

आयकर अपीलीय अधिकरण, 'डी' न्यायपीठ, चेन्नई

IN THE INCOME TAX APPELLATE TRIBUNAL
'D' BENCH, CHENNAI

श्री एन.आर.एस. गणेशन, न्यायिक सदस्य एवं श्री एस जयरामन, लेखा सदस्य केसमक्ष

BEFORE SHRI N.R.S. GANESAN, JUDICIAL MEMBER AND
SHRI S. JAYARAMAN, ACCOUNTANT MEMBER

आयकर अपील सं./ITA No.2487/Mds/2017

निर्धारण वर्ष / Assessment Year : 2013-14

M/s Pallipalayam Spinners (P) Ltd.,
14-A, Sankari Bye-Pass Road,
Pallipalayam – 638 006.

v. The Assistant Commissioner of
Income Tax,
Circle – 1,
Namakkal.

PAN : AABCP 2474 R
(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

आयकर अपील सं./ITA No.2488/Mds/2017

निर्धारण वर्ष / Assessment Year : 2013-14

M/s VSM Weaves India Ltd.,
S.F. No.334, Sankari Main Road,
Elanthakuttai PO,
Near Pallipalayam, Erode-638 008.

v. The Assistant Commissioner of
Income Tax,
Circle – 1,
Namakkal.

PAN : AABCV 7326 C
(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/Appellants by : Shri S. Sridhar, Advocate

प्रत्यर्थी की ओर से/Respondent by : Ms. S. Vijayaprabha, JCIT

सुनवाई की तारीख/Date of Hearing : 03.01.2018

घोषणा की तारीख/Date of Pronouncement : 10.01.2018

आदेश / O R D E R

PER N.R.S. GANESAN, JUDICIAL MEMBER:

Both the appeals of two independent assesseees are directed against the respective orders of the Commissioner of Income Tax (Appeals), Salem, dated 20.09.2017 and pertain to assessment year 2013-14. Since common issue arises for consideration in both the appeals, we heard both the appeals together and disposing of the same by this common order.

2. Shri S. Sridhar, the Ld.counsel for the assesseees, submitted that the only issue arises for consideration is disallowance of the claim made by the assesseees under Section 80-IA of the Income-tax Act, 1961 (in short 'the Act') in respect of electricity generated for captive consumption. According to the Ld. counsel, the assesseees claimed deduction under Section 80-IA of the Act in respect of the power generated through windmill and utilised for captive consumption. According to the Ld. counsel, the Tamil Nadu Electricity Board charged ₹5.50 per unit of the electricity during the year under consideration excluding electricity tax, service charges and other taxes, etc. The Assessing Officer by placing reliance on the decision of this Bench in Sri Matha Spinning Mills has taken the

cost of power consumed captively at ₹5.50 per unit on the ground that the Electricity Board charged only at that rate. According to the Ld. counsel, the Assessing Officer simply ignored the tax, duty and surcharge payable by the consumer to the Tamil Nadu Electricity Board which would be passed on to the Government.

3. Referring to the assessment order, the Ld.counsel for the assessee submitted that the Assessing Officer observed that it was exceptionally difficult for him to understand the legality of the Electricity Act, ennumber of orders issued by the State Government on demand and supply of electricity, understanding the working of TANTRANSCO, TNEB and TANGEDCO, Tamil Nadu Electricity Regulatory Authority reports, etc. Therefore, according to the Ld. counsel, he fixed the rate at ₹5.50 per unit the rate on which Electricity Board sells the electricity to consumer excluding the taxes payable by the consumer. Placing reliance on the judgment of Gujarat High Court in CIT v. Shah Alloys Limited in Tax Appeal No.2092 of 2010 dated 22.11.2011, a copy of which is filed before this Tribunal, the Ld.counsel submitted that Gujarat Electricity Board collected electricity duty at 8 paise per unit over and above the electricity charges. The Assessing Officer, in the case before the

Gujarat High Court, found that the market value of the electricity is only ₹5.32 per unit and 8 paise was collected by State Electricity Board as tax, therefore, it cannot be considered as cost of electricity for deduction under Section 80-IA of the Act. This claim of the Department was rejected and the Gujarat High Court found that the amount of ₹5.40 per unit comprises of the component of 8 paise which is nothing but electricity duty. To a consumer, the price paid remains ₹5.40 per unit. The fact that the seller of electricity, namely, Gujarat Electricity Board retains only ₹5.32 per unit and the balance of 8 paise would be passed on to State Government in the form of electricity duty, would not make any difference. In view of the above, the Assessing Officer, according to the Ld. counsel, is not justified in excluding the taxes and duties paid by the consumer of the Tamil Nadu Electricity Board over and above the electricity charges.

4. The Ld.counsel for the assesseees further submitted that proviso to Section 80-IA(8) of the Act is applicable only in respect of goods and service. According to the Ld. counsel, electricity is neither goods or service, therefore, the Assessing Officer has no authority to determine the cost of acquisition. The Ld.counsel has

also placed his reliance on the judgments of Gujarat High Court in ACIT v. Pragati Glass Works Pvt. Ltd. in Tax Appeal No.1646 of 2010 dated 30.01.2012 and also Principal CIT v. Gujarat Alkalies And Chemical Ltd. in Tax Appeal No.544 of 2016 dated 03.10.2016 and Principal CIT v. Alembic Ltd. in Tax Appeal No.553 of 2017 dated 28.08.2017. The Ld.counsel has filed copies of all the above cited judgments of Gujarat High Court relied on by him.

5. On the contrary, Ms. S. Vijayaprabha, the Ld. Departmental Representative, submitted that the Assessing Officer as well as the CIT(Appeals) by placing reliance on the decision of this Bench of the Tribunal in Sri Matha Spinning Mills Pvt. Ltd. v. DCIT in I.T.A. No. 1845/Mds/2011 dated 14.11.2012, found that the cost of electricity collected by Tamil Nadu Electricity Board from its consumer has to be taken as cost of the power generated by the assesseees for captive consumption. In fact, according to the Ld. D.R., the Assessing Officer has taken the rate fixed by the Tamil Nadu Electricity Board at ₹5.50 per unit as per the decision of this Bench of the Tribunal in Sri Matha Spinning Mills Pvt. Ltd. (supra). Referring to the grounds of appeal, the Ld. D.R. submitted that whether electricity is goods or service is not an issue and the same

was not raised by the assessees in their grounds of appeal. According to the Ld. D.R., the issue whether the electricity is not goods or service, cannot be canvassed before this Tribunal at this stage.

6. We have considered the rival submissions on either side and perused the relevant material available on record. The only question arises for consideration is whether the cost of electricity produced by the assessees through windmill and consumed captively would be the rate fixed by Tamil Nadu Electricity Board for electricity alone to its consumer or the cost includes other taxes and duties collected by Tamil Nadu Electricity Board? Admittedly, the Assessing Officer has taken ₹5.50 per unit as per the rate fixed by the Tamil Nadu Electricity Board for supplying electricity to its consumer. The Assessing Officer excluded the taxes and duties collected by State Electricity Board over and above and the rate fixed at ₹5.50 per unit. The Gujarat High Court in *Shah Alloys Limited (supra)* examined this issue and found that the duty collected by the assessees and which was passed on to Electricity Board would form part of cost of electricity. In fact, the Gujarat High Court has observed at para 7 of its judgment as follows:-

“7. We may notice that the Tribunal did not accept the contention of the assesseees that the electricity is neither goods nor services and that, transfer of electricity, therefore, would not be covered under sub-section (8) of Section 80-IA of the Act. However, in so far as the Tribunal's reasoning to adopt the market value of the goods at ₹5.40 ps. Per unit is concerned, we find no error. Undisputedly, GEB supplied the electricity to its consumers at the same rate. This, therefore, was a market value of the electricity supplied by the CPP Unit to the general unit. The fact that this amount of ₹5.40 ps. Comprises of a component of 8 paise, which was electricity duty, to our mind, would make no difference in so far as the market value is concerned. To a consumer, the price being paid remains 5.40 ps. per unit. The fact that the seller retains only ₹5.32 ps. out of the said collection and passes on 8 paise per unit to the Government in the form of electricity duty, to our mind, would make no difference. This question is, therefore, not required to be considered.”

7. The above observation of Gujarat High Court was followed in another judgment of the same High Court relied on by the Ld.counsel for the assesseees. In view of the above, this Tribunal is of the considered opinion that for the purpose of computing cost of electricity generated and consumed captively, the cost fixed by the State Electricity Board including the duty and taxes has to be taken for the purpose of grant of deduction under Section 80-IA(8) of the Act.

8. Now coming to difficulty expressed by the Assessing Officer in understanding the electricity laws, this Tribunal is of the considered opinion that the Assessing Officer is not a legally trained

person. He, being an executive authority, was trained only in tax laws for computing taxable income and levy tax thereon. Therefore, this Tribunal is of the considered opinion that the Assessing Officer would naturally have difficulty in understanding the electricity laws and other enactments made by Parliament and State Legislature. Therefore, in such a situation, it is for the Assessing Officer to get legal opinion from the Government Standing Counsel so that he can decide the issue after understanding the laws. The Assessing Officer being an adjudicating authority under the provisions of Income-tax Act, he cannot disown his responsibility conferred under the Income-tax Act merely because he was not able to understand the electricity laws. This Tribunal is of the considered opinion that he should take some effort to understand the electricity laws and decide the issue arose before him. Otherwise, the very object of provisions of Income-tax Act would be defeated.

9. With the above observation, orders of both the authorities below are set aside and the Assessing Officer is directed to fix the cost of electricity at the rate that was collected by the Electricity

Board from the consumers including the other charges like duty, surcharge cess, etc.

10. In the result, the appeals filed by both the assessee stand allowed.

Order pronounced on 10th January, 2018 at Chennai.

sd/-

(एस जयरामन)

(S. Jayaraman)

लेखा सदस्य/Accountant Member

sd/-

(एन.आर.एस. गणेशन)

(N.R.S. Ganesan)

न्यायिक सदस्य/Judicial Member

चेन्नई/Chennai,

दिनांक/Dated, the 10th January, 2018.

Kri.

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त (अपील)/CIT(A), Salem
4. Principal CIT, Salem
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF.