving the treatment appropriate since the incomes on such counts had only notionally accrued but had not been realised, did not deem the accounts to be inappropriate or the treatment of the relevant heads impermissible; and as such, completed the assessment as per the audited accounts. The fact that a superior officer deemed such treatment unacceptable in respect of a subsequent assessment year, may make the earlier assessment orders fallible and liable to be reopened; though not on the ground that there was no full or true disclosure of material facts by the assessee, but by reason of the methodology adopted for the assessment. However, the freedom to reopen concluded orders of assessment that Section 147 of the Act permits in its primary provision is circumscribed by the additional conditions spelt out in its proviso in respect of assessment orders pertaining to the assessment years after the expiry of four years from the end thereof.

18. Even in respect of concluded assessment orders of assessment years falling within the four-year period, there may be perfectly good answers for not reopening the same. But that would pertain to the merits of

the matter that ought not to be considered in this extraordinary jurisdiction under Article 226 of the Constitution. The orders passed under Section 147 of the Act in respect of assessment years 2012-13 and 2013-14 are without jurisdiction as they do not comply with applicable condition indicated in the relevant proviso. Once an order under Section 147 of the Act is found to be without authority, the consequential notice under Section 148 of the Act has no legs to stand on and the matter or the assessment cannot be reopened in the absence of the statutory pre-condition being met.

19. MC (WPC) No.208 of 2019 and MC (WPC) No.209 of 2019 stand disposed of.

20. The Department, as is the usual case in matters of the present kind, has had very little role to play in the present proceedings as the Department has to stand or fall on the basis of reasons disclosed in the relevant orders. Since the orders and resultant notices impugned in respect of assessment years 2012-13 and 2013-14 are found to be bereft of any allegation or insinuation even remotely amounting to the assessee's failure to fully and truly disclose material facts necessary for the assessment, the affidavits filed were almost redundant.

21. However, it would be unwise to conclude the matter without referring to the erudition of the deponent of the affidavits affirmed on behalf of the Department in his reference to the writ petition being barred by Sections 10, 11 and 12 of the Code of Civil Procedure, 1908 as evident from

what is pleaded in paragraph 34 of the affidavits. Small mercy that the High Court has been spared any allusion to complex theories of astrophysics or Einstein's theory of relativity in support of the Department's perception that the writ petitions should not have been entertained.

22. There will be no order as to costs.

(W. Diengdoh)
Judge

(Sanjib Banerjee)
Chief Justice

Meghalaya
31.08.2022
"Lam DR-PS"