

आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ - अहमदाबाद ।
IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD – BENCH ‘D’

**BEFORE SHRI RAJPAL YADAV, JUDICIAL MEMBER
AND
SHRI WASEEM AHMED, ACCOUNTANT MEMBER**

आयकर अपील सं./ ITA No.657/Ahd/2017

निर्धारण वर्ष/Assessment Year: 2012-13

Diamines and Chemicals Ltd. Plot No.13, PCC Area PO Petrochemicals Vadodara 391 346 PAN : AAACD 5356 R	Vs	DCIT, Cir.1(1)(1) Baroda.
--------------------------------------------------------------------------------------------------------------------	----	------------------------------

अपीलार्थी/ (Appellant)	प्रत्यर्थी/ (Respondent)
Assessee by :	Shri Sanjay R. Shah, AR
Revenue by :	Shri B.P. Srivastava, Sr.DR

सुनवाई की तारीख/Date of Hearing : 07/01/2019

घोषणा की तारीख /Date of Pronouncement : 9/01/2019

ORDER

PER RAJPAL YADAV, JUDICIAL MEMBER : Assessee is in appeal before the Tribunal against order of the Id.CIT(A)–1, Vadodara dated 2.12.2016 passed for the assessment year 2012-13.

2. Though the assessee has taken four grounds of appeal, but the Id.counsel for the assessee at the very outset submitted that only issue involved in this appeal is quantum of deduction admissible under section 80IA(4) of the Income Tax Act, 1961. He further contended that identical issue was considered by the Tribunal in the assessee’s own case for the Asstt.Year 2010-11 in ITA No.668/Ahd/2015. The Tribunal has decided the issue in favour of the assessee. He placed on record copy of the Tribunal’s order.

- 2 -

3. The Id.DR was unable to controvert the submissions made by the Id.counsel for the assessee.

4. With the assistance of the Id.representatives, we have gone through the record carefully. The assessee has a captive wind power plant. It is entitled for deduction under section 80IA. While computing eligible profit for claiming of deduction under section 80IA(4), r.w. section 80IA(8), the assessee considered average rate at which power was sold by an independent power supply company i.e. MGVCL to its customers, whereas the AO was of the view that average price at which GEB (UGVCL) has purchased power for supplying to its customers are required to be adopted. The Tribunal has considered this issue. The Id.counsel for the assessee at the time of hearing brought to our notice judgment of Hon'ble Gujarat High Court in the case of CIT Vs. Shah Alloys Ltd., rendered in Tax Appeal No.2093 of 2010. This appeal was decided on 22.1.2011. On the strength of this order, the Id.counsel for the assessee has contended that certain adjustment observed by the Tribunal in the assessee's own case for the Asstt.Year 2010-11 was not required to be made in view of the judgment. Discussion made by the Tribunal in the Asstt.Year 2010-11 is worth to note, which reads as under:

"8. We have considered the rival submissions and perused the orders of the authorities below. The substantive issue that arises for consideration is computation of 'eligible profits' for claim of deduction under s.80IA(4) r.w.s.80IA(8) in respect of assessee's Captive Wind Power Plant. For the purposes of claiming tax holiday, the assessee considered the average rate at which power was sold by an independent power supplier, i.e. MGVCL to its customers to enable it to determine the "market value" of electricity is generated by its Captive Wind Power Plant. The AO, on the other hand, has placed reliance upon the average price at which GUVNL has purchased power

- 3 -

for supply to customers. Consequently, the eligible profit under s.80IA(4) was reduced by Rs.18,87,051/-.

9. We observe that the identical issue has been squarely dealt with in the case of *Rainbow Papers Ltd. vs. ACIT in IT(SS)A Nos.101 to 103/Ahd/2013 for AYs2008-09 to 2010-11 order dated 11/07/2017* where one of us is party to the decision. In that case, it was held that the deemed sales price of the power supplied by independent power plants (UGVCL - in that case) excluding the cost towards surcharge and duty etc. levied by the supplier should be adopted for the purposes of determination of "market price" for computation of eligible profit under s.80IA(4) r.w.s.80IA(8) of the Act. The relevant para of the aforesaid order of the Tribunal dealing with the determination of eligible profit reads as under:-

"15. We shall now turn to the second and major controversy raised by the assessee towards the 'market value' of captive transfer of power generated by power unit to its paper unit for captive use. As narrated earlier, the assessee has adopted the rate charged by the GEB (UGVCL) including surcharge and duty for the purpose of working out the deemed selling price of power being supplied by the captive power generating unit to paper unit. The deemed sale value towards captive supply thus included recovery towards 'surcharge' and 'duty' similar to what is made by the Electricity Board on the basic sale price to its consumers. The AO declined to admit the claim of the assessee to include surcharge and duty levied by the GEB (UGVCL) for the purposes of calculation of selling price. In other words, the AO adjusted the deemed sale price of the power to exclude 'fuel surcharge' and 'duty' chargeable thereon in commercial sale.

15.1. The AO while determining the deemed sale price of power supplied by the captive power generating unit to paper unit excluded the cost towards surcharge and duty levied by GEB (UGVCL) for the purposes of determination of arm's length price. The eligible profits under s.80IA(4) r.w.s.80IA(8) of the Act was accordingly brought down by the AO to the extent of duty and surcharge. The CIT(A) also declined to admit the claim of the assessee towards 'surcharge' and 'duty' for the purposes of calculation of selling rate per unit. This apart, the CIT(A) further took note of the average price charged by various distribution companies commonly known as 'Discoms' and eventually calculated the selling price at Rs.2.99 per unit as per working reproduced in preceding paras. The assessee has vehemently contested the aforesaid action of the CIT(A). Thus, the substantive grievance of the assessee is that (i) the deemed selling price should be determined at the average price at which the GEB (UGVCL) is supplying to its consumers and not the average

- 4 -

rate of supply as adopted by the CIT(A) based on the price charged by the distribution company 'Discoms' in the open market and (ii) without excluding surcharge and duty. However, in the course of hearing as well as from the submissions before the CIT(A), we find that the assessee while fiercely asserting its claim for inclusion of 'surcharge' is not seriously contesting the exclusion of 'duty' charged by the GEB (UGVCL). Thus, two points of difference remains in determination of deemed selling price, one towards average selling price as per Discoms and second towards inclusion of surcharge.

15.2. The assessee asserts the rate charged by the GEB (UGVCL) as benchmark rate for the purposes of deemed selling price along with 'surcharge' collected by the Electricity Board.

15.3. In the context, it will be relevant to refer section 80IA(8) of the Act which provides for the manner of computation of transfer price where there is captive consumption of finished-goods of eligible unit for the purposes of computation of deduction under s.80IA(4) of the Act. We find strength in the assertion on behalf of the assessee that the market price is to be determined in sync with the rate prescribed by the GEB (UGVCL). The aforesaid price is most reliable for the purpose of determination of arm's length price. Thus, we do not see any logic for deviation from the same and apply average price of other companies without any solid basis.

16. We now seek to dwell on other aspect of controversy i.e. includibility for otherwise of 'surcharge' in the deemed selling price. The controversy concerns as to whether 'surcharge' and 'duty' levied by the power generation and distribution companies to its consumer will form part of selling price or not for the determination of market value under s.80IA(8) for calculation of eligible profits under s.80IA(4) of the Act.

16.1. In this regard, we refer to the Electricity Act, 2003 and note that surcharge is applied with an object of meeting the requirement of current level cross subsidy. The aforesaid Act clearly provides that surcharge shall not be leviable in case open access is provided to a person who had established a captive generating plant for hiring electricity to the destination of his own use. In parity, the captive power generating plant is not entitled to recover surcharge while transferring the power for captive use by operation of law. This being so, the deemed selling price should also not include the component of surcharge which is not chargeable at the first place in the facts of the case.

- 5 -

16.2. *The decision in the case of Pragati Glass (supra) also provides exclusion of excise duty for the purposes of determination of market value of electricity generated. The 'duty' being excluded, surcharge meant for specific purposes cannot form part of profits of the eligible business. We also take note of similar observations have been made by the Coordinate Bench of the Tribunal in West Coast Paper Mills Ltd. vs. ACIT 103 ITD 19 (Mum.) referred to and relied upon by the revenue to support our view.*

16.3. *In parity, we hold that both 'surcharge' and 'duty' shall not form part of the deemed sale price being extraneous charges for determination of 'market value' in terms of s.80IA(8) of the Act.*

16.4. *Thus, we are of the view that while averaging of selling price as per prices of various distribution companies is not warranted, the average standard sale price charged by Electricity Board excluding surcharge, duty and taxes etc. is reliable benchmark for computation deemed sale price and market value of goods/services supplied."*

10. *In the light of the aforesaid decision, we are in agreement with the contentions on behalf of the assessee that for the purposes of determination of 'market value' of goods/services of eligible business, it is the sale of price at which the Electricity Board supplies electricity to its consumer which will be taken as market price, subject however, to the exclusion of surcharge, duty etc. thereon. The issue is thus accordingly restored back to the file of the AO for determination of eligible profit for the purposes of deduction under s.80IA(4) of the Act in the light of observations of the Coordinate Bench of Tribunal in Rainbow Papers Ltd.(supra).*

11. *In the result, appeal of the assessee is allowed for statistical purposes."*

5. As far as the decision of Shah Alloys (supra) is concerned, it is very old decision rendered in 2011 and it was available when Asstt.Year 2010-11 was decided by the Tribunal. We have gone through this decision. But we find that Hon'ble High Court has adjudicated the issue factually in that case, and not laid down any ratio of law as contended by the ld.counsel for the assessee. Therefore, we do not see any reason to deviate ourselves from the finding of the Tribunal made in the assessee's own case for the Asstt.Year 2010-11. We allow the appeal for

- 6 -

statistical purpose and direct the AO to compute eligible profit for grant of deduction under section 80IA(4) r.w. section 80IA(8) as per the Tribunal's direction given in the order for the A.Y. 2010-11.

6. In the result, appeal of the assessee is allowed for statistical purpose.

Pronounced in the Open Court on 9th January, 2019.

**Sd/-
(WASEEM AHMED)
ACCOUNTANT MEMBER**

**Sd/-
(RAJPAL YADAV)
JUDICIAL MEMBER**