

**IN THE INCOME TAX APPELLATE TRIBUNAL  
VISAKHAPATNAM BENCH, VISAKHAPATNAM**

**BEFORE SHRI V. DURGA RAO, HON'BLE JUDICIAL MEMBER &  
SHRI D.S. SUNDER SINGH, HON'BLE ACCOUNTANT MEMBER**

**ITA Nos. 481 to 483/VIZ/2018  
(Asst. Years : 2009-10 to 2011-12)**

ACIT, Circle-1, vs. M/s. Sri Lalitha Enterprises  
Kakinada. Industries Pvt. Ltd., 4-1-57,  
Vadlamuru Road, Peddapuram,  
East Godavari District

(Appellant) PAN No. AAKCS 3233 N  
(Respondent)

**C.O.Nos. 135 to 137/VIZ/2018  
(Arising out of ITA Nos. 481 to 483/VIZ/2018)  
(Asst. Years : 2009-10 to 2011-12)**

M/s. Sri Lalitha Enterprises vs. ACIT, Circle-1,  
Industries Pvt. Ltd., 4-1-57, Kakinada.  
Vadlamuru Road, Peddapuram,  
East Godavari District

PAN No. AAKCS 3233 N  
(Appellant) (Respondent)

Assessee by : Shri G.V.N. Hari – Advocate.  
Department By : Shri V. Appala Raju – Sr.DR

Date of hearing : 02/01/2019.  
Date of pronouncement : 25/01/2019.

**ORDER**

**PER V. DURGA RAO, JUDICIAL MEMBER**

These appeals by the revenue and the Cross Objections by the assessee are directed against the common order of

Commissioner of Income Tax (Appeals)-9, Hyderabad, dated 22/06/2018 for the Assessment Years 2009-10 to 2011-12. Facts and issues involved in these appeals are common, therefore heard together and passed consolidated order. For the sake of convenience, facts are taken from ITA No.481/VIZ/2018 (A.Y. 2009-10).

**2.** The Department has raised the following grounds of appeal:-

- "1. The learned CIT(A) ought to have appreciated the action of the AO in computing the deduction u/s.801A of the I.T.Act.*
- 2. The learned CIT(A) ought not to have considered the decision of Hon'ble ITAT, Visakhapatnam in the assessee's own case for the AY5 2007-08, 2008-09 & 2012-13 in ITA No. 138-140/Viz/2016 and CO Nos.32-34/Viz/2016 dated 25.10-2017 wherein the Hon'ble ITAT relying on the decision of Hon'ble ITAT,"D" Bench, Chennai in the case of M/s Eveready Spinning Mills Pvt.Ltd in ITA No.1571/Mds/2011, dated 30-11-2011, the facts of which are contrary to the present case has no relevance to the assessee company.*
- 3. The learned CIT(A) ought to have discussed the case on merits individually since the claim of deduction u/s 801A is not an automatic process but an issue which needs to be decided by the AO based on the facts of the case for each assessment year.*
- 4. The CIT(A) erred in accepting the contention of the assessee that it has won an appeal before the Hon'ble ITAT, Visakhapatnam cannot be a rider for the AO to follow suit of the same as the issue of claim of deduction u/s. 801A has been a matter of adjudication as the Revenue was in appeal before the Hon'ble High Court of AP & TS, Hyderabad against the Hon'ble ITAT order on which the CIT(A) relying on.*
- 5. The CIT(A) ought to have justify the issue of notice u/s.148 by the AO is based on the material apparent from record as is evident from the information submitted by the assessee vis-à-vis return of income for the A.Y.2009- 10.*
- 6. The CIT(A) erred in relying on case laws instead of weighing*

*the merits of the case.*

7. *Any other ground submitted at the time of hearing."*

**3.** Ground Nos. 1 to 3 relates to deduction under section 80IA of the Income Tax Act, 1961 (hereinafter referred to as "Act").

**4.** Facts of the case in brief are that the assessee-company is engaged in the business of paddy milling and sale of rice and its bi-products, apart from generation of bio-mass. Consequent to search and seizure operation conducted on 03/02/2009, assessee filed its return of income by declaring total income of Rs.72,96,860/- after claiming deduction under section 80IA of the Act. The assessment was completed under section 143(3) r.w.s. 153A of the Act on 30/12/2010 and the assessment under section 153C r.w.s.263 was completed on 17/05/2013 assessing the income under normal provisions at Rs. 1,72,83,870/- and total income was computed. In the assessment order, the Assessing Officer observed that while calculating the eligible deduction under section 80IA from the profits derived from the power generation undertaking adopted sale value of power at Rs. 4.50 per unit being the rate paid by the assessee-company to APTRANSCO, however, APTRANSCO is seen to be adopting Rs. 3.25 per unit from the units obtained from other power plants. Hence, the claim of deduction under section 80IA at Rs. 4.50 per unit is found

to be not in order and the Assessing Officer added the excess claim of deduction under section 80IA of Rs. 85,77,250/- to the total income of the assessee. Accordingly, assessment is completed.

**5.** On appeal before the Id. CIT(A), assessee filed a letter dated 20/03/2018, which is reproduced as under:-

*"The issue in all the above mentioned appeals is common. The appellant is having a captive power plant and the appellant claimed deduction u/s 801A in respect of profit derived from the power plant. For this purpose, the appellant adopted a price of Rs. 4.50 per unit of power consumed by the Rice Mill of the appellant. The assessing officer is of the view that the deduction can be granted only at the price at which APTRANSCO would have paid the appellant, had the power generated been sold to APTRANSCO. Thus, the assessing officer adopted the rate @ Rs.3.25 per unit and disallowed the deduction u/s 801A in respect of the balance amount. This issue is squarely covered by the decision of Hon'ble ITAT in appellant's own case for the AYs. 2007-2008, 2008-2009 and A. Y. 2012-2013. The relevant findings of the Hon'ble ITAT are contained in Para No.24 & 25 of their order dt.25. 10.2017. The Hon'ble ITAT held that the appellant is justified in adopting the rate for power consumed internally @ Rs. 4.50 per unit of power.*

*Further, the assessments were reopened for all the three years merely on change of opinion and without any tangible material. Thus, the reopening is invalid. In view of the above, the appellant prays the learned Commissioner of Income Tax (Appeals) to direct the Assessing Officer to delete the addition made by him towards excess claim of deduction u/s. 80IA."*

**6.** The Id. CIT(A) after considering the above explanation, appeal filed by the assessee is allowed. For the sake of convenience, the relevant part of the order is extracted as under:-

*"4. In ITA No. 138-140/Viz/2016 and CO Nos. 32-34/Viz/2016 dated 25. 10.2017 the Hon'ble ITAT, Visakhapatnam bench has dealt the issues of re-opening as well as the 801A deduction for A.Y. 2007-08, 2008-09 and 2012-13, in appellants own case. The Hon'ble ITAT has quashed the re-opening u/s. 148 in all these years and on the issue of 801A deduction the Hon'ble tribunal relying on various case laws has not found any reason to interfere with the orders of the CIT(A) and has dismissed the appeals filed by the revenue. Therefore, respectfully following the Hon'ble ITAT, Visakhapatnam both the issues are decided in favour of the appellant."*

**7.** On being aggrieved, revenue carried the matter in appeal before the tribunal.

**8.** Ld. Departmental Representative relied on the grounds of appeal and supported the order passed by the Assessing Officer.

**9.** On the other hand, ld. counsel for the assessee has submitted that the issue involved in this appeal is squarely covered by the decision of the coordinate bench of the Visakhapatnam tribunal in assessee's own case in ITA Nos.138 to 140/VIZ/2016 for the Assessment Years 2007-08, 2008-09 & 2012-13, by order dated 25/10/2017 and strongly supported the order passed by the ld. CIT(A).

**10.** We have heard both the parties, perused the material available on record and gone through orders of the authorities below.

**11.** The case of the Assessing Officer is that APTRANSCO adopted Rs. 3.25 per unit as has been obtained units from other power plants, as such it is seen that the rate per unit adopted for claim of deduction under section 80IA at Rs. 4.50 per unit found to be not in order, therefore, the Assessing Officer has disallowed excess claim made by the assessee under section 80IA and the same is added to the total income of the assessee. On appeal, Id.CIT(A) by following the decision of the coordinate bench of the Visakhapatnam tribunal in assessee's own case in ITA Nos.138 to 140/VIZ/2016 for the Assessment Years 2007-08, 2008-09 & 2012-13, by order dated 25/10/2017, allowed the appeal of the assessee. For the sake of convenience, order passed by the Tribunal in ITA No. 140/VIZ/2016 is extracted as under:-

*"24. In this case, assessee has adopted the rate at Rs. 4.50 ps. per unit which is paid by the assessee to the AP Transco. The Assessing Officer is of the opinion that the assessee is supplying to APEPDCL at Rs.3.40 ps. per unit and therefore the same has to be considered in the case of unit-1 of the assessee also. The very same issue has been considered by the coordinate bench of the tribunal in M/s. Eveready Spinning Mills Pvt. Ltd. (supra) and held as under:-*

*"6. We have perused the orders and heard the contention of learned D.R. The short question arising here is whether the per unit rate of electricity, for the purpose of computing the profits windmills of the assessee, has to be taken at Rs. 2.70 or at Rs.3.50. Rs. 2.70 was the price given by Electricity Board to the assessee for electricity generated by the windmills but, such electricity when supplied by the Electricity Board to the yarn manufacturing unit of the assessee, they had charged from the assessee Rs. 3.50 per unit. There is no dispute that the power manufactured by the assessee from its windmills though meant for the use of captive consumption in its yarn manufacturing unit, was not physically the same as was actually used by the yarn manufacturing units. The windmills were disparately situated vis-*

*à-vis the yarn manufacturing unit. Assessee was left with no go other than supply the electricity to the Electricity Board. It is not that the same power that was produced by the assessee was supplied by the Electricity Board to its yarn manufacturing unit. The adjustment in the bills as a barter arrangement was, therefore, only for the convenience of the Electricity Board. Sub-section (8) of Section 80-IA provides that where an assessee, which is eligible for 80-IA benefits, transferred its goods or service to its business other than the eligible business, the consideration if any recorded for such transfer in the accounts of the eligible business, should correspond to the market value of such goods or services. Ostensibly, in this case, the A.O. was of the opinion that the consideration for transfer of power to captive consumption to the yarn manufacturing unit was recorded at a consideration which did not correspond to its market value. In other words, A.O perceived Rs. 2.70 as the market value, being the price at which assessed sold power to Electricity Board and not Rs. 3.50 per unit at which assessee, in turn, purchased the power from the Electricity Board for its yarn manufacturing unit. In terms of Electricity (Supply) Act, 1948, legislature has put restrictions on establishment on power generating units and their functioning. Power generating concerns are allowed to use power for captive consumption of their other units, and the surplus, if any, has to be supplied or transferred to State Electricity Boards. Section 43 of Electricity (Supply) Act, 1948 authorizes State Electricity Board to enter into arrangements for purchase and sale of electricity under certain conditions mentioned therein. Section 43A of the said Act also lays down rules and conditions for determining tariff from the sale of electricity by a generating company to State Electricity Boards. The tariff is determined on the basis of various parameters mentioned therein. A private person requires a specific consent to set up a power generating unit and it has to comply with the restrictions for use of power generated and the tariff at which the power can be supplied to Electricity Board. Thus the determining of tariff between assessee and Electricity Board cannot be considered as an exercise undertaken in a competitive environment and under market conditions. Price determined in such a scenario cannot be equated with a situation where the price is determined in the normal course of competitive environment. Thus, the price at which assessee sold its power to the Electricity Board cannot be equated with market rate as understood for the purpose of Section 80dA(8) of the Act. Now the question that remains is whether the price recorded by the assessee at Rs. 3.50 per unit for purchasing power from the Electricity Board for its yarn manufacturing unit can be considered the market value. Assessee undoubtedly is an industrial consumer and the Board supplies power to such industrial consumers at the rate of Rs. 3.50 per unit. Had the assessee not been saddled with the restrictions of supplying surplus power to the State Electricity Board, it would*

*have supplied the power to ultimate customers at a price not less than Rs. 3.50 per unit, being the rate charged by the Board from its industrial consumers. Thus, under the given circumstances, it would appropriate to hold that the consideration recorded by the assessee for transfer of power for captive consumption, which is at the rate of Rs. 3.50 per unit, corresponds to the market value of such power Jindal Steel And Power Ltd. (2007) (16-SOT 509), we are of the opinion that this decision better supports the case of the assessee. In taking this, we are also roboranted by the decision of Bombay Bench of this Tribunal, in the case of West Coast Paper Mills Ltd. v. JCIT 100 TTJ (Mumbai) 833. We are, therefore, of the opinion that assessee has to succeed in its appeal and profits of eligible undertaking has to be determined on the basis of annual landing cost of electricity purchased by the assessee from TNEB."*

*25. From the above decision, it is clear that for the purpose of 80IA, profit of eligible undertaking has to be determined on the basis of actual lending cost of electricity purchased by the assessee from Tamilnadu Electricity Board and the tribunal has come to a conclusion by following the decision in the case of Jindal Steel and Power Ltd. (supra) and also the case Bombay Bench of the Tribunal in the case of West Coast Paper Mills Ltd. Vs. JCIT [100 TTJ (Mumbai) 833]. Therefore, respectfully following the decision of the coordinate bench of the tribunal in the case of M/s. Eveready Spinning Mills Pvt. Ltd. (supra), we do not find any reason to interfere with the order of the Id. CIT(A). Thus, this appeal filed by the revenue is dismissed.*

**12.** Therefore, respectfully flowing the decision of the ITAT, Visakhapatnam Bench in the case of assessee's itself in ITA No. 140/VIZ/2016, we find no reason to interfere with the order passed by the Id. CIT(A). Thus, the ground Nos. 1 to 3 raised by the Revenue are dismissed.

**13.** Insofar as ground No.4 raised by the Revenue is concerned, the contention of the department is that the issue decided in favour of the assessee by the ITAT, Visakhapatnam Bench has been tested before the Hon'ble Jurisdictional High Court,

therefore, Id. CIT(A) ought not to follow the order of the Tribunal. We find that the ITAT, Visakhapatnam Bench in assessee's own case for the Assessment Years 2007-08, 2008-09 & 2012-13 has decided this issue in favour of the assessee, the same has been followed by the Id. CIT(A). The Id. CIT(A) being a *quasi* judicial body, bound by the order passed by the ITAT. Accordingly, the Id.CIT(A) by following the decision of the ITAT, allowed the appeal of the assessee. We find no merit in the ground raised by the department. Even before us, the department has not placed any material about the status of the appeal filed before the High Court and also not placed any material to show that the order passed by the ITAT in assessee's own case has been stayed by the Hon'ble Jurisdictional High Court and also not placed any contrary decision which is in favour of the department. Under these facts and circumstances of the case, we find no merit in the ground raised by the department and the same is dismissed. Thus, ground No. 4 raised by the department is dismissed.

**14.** So far as ground No.5 raised by the department relates to notice issued under section 148 of the Act. The Id. CIT(A) in consideration of this issue has observed that assessment under section 143(3) have been taken place for all three assessment years on 30/12/2010, 17/01/2010 & 25/03/2010. The only

difference is that for the Assessment Year 2009-10 assessment was completed under section 153A r.w.s. 143(3) and in this year, assessment was revised under section 263 and consequential order is passed on 17/05/2013. Therefore, in this year, it is a third round of assessment, whereas for the remaining two assessment years, this is a second round of litigation. By observing the above, the Id. CIT(A) quashed the reopening by following the decision of the Tribunal. Before us, Id. Departmental Representative has not pointed out any error committed by the Id. CIT(A). He simply relied on the grounds. For the Assessment Year 2009-10 original assessment was completed under section 143(3) on 30/12/2010. Subsequently, the order was revised under section 143(3) r.w.s. 153C and 263 of the Act, dated 17/05/2013 again assessment was reopened and assessment is completed under section 143(3) r.w.s. 147 of the Act dated 31/08/2016. For the remaining assessment years, assessments were completed under section 143(3) of the Act. Therefore, the Id. CIT(A) came to a conclusion that it is a change of opinion and therefore, notice issued under section 148 of the Act is not valid. We find no reason to interfere with the order passed by the Id. CIT(A).

**15.** So far as cross objections filed by the assessee are concerned, these are only supportive to the order of the Id.CIT(A). In view of our decision above, the cross objections filed by assessee have become infructuous and are dismissed accordingly.

**16.** In the result, all the appeals filed by the Revenue and the Cross Objections filed by the assessee are dismissed.

Order Pronounced in open Court on this 25<sup>th</sup> day of Jan., 2019.

Sd/-  
**(D.S. SUNDER SINGH)**  
Accountant Member

sd/-  
**(V. DURGA RAO)**  
Judicial Member

**Dated : 25<sup>th</sup> January, 2019.**

**vr/-**

*Copy to:*

1. *The Assessee - M/s. Sri Lalitha Enterprises Industries Pvt. Ltd., 4-1-57, Vadlamuru Road, Peddapuram, E.G. District.*
2. *The Revenue - ACIT, Circle-1, Kakinada.*
3. *The PCIT-2, Visakhapatnam.*
4. *The CIT(A)-9, Hyderabad.*
5. *The D.R., Visakhapatnam.*
6. *Guard file.*

By order

(VUKKEM RAMBABU)  
Sr. Private Secretary,  
ITAT, Visakhapatnam.