आयकर अपीलीय अधीकरण, न्यायपीठ –"C" कोलकाता,
IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH: KOLKATA
[Before Shri P. M .Jagtap, Vice-President (KZ) and Shri A. T. Varkey, JM]

I.T.A. No.127/Kol/2021
Assessment Year: 2016-17

Star Paper Mills Limited (PAN:AAECS0759B)	Vs.	DCIT, Circle-4(2), Kolkata
Appellant		Respondent

Date of Hearing (Virtual)	22.09.2021
Date of Pronouncement	26.10.2021
For the Appellant	Shri Akkal Dudhewala, FCA
For the Respondent	Shri Gaurav Kanaujia CIT TP, & Shri Supriyo Pal, Addl. CIT, Sr. D.R

ORDER

Per Shri A. T. Varkey, JM:

The appeal filed by the assessee is against the Assessment Order dated 30.03.2021 passed by the Deputy Commissioner of Income-tax, Circle 4(2), Kolkata [*hereinafter referred to as the* 'AO'] under Section 143(3) read with 144C of the Income Tax Act, 1961[*hereinafter referred to as* 'the Act'] pursuant to the directions given by the Ld. Dispute Resolution Panel - 2, Delhi [*hereinafter referred to as* 'DRP'] dated 27.02.2020 for the Assessment Year 2016-17.

2. Ground Nos. 1 & 2 of the appeal raised by the assessee read as under:

1. For that on the facts and in the circumstances of the case and in law, the AO erred in law and on facts in passing the final assessment order without following the mandatory procedure prescribed in section 144C of the Income Tax Act, 1961 and in that view of the matter the impugned assessment order passed u/s 143(3) r.w.s. 144C dated 30.03.2021 be declared void ab initio.

2. For that on the facts and in the circumstances of the case and in law, the final assessment order passed by the Ld. AO being barred by limitation ought to be held as void-ab-initio and consequently the entire assessment be quashed.

3. At the time of hearing, the Ld. AR appearing on behalf of the assessee did not press these grounds and therefore the same stands dismissed.

4. Ground Nos. 3 to 7 of the appeal relate to the claim of deduction u/s 80IA of the Act, which read as under:

> 3. For that on the facts and in the circumstances of the case and in law and without prejudice to the preceding grounds, the lower authorities grossly erred in making an adjustment of Rs.13,71,40,567/- in respect of the transfer value of power by the captive power plant at Saharanpur.
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> 4. For that on the facts and in the circumstances of the case and in law and without prejudice to the preceding grounds, the lower authorities erred in not appreciating that that the "market value" or "transfer price" of the power adopted by the appellant for the purposes of computation of profits of the eligible unit and deduction u/s 80IA was in accordance with the said provisions and hence the downward adjustment of Rs.13,71,40,567/- computed by the TPO was unjustified on facts and in law.
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> 5. For that on the facts and in the circumstances of the case and in law and without prejudice to the preceding grounds, the lower authorities grossly erred in not holding that the methodology proposed by Ld. TPO to benchmark the "market value or transfer price" of the power generated by the eligible unit was wholly fallacious and suffered from serious infirmities and in that view of the matter the downward adjustment of Rs.13,71,40,567/- made by him deserves to be deleted in full.
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> 6. For that on the facts and in the circumstances of the case and in law and without prejudice to the preceding grounds, the lower authorities erred in making addition on account of transfer pricing adjustment of Rs.13,71,40,567/- computed in respect of the transaction referred to in Section 92BA(iii) & (v) read with Section 80IA(8) & (10) of the Act without appreciating the jurisdictional fact that the appellant did not claim any deduction u/s 80IA in the return of income and in that view of the matter no addition whatsoever was warranted to the total income.
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> 7. For that on the facts and in the circumstances of the case and in law and without prejudice to the preceding grounds, the lower authorities ought to have held that, in absence of claim u/s 80IA due to the fact that the gross total income ('GTI') was NIL, the downward adjustment of Rs.13,71,40,567/- computed by the TPO being only academic in nature could not have been legally added to the final assessable income of the appellant.

5. Briefly stated, the facts of the case are that, the assessee company is engaged in the business of manufacture & sale of paper having its factory situated at Saharanpur, in the State of Uttar Pradesh. The assessee had setup a captive power

plant [*hereinafter referred to as* 'CPP' or 'eligible unit'] to meet the power requirements of the paper manufacturing unit [*hereinafter referred to as* 'manufacturing unit' or 'non-eligible unit']. The CPP commenced its activity on 06.11.2006. The CPP qualified as an 'eligible unit' engaged in the business of generation of power under Section 80-IA(4)(iv) of the Act. The assessee accordingly prepared *stand-alone* accounts of said eligible unit in terms of Section 80-IA(5)/(7) of the Act. Further, as the power generated by the assessee was captively consumed by the paper manufacturing unit, such transfer of power qualified as a reportable specified domestic transaction in terms of Section 80-IA(8) read with Section 92BA of the Act. The transfer pricing auditor duly reported this *intra-unit transfer* in Form 3CEB filed for AY 2016-17 and the said specified domestic transaction was benchmarked following the Comparable Uncontrolled Price Method [*hereinafter referred to as* CUP]. Perusal of the Transfer Pricing Study Report placed at Pages 31 to 67 of the paper-book, reveals that the non-eligible unit was taken as the '*tested party*' as it was procuring power both from CPP as well as Paschimancla Vidyut Vitran Nigam Ltd i.e, State Electricity Board [*hereinafter referred to as* 'SEB']. The transfer price of power supplied by the CPP to the paper manufacturing unit was accordingly benchmarked at the annual average of the landed cost at which power was being purchased by the non-eligible unit from the SEB i.e. Rs.8.41 per unit. Having regard to the aforesaid transfer price of power, the profits of the CPP was worked out by the assessee at Rs.19,03,49,419/- which was eligible for deduction u/s 80-IA of the Act. However as the Gross Total Income, after setting off brought forward losses was NIL, the assessee did not claim any deduction u/s 80-IA in the return of income filed for AY 2016-17.

6. The case of the assessee was selected for scrutiny on CASS parameters which *inter alia* included transfer pricing risk parameter. The AO accordingly referred the case of the assessee to the Transfer Pricing Officer [*hereinafter referred to as* 'TPO'] u/s 92CA(2) of the Act. After examining the Transfer Pricing Study Report and the details furnished by the assessee, the TPO show caused the assessee to explain as to why the power generated by the eligible unit and transferred to the non-eligible unit

should not be benchmarked at the rate at which power generating stations sold electricity to exchange boards/distribution companies. In response, the assessee filed detailed submission on 23.10.2019. The TPO however was not agreeable to the same. According to him, the CPP was a power generating unit and the SEB from which the non-eligible unit purchased power, was a distribution unit and therefore the comparison of CPP with SEB was unwarranted, since they were functionally dissimilar. Referring to the judgment of the Hon'ble Calcutta High Court in the case of CIT Vs ITC Ltd (236 Taxman 612), the TPO observed that the rate at which power was being purchased by the manufacturing unit from SEB cannot be taken as the open market value at which power could be sold by CPP in the market. According to the TPO, the benefit u/s 80-IA of the Act can be claimed only with reference to the rate fixed by Tariff Regulatory Commission for sale of electricity by power generating companies. According to him, the rate at which non-eligible unit purchased power from distribution unit did not represent the market price. The TPO therefore rejected the benchmarking analysis performed by the assessee and substituted the transfer price of power determined by the assessee at Rs.8.41 per unit with the tariff of Rs.3.73 per unit, as notified by UPERC for sale of power by the power generation stations to its State distribution company, MVNNL. Accordingly, the arm's length sale value of the eligible unit was computed at Rs.10,91,95,086/- [Rs.3.73 per unit X 2,93,03,540 units] as opposed to Rs.24,63,35,653/- [Rs.8.41 per unit X 2,93,03,540 units] reported in Form 3CEB, resulting in downward adjustment of Rs.13,71,40,567/-.

7. Pursuant to the above transfer pricing order dated 25.10.2019 passed u/s 92CA (3) of the Act, the AO issued draft assessment order u/s 144C of the Act dated 30.11.2019. Aggrieved by the said draft order, the assessee preferred an appeal before the Ld. DRP which dismissed by their order dated 27.02.2020. Being aggrieved by the same, the assessee is now in appeal before us.

8. In the course of hearing, the Ld. AR Shri Akkal Dudhewala FCA, appearing on behalf of the assessee contended that the lower authorities failed to appreciate that the eligible unit i.e. CPP did not supply power to any unrelated parties other than the

non-eligible unit i.e. the paper manufacturing unit. On the other hand, the paper manufacturing unit was procuring power from both the CPP as well as unrelated third party i.e. the SEB. He therefore submitted that there was *reliable internal* CUP data available with the assessee to benchmark the transfer price of power. He thus claimed that the transfer price of the power procured by the non-eligible unit from the eligible unit was rightly benchmarked with reference to the price at which the tested party purchased power from unrelated parties. In support of its contention, the Ld. AR referred to several decisions of this Tribunal as well as the Hon'ble High Courts (which will be discussed *infra*) wherein the rate at which the non-eligible unit purchased power from SEB/distribution companies was held to be an appropriate benchmark rate to ascertain the sale value of power supplied by the eligible unit to non-eligible unit. He thus urged that the benchmarking analysis of the assessee be accepted and the downward adjustment made by the AO/TPO to the eligible profits u/s 80-IA of the Act be deleted.

9. Per contra, the Ld. TP CIT, DR Shri Gaurav Kanaujia supported the order of the lower authorities. He furnished a detailed note in support thereof. Inviting our attention to Paras 2 to 4 of his submissions, the Ld. CIT, DR contended that the decisions relied upon by the assessee was distinguishable in as much as in all the referred judgments, the Courts had determined the '*open market value*' of the power supplied by CPP to the non-eligible unit and not the '*arm's length price*' of the power. He submitted that the concept of 'open market value' was different that 'arm's length price' for which he referred to the Explanation inserted by the Finance Act, 2012 in Section 80-IA(8) of the Act which defines the term 'market value' to also mean arm's length price as defined in Section 92F(ii) of the Act. According to him, post the introduction of specified domestic transactions from AY 2013-14 and onwards, the transactions referred to in Section 80-IA(8) was required to be benchmarked under the transfer pricing provisions which mandated determination of 'arm's length price' and *not* 'open market value'. He further contended that the assessee's action of taking the paper manufacturing unit as the '*tested party*' was flawed for the reason that the concept of 'tested party' is not applicable in CUP Method for which he relied on the

decision of the Mumbai Bench of this Tribunal in the case of India Debt Management Pvt Ltd Vs DCIT (69 taxmann.com 125). Alternatively, he contended that even if the tested party was required to be ascertained for applying the CUP Method, then the CPP ought to be taken as tested party since it was less complex that the paper manufacturing unit.

10. In his rejoinder, the Ld. AR of the assessee argued that, the assessee has not disputed that the impugned transaction which is covered u/s 80I-A(8) of the Act, is not subject to provisions of Chapter X of the Act or that it is not to be subjected to arm's length principles. He took us through the Form 3CEB wherein the assessee had determined the ALP of the power supplied by the CPP, by using the CUP Method. He also referred to the Transfer Pricing Study Report to show that even the auditor had performed the FAR Analysis & the Economic Analysis and thereafter determined the arm's length price of power transferred by the eligible unit to non-eligible unit in terms of Rule 10B of the Income-tax Rules, 1962. He further contended that the purported difference being carved out by the Revenue between the concept of 'open market value' and 'arm's length price' was without any basis. He invited our attention to the Guidance Note issued by the IRS of United States of America relied upon by the Ld. CIT, DR which stated that, ordinarily the fair market valuation standards produces arm's length results and it is only in some instances where the rules and principles of fair valuation standards was inconsistent with the arm's length standards that it may produce a result which may not be consistent. He pointed out that the manner in which 'open market value' of the transfer price of power was determined by this Tribunal in the cases of DCIT Vs Balrampur Chini Mills Ltd (ITA No. 1672/Kol/2019) and Gujarat Fluro chemicals Ltd Vs DCIT (97 taxmann.com 10) and the High Court in the case of CIT Vs Godavari Power & Ispat Ltd (223 Taxman 234) was consistent with the rules and considerations of CUP Method and therefore the approach followed by these judicial forums produced arm's length results. The Ld. AR further pointed out the inconsistency in the CUP methodology adopted by the lower authorities.

11. We have heard both the parties and perused the material available on record. The admitted facts of the case are that, the assessee operates an eligible power generating undertaking at Saharanpur in the State of U.P, profits of which are eligible for deduction u/s 80-IA(8) of the Act. The power generated by the eligible unit is entirely consumed captively by the non-eligible unit. For the purposes of Section 80-IA(8) of the Act and in order to determine the stand-alone profits of the eligible unit, the assessee had ascertained the transfer value of power to non-eligible unit at Rs.8.41 per unit with reference to average landed cost at which the non-eligible unit procured power from the SEB. The said transaction being in the nature of specified domestic transaction had been benchmarked using internal CUP Method in the transfer pricing audit report filed in Form 3CEB.There is no dispute between both the parties that the Most Appropriate Method to benchmark the transfer price of power is the CUP Method. The dispute is regarding the manner of benchmarking the transfer price of power under the CUP Method. According to the TPO/Revenue, the average rate at which the power generating stations sold power to the Grid, in terms of the notified tariff order, constituted the representative arm's length price. Per contra, it is the assessee's contention that it's internal CUP i.e. *the rate at which the non-eligible unit procured power in an uncontrolled transaction from an unrelated entity viz. SEB, was the right basis for determination of ALP*. Hence, the question for our consideration is what should be the most appropriate data and the price to be adopted for applying CUP Method.

12. Before we proceed further, it is worthwhile to quote here the relevant provisions of Rule 10B of Income Tax Rules 1962 [*herein after referred to as the* Rules]. Clause (a) of sub-rule (1) of Rule 10B defines CUP Method as follows:

> "Rule 10B. Determination of arm's length price under section 92C.
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> (1) For the purposes of sub-section (2) of section 92C, the arm's length price in relation to an international transaction shall be determined by any of the following methods, being the most appropriate method, in the following manner, namely:
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> (a) comparable uncontrolled price method, by which,--

(i) the price charged or paid for property transferred or services provided in a comparable uncontrolled transaction, or a number of such transactions, is identified;

(ii) such price is adjusted to account for differences, if any, between the international transaction and the comparable uncontrolled transactions or between the enterprises entering into such transactions, which could materially affect the price in the open market;

(iii) the adjusted price arrived at under sub-clause (ii) is taken to be an arm's length price in respect of the property transferred or services provided in the international transaction;" the CUP Method.

13. From the above Rule, it is evidently clear that, what is required to be seen is the price at which a *property*, *good* or *service* has been acquired under a comparable uncontrolled transaction under similar market conditions. The application of CUP Method requires strict *product comparability* which has been transacted under similar conditions. This method can be applied where AEs buy or sell similar goods or services in comparable transactions with unrelated enterprises or when unrelated enterprises buy or sell similar goods or services under similar conditions, as is being done between the AEs. The CUP Method, is broadly classified into two categories *viz.*, Internal CUP Method & External CUP Method. Under the Internal CUP Method, the controlled transactions between the AEs involving buying or selling of goods, is compared with the transactions conducted by any of the AEs with unrelated parties for the same goods under similar circumstances. If reliable data is available, then internal CUP is the most appropriate method. In a case where such reliable internal data is not available, one resorts to application of external CUP which involves comparison of prices paid/charged for the same goods between two unrelated third parties, with the transaction conducted between the AEs.

14. In the facts of the present case, we note that the goods in question is 'power' which is transferred by the eligible unit to the paper manufacturing unit. Admittedly, the CPP has not sold power to any unrelated parties. On the other hand, the paper manufacturing unit has procured power throughout the year both from the CPP as well as unrelated external party i.e. the SEB. Undeniably, the product purchased by the AE from its related party as well as unrelated party is the identical i.e. power/electricity.

The rate at which power has been supplied by the SEB to the assessee is the prevailing market rate at which SEB supplies power to other factories/units located in the same geographical location. From the data provided by the assessee, it is noted that both the CPP and SEB have supplied power in all the months of the year and therefore there are no timing differences as well. In the circumstances, the transaction involving purchase of power by the non-eligible unit from the SEB, is found to fulfill the internal CUP parameters and thus the landed cost paid by the paper manufacturing unit to the SEB is held to represent internal comparable arm's length rate. We accordingly find sufficient merit in the benchmarking analysis undertaken by the assessee applying internal CUP Method.

15. Before us the Ld. TP CIT, DR had argued that, the choice of 'tested party' is irrelevant for the purposes of application of CUP Method. We agree that the key factor in application of CUP is 'product comparability' and choice of 'tested party' is of lesser significance. In the present case, we note that reliable comparable data is available for the same product purchased by non-eligible unit from eligible unit. Hence, as the significant criteria i.e. product comparability is found to be met, we do not see any infirmity in the manner in the assessee's application of CUP Method to ascertain the transfer price of power u/s 80-IA(8) of the Act.

16. In this regard, the Ld. CIT, DR had relied on some of the observations made by the Mumbai Bench of this Tribunal in the case of India Debt Management Pvt Ltd Vs DCIT (supra)which we find to be misplaced. Having perused the said order, we note that this decision was rendered in a different factual context and, in fact, the ratio laid down therein supports the case of the assessee. In the decided case, this Tribunal held that, for the determination of ALP using the CUP Method, the 'product comparability' is the most relevant factor and for such reason it was held that identification of "tested party" under CUP is not necessary. In that case, the question before the Tribunal was determination of ALP of the INR denominated loan taken by the assessee from its AE. The Revenue had benchmarked the Indian Rupee denominated loan taking the foreign AE as 'tested party' by using the USD

denominated Corporate Bond Rate. It is in this factual context that this Tribunal had rejected the bench marking analysis of the Revenue by holding that the key factor under CUP was the 'product comparability' and not 'tested party' and therefore INR denominated debt taken by the assessee from its foreign AE was required to be benchmarked with reference to INR debt issuances in India. For arriving at this conclusion, the Tribunal observed as under:

> "12. In wake of this background, the first and foremost issue for our adjudication is whether, while applying the CUP Method, it is necessary to identify the "tested party". Although Indian TP regulation does not laid down any specific procedure or guidelines for choice of "tested party", however, OECD provides that, as a general rule, tested party should be the one to which transfer pricing method can be applied in most reliable manner and for which most reliable comparables can be found. In other words, the tested party ought to be the enterprise that offers high degree of comparability and requires least amount of adjustment. It should be, most often the one that has least complex functional analysis. Under CUP method, what is required to be seen is the price at which a controlled transaction is carried out as compared to the price obtained in a comparable uncontrolled transaction under similar conditions. Thus, it is a direct method for determination of Arm's length price. Product Comparability is the main 'key factor'."

17. It is thus noted that the facts involved in the above case were materially different from the facts involved in the assessee's case. One has to bear in mind that the ratio of any decision is rendered in the context of the facts which are before the Court. It is settled legal proposition that the observations of the any Court must be read in the context of the facts and the issues before the Court for consideration. The Hon'ble Supreme Court in the case of CIT Vs Sun Engineering Works (P) Ltd (198 ITR 297) has observed as follows:

> "It is neither desirable nor permissible to pick out a word or a sentence from the judgment of the Court, divorced from the context of the question under consideration and treat it to be the complete 'law' declared by the Court. The judgment must be read as a whole and the observations from the judgment have to be considered in the light of the questions which were before the Court. A decision of the Court takes its colour from the questions involved in the case in which it is rendered and while applying the decision to a latter case, the Courts must carefully try to ascertain the true principle laid down by the decision of the Court and not pick out words or sentences from the judgment, divorced from the context of the questions under consideration by the Court, to support their proceedings."

18. Coming back to the facts in the present case, it is noted that the TPO had taken the rates notified in the tariff orders of the UPERC to be the arm's length price. We find merit in the Ld. AR's contention that this rate does not represent the comparable rate of electricity following the arm's length principle, for the reason that, no power generating station/company can or would sell electricity to any industrial consumer at these rates. The market conditions under which the power generating stations operate are significantly different from that of the captive power units operated by industries. At this juncture, it is first relevant to understand the intent and purpose for setting up of a CPP by any manufacturing industry. As rightly pointed out by the Ld. CIT, DR, the power tariff charged from industrial consumers is different from that of domestic & agricultural consumers, as the higher rates of the former subsidize the rates charged from the latter. Further, although India has surplus power generation capacity, it lacks adequate transmission and distribution infrastructure. As a consequence, due to the high power tariffs and unstable supply of power, there are significant cost overruns in the manufacturing unit. The captive power plant is thus set-up with the dominant intent to save power costs, which the manufacturing unit is otherwise required to incur & pay to the SEBs, and at the same time, to ensure stable supply of un-interrupted power for smooth production. This results in opportunity cost savings to the assessee company. Accordingly, while drawing up the stand-alone accounts of the eligible CPP and non-eligible manufacturing unit, the landed rate at which the manufacturing unit is procuring power from SEB is used as the comparable rate under the arm's length standards.

19. According to the Ld. CIT, DR however this landed rate at which the non-eligible unit purchases power from the SEB is regulated and therefore cannot be said to represent an uncontrolled transaction. This argument does not hold good in the given facts of the present case, for the reason that even the notified tariff order of the UPERC relied upon by the TPO is heavily regulated and is ascertained by the State Electricity Commission after taking into account several socio-political considerations, which is evident from the tariff order itself. The fact that the rates at

which SEB supplies power is regulated is of no consequence, as it is not a case that this rate has been fixed exclusively by the SEB for the assessee. Instead the SEB supplies power at the same tariff rate to all industrial consumers (*similar to the assessee*) in the same State, which thus represents the prevailing market rate.

20. As noted earlier, the application of CUP method requires high degree of comparability not only in the products sold and services provided but also in the economic circumstances in which the transactions take place. One should examine the market conditions in which the electricity is being sold. The tariff order relied upon by the TPO operates in an altogether different market, which is the Business to Business (*commonly known as B2B*) Model. This tariff rate is the rate at which electricity is purchased by distribution companies from generation companies. The conditions of this market are different and distinct from the consumer market. As noted earlier, no consumer of electricity can procure power in the market at the rate at which generation companies sell to distribution companies under the notified tariff order. In the circumstances, when the market conditions of the comparable transaction cited by the TPO are not similar to that of the assessee, his application of CUP fails. According to us, the comparable market condition, in the facts of the present case, is the Business to Consumer (*commonly known as B2C*) Model. This market comprises of rates at which the ultimate consumers (*paper manufacturing unit in the instant case*) can purchase power for their own consumption. This market comprises of power sold by SEBs, IEX etc. to different categories of consumers. In the present case, the assessee has adopted the comparable rate to be the landed rate at which the manufacturing unit is purchasing power from an independent SEB, apart from the CPP. As the economic & market conditions are similar, this benchmark rate adopted by the assessee is held to be fulfilling the CUP parameters.

21. As regards the Revenue's claim that the CPP and SEB being functionally dissimilar, the benchmarking of sale of CPP at the rate at which non-eligible unit brought electricity from SEB is not reliable, it is noted that this exact same argument has been considered and rejected by the coordinate Bench of this Tribunal in the case

of Gujarat Flurochemicals Ltd Vs DCIT (97 taxmann.com 10) . The relevant findings of this Tribunal on this issue, are as under:

> "29. … With regard to the assessment year 2013-14, the ld.DRP has observed that there is a little change in the statutory provision by virtue of section 80IA(8). The arm's length price of the goods sold by the assessee in the alleged captive power plant has to be determined. The ld.DRP thereafter observed that the TPO has determined value of the goods and services sold by its eligible units. According to the TPO captive power plant and electricity distributing companies are to be pitted at different pedestal. According to the DRP, there is a material difference between captive power plant as a seller and distribution/transmission entity. Thus, differences are both in terms of functions performed as well as asset used. In the case of distribution and transmission entities, apart from assets used for generation of electricity huge investments have gone in laying in transmission and distribution infrastructure. These investments and related transmission and distribution function are totally missing in the CPP. It also observed that sale of electricity is regulated activity, thus, as per the law, CPP could have sold to a distribution licensee (through transmission utility). The benchmarking of sale of CPP at the rate at which non-eligible units brought electricity from the grid is thus incorrect. The ld.DRP under this misconception construed that the rate at which electricity supply-companies are purchasing the electricity should be applied for benchmarking the value of electricity sold by the CPP to its manufacturing units. In other words, the DRP was of the view that non-eligible units cannot be taken for the benchmarking for determining the value at which electricity was sold by the CPP. DRP has emphasized that manufacturing units could have different source of procurement of electricity; say - from CPP or from electricity boards. But as electricity producer, in a CPP, it could only be sold to distribution licensee holder. In this way, the ld.DRP observed that value of electricity cannot be benchmarked by adopting the rate at which manufacturing units of the assessee has been purchasing the electricity, rather, according to the DRP, the rate at which supplier companies are purchasing the electricity ought to be applied.
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> Before us, the ld. counsel for the assessee contended that this controversy has been silenced by the Hon'ble Gujarat High Court in the case of Pr. CIT v. Gujarat Alkalis & Chemicals Ltd. [2017] 88 taxmann.com 722. He placed on record copy of the Hon'ble High Court's decision and contended that for the purpose of computation of deduction admissible under section 80IA market price of the electricity supplied by a CPP is to be determined by adopting rate at which manufacturing unit has been purchasing the electricity from the open market. The ld. DR, on the other hand relied upon the order of the DRP, but unable to controvert the contentions raised by the assessee.
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> 32. The Hon'ble High Court has replied this question by recording the following finding:
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> > '3. Since both the issues are covered by various judgments of this Court, we do not find it necessary to record facts at any length. Division Bench of this Court by judgment dated 22.11.2011 in Tax Appeal No.2092/2010 in somewhat similar controversy observed as under :

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6. Under sub-Section(8) of Section 80IA of the Act, if it is found that where any goods or services held for the purposes of the eligible business are transferred to any other business carried on by the assessee or where any goods or services held for the purposes of any other business carried on by the assessee are transferred to the eligible business and in either case the consideration for such transfer does not correspond to the market value of such goods as on the date of the transfer, then for the purposes of deduction under Section 80IA in case of the eligible business as if the transfer had been made at the market value of such goods or services. It is in this context that the question of substituting the actual consideration by the market value comes into picture.

7. We may notice that the Tribunal did not accept the contention of the assessee that the electricity is neither goods nor services and that, transfer of electricity, therefore, would not be covered under sub-Section (8) of Section 80IA of the Act. However, in so far as the Tribunal's reasoning to adopt the market value of the goods at Rs. 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 Rs. 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 Rs. 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."

4. This was followed in case of CIT v. Shah Alloys Ltd. in Tax Appeal No. 2093/2010. This was reiterated in Tax Appeal No.1646/2010 in case of ACIT v. Pragati Glass Works (P.) Ltd. (order dated 30.1.2012), in which following observations were made :

"7. To our mind, Tribunal has committed no error. Assessing Officer and CIT (Appeals) while adopting Rs. 4.51 per unit as the value of electricity generated by eligible unit of assessee and supplied through its non eligible unit only worked out cost of such electricity generation. In fact CIT(Appeals) in terms recorded that Rs. 4.51 was computed as the reasonable value of the electricity generated by eligible unit of assessee. This amount included Rs. 4.17 per unit which was the cost of electricity generation and Rs. 0.34 per unit which was duty paid by the assessee to GEB for such power generation. Thus the sum of Rs. 4.51 per unit only represented the cost of electricity generation to the assessee. In Section 80IA(8) of the Act what is required to be ascertained is the market value of the goods transferred by the eligible business, when such transfer is by eligible business to another non eligible business of the same assessee and the consideration recorded in the accounts of the eligible business does not

correspond to market value of such goods. Term "Market Value" is further explained in explanation to said sub-section to mean in relation to any goods or services, price that such goods or services will ordinarily fetch in the open market. To our mind sum of Rs. 4.51 per unit of electricity only represented cost of electricity generation to the assessee and not the market value thereof. It is not in dispute that the GEB charged Rs. 5 per unit for supplying electricity to other industries including non eligible unit of the assessee itself. Tribunal therefore, while adopting the said base figure and excluding excise duty therefrom to work out Rs. 4.90 as the market value of the electricity generated by the assessee, to our mind, committed no error. It can be easily seen that if the assessee were to supply such electricity or was allowed to do so in the open market, surely it would not fetch Rs. 4.51 per unit but Rs. 5 per unit as was being charged by GEB. Since the excise duty component thereof would not be retained by the assessee, Tribunal reduced the said figure by the nature of excise duty and came to the figure of Rs. 4.90 to ascertain the market value of electricity generated by the eligible unit and supplied to non eligible business of the assessee. No error was committed by the Tribunal. No question of law therefore, arises. Tax Appeal is dismissed."

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6. Issues are thus considered on number of occasions by the Court and held against the Revenue. Questions are answered against the Revenue. Both the tax appeals are therefore, dismissed.'

This judgment of Hon'ble High Court is directly on the issue. Hon'ble Court has considered section 80IA(8), therefore, it is not justifiable at the end of ld.DRP to ignore the judgment of Hon'ble jurisdictional High Court.

33. Respectfully following the authoritative pronouncements of the Hon'ble jurisdictional High Court, we allow these grounds of appeal. We direct the AO to grant deduction under section 80IA(4) on the value of electricity supplied by the CPP to its manufacturing units by adopting the average rate of electricity supplied to the assessee by MGVCL, DGVCL.

22. Useful reference in this regard may also be made to the decision of this Tribunal in the case of DCIT Vs Balrampur Chini Mills Ltd in ITA No. 1672/Kol/2019 for AY 2016-17 involving similar facts and circumstances as involved in the present case. In the decided case as well, identical benchmarking analysis was performed by the assessee to determine the ALP of power transferred by the CPP to the manufacturing unit for the purposes of Section 80-IA(8) of the Act. This benchmarking exercise was rejected by the TPO, who substituted it with the rate notified for sale of power by the power generating companies to distribution

companies, in the tariff order by the State Electricity Commission. This Tribunal adjudicated the issue in favour of the assessee, by observing as under:

> 5. On the contrary however, it is noted that the non-eligible undertaking to which the eligible unit supplied power, had procured substantial quantity of power throughout the year from unrelated enterprise i.e. SEB under uncontrolled conditions and prevailing market circumstances at the rate of Rs.ll.22/unit. Therefore the tariff at which the other non-eligible units purchased power from SEB can be taken to be a fair indicator to benchmark the transfer value of Rs.8.30/unit adopted by the appellant. It is noted that the transfer value of Rs.8.30 / unit was based on the tariff order issued by the SEB in respect of supply of power to units located in the same region as that of the non-eligible unit which procured power from the eligible unit. This tariff order issued by the SEB was available in open market and determined under uncontrolled conditions and is hence a reliable external CUP available in the given facts of the case. On comparing the rates in tariff order with the rates at which other non-eligible units procured power from open market under uncontrolled conditions; it is noted therefore that the transfer value of Rs.8.30/unit determined by the appellant is fair and reasonable. I therefore find merit in the submissions of the Ld. AR as well as the TPSR that the average landed tariff rate notified by the UPSCB is a fair, reliable and reasonable basis to benchmark the transfer value of power procured by the non-eligible undertaking from the eligible unit.
>
> 6. The Ld. TPO's reference to the judgment of the Hon'ble Calcutta High Court in ITC Limited (supra) is wholly distinguishable since the appellant has sufficiently demonstrated that not only is it is permitted to supply power independently to unrelated parties but it has actually supplied substantial quantities of power to unrelated parties. Instead I find that the issue of allowability of deduction under Section 80IA in respect of profits derived by CPP came up for consideration before another coordinate Bench of the Hon'ble Jurisdictional ITAT in the case of M/s Electrosteel Castings Ltd in I.T. (SS) No. 47 to 60/Kol/2014, 313 and 256/Kol/2015, 66 and 124/Kol/2016 dated 25th November 2016. In respect of appeals relating to abated assessment years, the Revenue had relied on the judgment of Calcutta High Court in the case of CIT Vs ITC Ltd. (supra) to contend that the deduction was required to be allowed taking into account the price at which distribution companies were purchasing electricity. After taking into account the provisions of the Electricity Act of 2003, and the regulatory provisions applicable in the State of West Bengal, the coordinate Bench accepted the assessee's contention that in view of the provisions of Electricity Act of 2003, which were applicable in the concerned AY 2011-12, the decision of Calcutta High Court in the case of CIT Vs ITC Ltd. (supra) was not applicable.
> ….
>
> 8.13. If it is taken that ALP is the market value, then we find there is no dispute that the MAM is CUP. The contention of the ld. D/R that when MAM is taken as CUP, we need not determine a tested party is erroneous. The ICAI in Guidance note u/s 94B of the Act has laid down that the tested party has to be identified even when MAM is CUP. In this case the assessee has taken that the tested party as the non-eligible unit and whereas the TPO has taken the tested party as the CPP i.e. the eligible unit. In our view

the profit of the non-eligible unit also has to be properly determined. The only purpose for which the manufacturing unit is taken as the tested party was to determine the market value at which the manufacturing unit purchases power from unrelated third parties. No other function etc. are in question. In our view taking the manufacturing unit as tested party for the purpose of determination of ALP with MAM being CUP, cannot be found fault with. The TPO has chosen to take the price specified in the PPAs for purchase of power as the market value. The PPA is a 20 year agreement. The assessee required to take statutory clearances and approvals. The price is regulated. The sale of power under the terms and conditions of PPA cannot be considered as the market value of the sale of electricity. Such sales cannot be considered as made in "uncontrolled conditions". The ld. D/R submitted that the power generating company does not have distribution costs. When a captive power plant in an industry supplies electricity to its own manufacturing unit, there is no power distribution cost. The savings of cost of power can be determined only when the rate at which the manufacturing unit of the company purchases power in the open market from the power distribution companies is considered. Imaginary costs which are not incurred cannot guide our decision.

8.14. Thus while determining the ALP under transfer pricing provisions, in our view the assessee has correctly identified the manufacturing unit as the tested party and CUP as the MAM and the purchase price of electricity in the open market from the State Electricity Board to the manufacturing units in uncontrolled conditions as the ALP.

23. Gainful reference in this regard may also be made to the following decisions of the Hon'ble High Courts.

(A) CIT Vs Godavari Power & Ispat Ltd (223 Taxman 234) (Chattisgarh HC)

"30. The Steel-Division of the Assessee is a consumer. The CPP of the Assessee supplies electricity to the Steel-Division. Had the Steel-Division not taken power from the CPP then it had to purchase power from the Board. The CPP has charged the same rate from the Steel-Division that the Steel-Division had to pay to the Board if the power was purchased from the Board.

31. The market value of the power supplied to the Steel-Division should be computed considering the rate of power to a consumer in the open market and it should not be compared with the rate of power when it is sold to a supplier as this is not the rate for which a consumer or the Steel-Division could have purchased power in the open market. The rate of power to a supplier is not the market rate to a consumer in the open market.

32. In our opinion, the AO committed an illegality in computing the market value by taking into account the rate charged to a supplier: it should have been compared with the market value of power supplied to a consumer.

33. It is admitted by the Department that in Chhattisgarh the power was supplied to the industrial consumers at the rate of Rs. 3.20/- per unit for the AY 2004-05 and Rs. 3.75/- per unit for the AYs 2005-06 and 2006-07. It was this rate that was to be considered while computing the market value of the power.

34. The CIT-A and the Tribunal had rightly computed the market value of the power after considering it with the rate of power available in the open market namely the price charged by the Board. There is no illegality in their orders.

35. In view of above, the question is decided against the Department and in favour of the Assessee. The tax appeals have no merit. They are dismissed."

(B) CIT Vs Reliance Industries Ltd (421 ITR 686) (Bom HC)

4. Question (c) pertains to the dispute between the department and the assessee regarding the rate at which the electricity generated by one unit of the assessee-company and provided to the another be valued. The assessee contended that such valuation should be at the rate at which the electricity distribution companies are allowed to supply electricity to the consumers. The revenue on the other hand argues that the appropriate rate should be the rate at which the electricity is purchased by the distribution companies from the electricity generating companies.

5. This controversy arose in the background of the fact that the assessee had set up a captive power generating unit and claimed deduction under Section 80IA of the Income Tax Act, 1961 ("the Act" for short) in respect of the profits arising out of such activity. Obviously, therefore the attempt on the part of the assessee was to claim larger profit under the unit which was eligible for such deduction as against this, attempt of the revenue would be see that the ineligible unit shows greater profit.

6. The Tribunal in the impugned judgment extracted extensively from the order of CIT (Appeals) and independent reasons for confirming the same. In such order CIT (Appeals) had placed reliance on an earlier judgment of the Tribunal in case of Reliance Infrastructure Ltd. v. Addl. CIT [2011] 9 taxmann.com 186 (Mum. - Trib.). Learned counsel for the assessee had placed on record a copy of the judgment of the Tribunal in case of Reliance Infrastructure limited. In such

judgment an identical issue came up for consideration. The Tribunal by detailed judgment had held and observed as under:—

> "44. In the given facts and circumstances of the case, we are of the view that the profits of the business of generation of power worked out by the Assessee on the basis of the price that it paid to TPC for purchase of power continues to be the best basis even after the order of MERC and therefore the same has to be accepted as was done in the past and as approved by the ITAT in Assesssee's case. We therefore dismiss ground No.4 of the revenue."

7. Counsel for the assessee pointed out that the judgment of the Tribunal in case of Reliance Infrastructure Ltd. (supra) was carried in appeal by the revenue before the High Court in Income Tax Appeal No.2180 of 2011, such appeal was dismissed making following observations:—

> "6. As far as question (d), namely, the claim relating to purchase price from Tata Power Company is concerned and that was for the deduction under Section 80IA, the ITAT in paragraph 21 onwards has noted the factual findings and also referred to the order of the Maharashtra Electricity Regulatory Authority (for short "MERC"). Paragraph 36 set outs as to how the claim arose. The claim has been considered in the light of Section 80IA and particularly proviso and explanation thereto. The Tribunal eventually held that till the Assessment Year 2005-2006, the Revenue considered the rate at which the power was purchased by the Assessee from Tata Power Company as market value. There is nothing brought on record as to how the rate determined by the MERC is the true market value. The Assessee gave explanation that the rates determined by the MERC do not reflect the correct market rate. The finding is that the mode of computation and deduction under Section 80IA requires no deviation from the past. The findings of fact and to be found in paragraphs 42 to 50 also reflect that the very issue came up for consideration for the Assessment Year 2003-2004. For the reasons assigned by the ITAT and finding that the attempt is to seek reappreciation and reappraisal of the factual data that we come to a conclusion that even question (d) as framed is not a substantial question of law."

8. Thus, the issue at hand had been examined by this Court on earlier occasion and the view of the Tribunal under similar circumstances was approved.

9. Additionally, we also notice that similar issue came up for consideration before Chhattisgarh High Court in case of CIT v. Godawari Power & Ispat Ltd.

[2014] 42 taxmann.com 551/223 Taxman 234, in which the Court held and observed as under:

…….

10. Gujarat High Court in case of Pr. CIT v. Gujarat Alkalies & Chemicals Ltd. [2017] 395 ITR 247/88 taxmann.com 722 also had occasion to examine such an issue. It referred to earlier order in case of Asstt. CIT v. Pragati Glass Works (P.) Ltd. [Tax Appeal No. 1646 of 2010, dated 30-1-2012] in which following observations were made:—

…….

11. Judgment of Calcutta High Court in case of CIT v. ITC Ltd. [2016] 236 Taxman 612/[2015] 64 taxmann.com 214 was also brought to our notice in which the said High Court has taken a different stand. However, since the issue has already been examined by this Court earlier and in view of the decisions of the Chhattisgarh and Gujarat High Court, we see no reason to entertain this question.

12. In the result, Income Tax Appeal is dismissed.

24. The contention of the Ld. CIT, DR that the above referred decisions are not applicable since they were rendered in the context of 'open market value' and not 'arm's length price' is found to be misplaced. We agree with the Ld. AR of the assessee that, the 'open market value' standards and 'arm's length price' standards would ordinarily yield the same results, unless the considerations and rules involved are different. On this particular issue of determination of the transfer price of power u/s 80-IA(8) of the Act, we note that the considerations taken into account under the open market valuation standards by the High Courts in the above decided cases (supra) are consistent with the considerations and guidelines under the arm's length standards set out in Chapter X of the Act and therefore the ratio laid down in the above decisions (supra) indeed applies in the present case as well.

25. As far as the Revenue's reliance on the judgment of the Hon'ble Calcutta High Court in the case of ITC Ltd (supra) is concerned, we note that it is distinguishable on facts as well as in law and is thus not applicable to the assessee's

case. In the decided case, the relevant year in question was Financial Year 2001-02 i.e. prior to the introduction of Electricity Act, 2003. Until then, the electricity generating companies could only sell or supply power to the State Power Utility or company engaged both in generation & distribution and that too at the tariffs rates prescribed by the Regulatory Commission. Therefore, in absence of any alternate rates, the High Court held that the price at which electricity generating company sold power to SEBs was the only available open market rate. However subsequent to the enactment of Electricity Act, 2003, the functioning of the power sector was liberalized as the business became de-regulated and it was legally permissible for the private CPPs to supply power to other consumers and the prices could be determined through competitive bidding process or any other mutually agreed terms. Hence, the decision of Calcutta High Court (supra) is not applicable to the relevant FY 2015-16 in question, i.e. post introduction of the Electricity Act, 2003.

26. We note that this Tribunal in the case of DCIT Vs M/s Kesoram Industries Limited for AYs 2008-09 & 2009-10, through its lead order in ITA No. 1722/Kol/2012, after considering the judgment of the Calcutta High Court in the case of CIT Vs ITC Ltd (supra), the provisions of Electricity Act, 2003 and the decision of Hon'ble Apex Court in the case of Thiru Arooran Sugars Ltd (227 ITR 432) upheld the assessee's contention that the open market value of electricity for the purposes of Section 80IA(8) should be the price at which the assessee procures power from SEBs. The relevant findings are as under:

> 21. We have considered the rival submissions and perused the documents in the paper book which inter alia contained Electricity Act, 2003, KERC Regulations 2004, copy of KERCs order dated 27.02.2007 approving 'open access' to CPPs for supply of electricity etc. The bone of contention between the parties is the adoption of the most appropriate rate at which sale of electricity would be valued for the purpose of determining the profitability of all the four CPPs. It is not in dispute that during the relevant year, the assessee operated four CPPs in the State of Karnataka, Orissa and West Bengal and the power generated was entirely supplied and consumed by manufacturing undertakings of the assessee. The A.O. per-se did not dispute the fact that the CPPs constituted separate and distinct undertakings and were eligible for claiming the deduction under section 80IA of the Act. However, on perusal of the working of the profitability, the A.O. found that the transfer price for power was

considered by the assessee equal to the price at which the electricity was procured by the manufacturing undertakings from the respective SEBs. Referring to explanation to section 80IA, the A.O. held that for the purposes of section 80IA,the term 'market value' means the price that such goods or services would ordinarily fetch in the open market. According to the A.O., such market value was to be ascertained from the view point of the power generating undertakings claiming the deduction and not from the perspective of the manufacturing undertaking which was the captive consumer of the CPP. We note that the A.O. proceeded on the premise that the CPP owned by the assessee was not allowed to sell its power to the final consumer but was allowed to sell the same only to grid of the SEB in case of excess production. Save and except such monopoly buyer, the CPP was not permitted to sell power to anyone else. According to the A.O., therefore, the market value which the assessee was likely to fetch by sale of excess power to monopoly buyer like SEB represented the market value. In the AO's opinion the rates at which the SEBs were selling power to the consumers were much higher than the price at which the power was purchased from the CPPs because in addition to profit margin of the SEB, such price also included the costs towards distribution, storage, transmission losses etc.

22. We note that the sole basis for AO's inference against the assessee was his belief that the CPP or independent power producer was not allowed to sell power to any person other than the SEBs or power distribution companies. According to the A.O., there was monopoly buyer who alone was permitted to purchase the power at the price determined in the sole discretion of the SEBs and therefore, the price at which the SEBs were purchasing power alone represented the market value for the power generated by CPPs. We also note that the premise on which the A.O. proceeded was analogous to the premise on which the Hon'ble Calcutta High Court decided the Revenue's appeal in the case of ITC Ltd. (supra). In that case also the Hon'ble High Court proceeded on premise that the independent power producers or CPPs could sell the power only to power distribution companies and that too at the rates determined by the State Regulatory Commission. In other words in the opinion of the A.O. and the Hon'ble High Court the power producers were necessarily required to sell the power in the regulated market where prices were fixed at the discretion of the State Electricity Boards and / or Regulatory Commissions and the power generating companies had no option or discretion to determine the selling rate. However, in the case in hand there is a change of scenario before us and the learned AR of the assessee in his detailed presentation (supra) has brought out the salient features of the Electricity Act 2003 by which CPPs were granted 'open access' by law. In terms of the 'open access' granted, the power generating companies were free to sell the power to any third party at the prices mutually agreed and in such case, the regulatory commission was required to determine only the 'wheeling charges' which the transmission companies / authorities could levy. In this regard, the useful reference may also be made to KERC's order dated 27.02.2007. In this order, the commission explained the salient features of the National Electricity Policy issued by the Government of India on 12.02.2005 with regard to captive generation. The said order explains that the Electricity Act 2003, put in place highly liberal frame work for power generation wherein there is no requirement of licensing for generation of power. The requirement of techno-economic clearance of CEA for thermal generation was no longer there. Captive generation has been freed

from all controls. The said policy further clarified that the captive generating plants were permitted to sell electricity to licensees and consumers when they were allowed 'open access' by SERCs under section 42 of the Electricity Act, 2003. The tariff policy issued by Government of India on 06.01.2006 also provided that the sole purpose of freely allowing captive generation was to enable industries to access reliable quality and cost effective power. As per the recommendation made, the SERCs were required to encourage the distribution licensees to procure power from CPPs through competitive bidding on a composite tariff basis. From a conjoint reading of the provisions of the Electricity Act 2003, KERCs 'open access' Regulation notified in 2004 and the order of the KERC dated 27.02.2007, it therefore, appears that there was no statutory bar on the CPPs to sell electricity to any third party and that too at the rate mutually agreed by and between the parties. We, therefore, find that the very foundation on which the A.O. held that the assessee had no option but to sell electricity to SEB alone was factually wrong and misplaced and therefore, legally untenable in the changed factual scenario as discussed above.

23. The learned AR drew our attention to the chart published by the Indian Energy Exchange (IEX) for the yearly power price prevailing on the IEX in different regions during the year2008-09. The said chart we note gave break up of power price at which the was purchased and sold by power producers, distribution companies etc in different regions of the country. From the said chart it appears that the average power unit price of the Eastern Region in the year 2008 was Rs. 7.53/-. Similarly for the Southern Region of Rs. 7.54 per unit. Similar prices prevailed in 2009 as well. The foregoing documents therefore prove that the A.O.'s presumption that the assessee was legally obliged to sell electricity only to the power distribution companies and SEBs and that too at the controlled prices was devoid of any legal or factual foundation. We note that this specific issue was adjudicated by the Co-ordinate Bench of this Tribunal in the case of DCIT vs Birla Corporation Ltd. to which one of us was signatory. In the said decision, the Co-ordinate Bench of this Tribunal, after considering the ratio laid down by the Hon'ble Supreme Court in the case Thiru Arooran Sugar Ltd. held as follows:

> "5.6. We have heard the rival submissions and perused the materials available on record including the paper book and the relevant provisions of the Electricity Act, 2003 as detailed supra. We find that the main thrust of order of ld CITA was by placing reliance on the decision of this tribunal in the case of ITC Ltd, which was modified by the Hon'ble Jurisdictional High Court. The ld AR fairly brought to our attention the decision of Hon'ble Jurisdictional High Court in the case of ITC Ltd before us and had duly distinguished the same as not applicable to the facts of the instant case , as admittedly, the Asst Year before Hon'ble Calcutta High Court in ITC Ltd was Asst Year 2002-03. The said decision in ITC Ltd for Asst Year 2002-03 was rendered by taking into account the relevant provisions of Indian Electricity Act, 1910 and Electricity (Supply) Act, 1948. These Acts were repealed and a new Electricity Act 2003 was introduced with effect from 10.6.2003. Hence for the Asst Years 2008-09 and 2009-10 (i.e the years under appeal before us) , the assessee would be governed by the provisions of Electricity Act, 2003.

> 5.6.1. We have already seen that the ITC's case in Hon'ble Calcutta High Court, proceeded on the basis that the open market for the captive power plant was only a distribution company or a company engaged both in generation and distribution and that the rate at which electricity could be sold by the captive power plant was the one fixed by the tariff regulatory commission. However, such position has undergone sea change inasmuch as during the relevant previous years it was open to the assessee to sell even to a consumer and the price for sale to a distribution company or to a consumer that could be mutually agreed upon notwithstanding the tariff fixed by the State Regulatory Commission. We find that during the previous year relevant to the Asst Year 2009-10, the assessee infact sold electricity at rates higher than that charged from it by the State Electricity Board. The assessee nevertheless made the computation for the purpose of section 80IA of the Act with reference to the price charged from it by the State Electricity Board. In such circumstances, we hold that, when it was permissible for the assessee to sell electricity to consumers and distribution licensees at rates higher than that paid by it to the State Electricity Board, the price charged by the State Electricity Board would be a very good indication of the market value of electricity and the assessee did not commit any error in adopting such price for working out the amount eligible for deduction u/s 80IA of the Act.
>
> ……
>
> 30. Following the judgment of the Hon'ble Gujarat High Court and decision of the Co-ordinate Bench, we direct the A.O. to allow the deduction under section 80IA(4) by adopting the weighted average landed cost of electricity at the rates of Rs. 6.35, Rs. 3.72 and Rs. 4.90 in respect of CPPs at Karnataka, Orissa and West Bengal respectively.

27. For the reasons set out above and following the above cited decisions (supra), we thus hold that the benchmarking analysis undertaken by the assessee to ascertain the arm's length transfer price of power by eligible unit to non-eligible unit at Rs.8.41/unit was justified. The AO/TPO is accordingly directed to delete the transfer pricing adjustment of Rs.13,71,40,567/-.

28. There is yet another connected issue raised by the assessee in Ground Nos. 6 & 7 of the appeal. It is noted that, although the profits of the eligible unit was determined by the assessee at Rs.19,03,49,419/-, but since the Gross Total Income, after setting off brought forward losses, as declared in the return of income was NIL, the assessee had not claimed any deduction for Rs.19,03,49,419/- determined u/s 80-IA of the Act. It is the contention of the assessee that, downward adjustment, if any, made to the sale value of power in terms of Section 92BA read with Section 80-IA(8)

of the Act, would correspondingly result in decrease in the quantum of eligible profits u/s 80-IA of the Act. Hence, if the gross total income assessed by the AO remains NIL, then even with reference to the revised eligible profit, the claim of deduction u/s 80-IA of the Act would continue to remain NIL. The Ld. AR pointed out that, the AO instead of making the downward adjustment to the eligible profits u/s 80-IA of the Act, had added it back to the total income of the assessee, which according to him was incorrect. To illustrate the same, the Ld. AR furnished the comparative figures of the income returned by the assessee, adjustment made by the AO in final assessment order and the corrected computation of assessable income, which the AO ought to have made, in case the transfer pricing adjustment is upheld. The same is reproduced below:

Particulars	**As per Assessee's Return**		**As per Final assessment order**		**Computation if effect to TPO's order is correctly given**	
	Amount	**Amount**	**Amount**	**Amount**	**Amount**	**Amount**
Income declared under the head Business		20,68,32,123		20,68,32,123		20,68,32,123
Add: Additions - Club Expenses - Downward Adjustment to ALP of power		-		8,65,913 13,71,40,567 13,80,06,480		8,65,913 - 8,65,913
Business Income		20,68,32,123		34,48,38,603		20,78,89,350
Less: Brought forward loss (set off to the extent of income)		20,68,32,123		34,48,38,603		20,78,89,350
Gross Total Income		NIL		NIL		NIL
B. Deduction under Chapter VI - Deduction u/s 80-IA Less: TP adjustment Eligible Deduction after TP Adjustment (Restricted to the extent of GTI)	19,03,49,419 - 19,03,49,419	NIL	-	-	19,03,49,419 13,71,40,567 5,32,08,852	NIL
Assessed Income		NIL		NIL		NIL

29. The Ld. DRP however did not agree with the above contention of the assessee and held that the transfer pricing adjustment made by the TPO is distinct from claim of deduction u/s 80-IA of the Act. According to the Ld. DRP, any transfer

pricing adjustment would result in enhancement of business income of the assessee and not reduction in the claim made u/s 80-IA of the Act. The Ld. DRP accordingly upheld the action of the AO in increasing the business income of the assessee by the impugned transfer pricing adjustment. Being aggrieved by this action of the Ld. DRP, the assessee is in appeal before us.

30. Having considered the rival submissions of both the parties, it is noted that, in view of our findings on merits, this issue has now become of academic interest; but for the sake of completeness of the matter, we proceed to decide this question as well.

31. For the AY 2016-17, the assessee had disclosed Gross Total Income of Rs.20,68,23,313/- before setting-off of brought forward business losses. After setting off the losses brought forward from the earlier years, the Gross Total Income in terms of Section 80A of the Act was NIL. Accordingly, the assessee could not have claimed any deduction under Part-C of Chapter VI-A of the Act, because as per the provisions of Section 80A(2), the deduction permissible under Chapter VI-A cannot exceed the gross total income, which in the present case was NIL. Hence, when no deduction for Rs.19,03,49,419/- has been claimed u/s 80-IA(4)(ii) of the Act, then even if, any transfer pricing adjustment is made to the transactions of the eligible unit referred to u/s 80-IA(8)/(10), the same will not have any bearing on the computation of total income, as the revised claim u/s 80-IA of the Act, even after the transfer pricing adjustment, would continue to remain NIL. The manner of computation of income, had the downward adjustment made u/s 80-IA(8)/(10) of the Act been upheld, as explained by the assessee in the above illustration, is thus held to be justified and in accordance with law.

32. We agree with the Ld. AR of the assessee that the ALP determined u/s 92BA, is in the context of Section 80-IA(8) of the Act, and thus the consequent transfer pricing adjustment, if any, has to be made to the quantum of the eligible deduction u/s 80-IA of the Act and not to the 'Business Income' as held by the Ld. DRP. In the garb of making downward adjustment to the quantum of profits of the CPP eligible for

deduction, the AO cannot artificially enhance the returned income, by making adjustment which is in excess of the deduction claimed under Chapter VI-A i.e. Section 80-IA of the Act. Such action is held to be unwarranted.

33. For the reasons set out above, Ground Nos. 1 to 7 of the appeal stands allowed.

34. Ground No. 8 of the appeal is as follows:

> 8. For that on the facts and in the circumstances of the case and in law and without prejudice to the preceding grounds, the AO grossly erred on facts and in law in disallowing club expenses of Rs.8,65,913/- even though the appellant had substantiated such expenditure.

35. Briefly stated, the AO noted that the tax auditor had reported sum of Rs.8,65,913/-in the tax audit report being expenses incurred at clubs & associations. According to the AO, such expenses incurred by the company were personal in nature and he therefore disallowed it u/s 37(1) of the Act. On appeal, the Ld. DRP held that the club expenses were in the nature of pure business expense allowable u/s 37 of the Act. It further held that the membership fees of trade associations were also for business purposes. It however directed the AO to verify whether the membership was in the nature of company or the individuals and accordingly allow deduction for the said expenditure. The AO noted that, the club memberships were in the names of Directors and not the company and thus added back the entire club expenses of Rs.8,65,913/- to the total income. Being aggrieved by the action of the lower authorities, the assessee is now in appeal before us.

36. We have heard both the parties and perused the material available on record. It is noted that out of the total amount of Rs.8,65,913/-, sum of Rs.3,61,164/- comprises of subscription fees paid to different trade associations such as Indian Paper Mfg Association, Indian Chamber of Commerce, Tappi Journal etc., which are ex-

facie for business purposes. We do not find any infirmity in the deduction claimed for the aforesaid expenses and accordingly allow the same.

37. As regards the remaining sum of Rs.5,04,479/-, it is noted that these expenses comprise of annual membership fees of clubs paid for the Directors of the company. It is noted that the Hon'ble Supreme Court in the case of CIT Vs United Glass Mfg. Co. Ltd. (28 taxmann.com 429) has held that the club membership fees for employees incurred by the assessee is business expense u/s 37 of the Act. The relevant findings of the Hon'ble Apex Court are as follows:

> "As far as Question No. 2 is concerned, we find that a series of judgements have been passed by High Courts holding that club membership fees for employees incurred by the assessee is business expense under Section 37 of the Income Tax Act, 1961. We also find that none of the decisions have been challenged in this Court. Even otherwise, we are of the view that it is a pure business expense."

38. The Ld. AR of the assessee has also demonstrated that these club expenses were considered as non-monetary perquisite in the hands of the Directors and it formed part of their respective taxable salaries. The copies of the relevant Forms 16 of the Directors are available at Pages 129 to 136 of the paper book. Hence, the club expenses borne by the assessee was in sum and substance in the nature of employees' compensation cost, which was rightly claimed as deduction u/s 37 of the Act.

39. For the reasons as set out above, we hold that the club expenses of Rs.8,65,913/-is allowable as business expenditure and therefore the impugned disallowance made by the AO is directed to be deleted. This ground also stands allowed.

40. Ground Nos. 9& 10 of the appeal are as follows:

> 9. For that on the facts and in the circumstances of the case and in law and without prejudice to the preceding grounds, although the AO ultimately held that that the entry tax of Rs.62,90,188/- was actually paid to the UP State Government during the relevant year and was therefore allowable u/s 43B of the

Act, but he failed to allow the deduction thereof while computing the final assessable income for the relevant AY 2016-17.

10. For that on the facts and in the circumstances of the case and in law and without prejudice to the preceding grounds, the AO be directed to allow deduction for entry tax of Rs.62,90,188/- paid during the year and accordingly re-compute the total income for the relevant year.

41. It is noted that, before the Ld. DRP, the assessee had raised an additional claim for deduction of entry tax paid under protest during the relevant year u/s 43B of the Act, which had not been claimed in the return of income. Upon examining the details furnished by the assessee and having regard to the provisions of Section 43B of the Act, the Ld. DRP admitted this new claim and directed the AO to allow the deduction u/s 43B after verification of the payment details. Following the directions issued by the Ld. DRP, the AO allowed the claim at Para 4 of his assessment order. The relevant findings recorded by the AO are as follows:

"4. Regarding deduction in respect of Rs.62,90,188/- paid by the assessee towards the entry tax paid by the assessee under protest as per directions of the Hon'ble Court during the relevant year on actual payment basis in terms of Section 43B of the I.T. Act, the Hon'ble DRP directed to allow the said deduction after verification of the payment details. In this regard, during the assessment proceedings the assessee suo moto has furnished the proof of all the payments made towards Entry tax during the year under consideration. On verification of the same it is found that all the payments have been made during the financial year 2015-16 relevant to A.Y. 2016-17, hence the amount of Rs.62,90,188/- paid by assessee towards the entry tax is allowed u/s. 43B of the I.T. Act on the actual payment basis."

42 The Ld. AR pointed out that, although the AO had categorically observed that the amount of Rs.62,90,188/- was allowable u/s 43B of the Act, but while computing the taxable income, separate deduction in relation thereto, had not been granted by him. The limited prayed of the Ld. AR of the assessee is to direct the AO to follow his own observations and allow deduction for the entry tax paid in the computation of total income. The Ld. DR appearing on behalf of the Revenue fairly stated that this appears to be an apparent mistake committed by the AO in the computation of assessable income. Having regard to the foregoing, we accordingly

direct the AO to allow deduction for entry tax of Rs.62,90,188/- paid by the assessee during the year while assessing the total income for the relevant year. This ground therefore stands allowed.

43. Ground No. 11 raised in this appeal is as follows:

> 11. For that on the facts and in the circumstances of the case and in law, the expenditure of Rs.33,80,641/- incurred towards mandi fees was not in the nature of tax, duty or cess in terms of Section 43B of the Act and in that view of the matter the AO be directed to allow deduction thereof on mercantile basis.

44. Briefly stated, the assessee had incurred liability to pay mandi fees to the local state committee amounting to Rs.33,80,641/- during the relevant year, which remained unpaid upto the return filing due date. The tax auditor reported the aforesaid amount to be disallowable u/s 43B of the Act. Accordingly the assessee had added back the same in the return of income filed for AY 2016-17. Before this Tribunal, the assessee has for the first time claimed that such mandi fees payable by it, was not in the nature of statutory liability by way of tax, duty or cess. Relying on the judgment of the Hon'ble Apex Court in the case of CIT Vs Mcdowell Co Ltd (180 Taxman 514), the assessee contended that such fees did not fall within the ambit of Section 43B of the Act and thus the same was required to be allowed on mercantile basis during the relevant year. Per contra, the Ld. CIT, DR appearing on behalf of the Revenue opposed the admission of this fresh claim by relying on the decision of the Hon'ble Supreme Court in the case of Goetze (India) Ltd. vs. CIT (284 ITR 323). He further submitted that the judgment relied upon by the assessee was not applicable in as much as there has been a change in law and the provisions of Section 43B(1)(a) had been amended from 01.04.1989 to include 'fees' within its ambit.

45. We have heard both the parties. As regards the admissibility of this ground, we note that the assessee can raise additional ground before the appellate authority, as allowed by the Hon'ble Supreme Court in Goetze (India) Ltd. Vs. CIT (supra), though not raised before the AO. In this decision, the Hon'ble Supreme Court has held that where claim of deduction was not made in the ROI or by filing a revised ROI, the

same cannot be made before the AO, but it was clarified by the Hon'ble Apex Court that there is no bar in making a fresh claim before the appellate authorities. We further note that the Hon'ble Gujrat High Court in the case of CIT vs. Mitesh Impex (270 CTR66) after considering the decisions rendered by the Hon'ble Apex Court in the case of NTPC Vs CIT (229 ITR 383) and Goetze (India) Ltd. vs. CIT (284 ITR 323) has held that that, if a claim which is available in law is not raised either inadvertently or an account of erroneous plea of complex legal position, in the return of income such a relief cannot be shut up for all the times to come merely because it is raised for the first time in appellate proceedings in absence of a revised return filed before the Assessing Officer. For the aforementioned reasons, we therefore admit this ground raised by the assessee.

46. Coming to the merits of the claim, we find sufficient force in the Ld. CIT, DR's contention that, post amendment made in Section 43B of the Act by the Finance Act, 1988with effect from 01.04.1989, mandi 'fees' are subject to the provisions of Section 43B of the Act. It is noted that the decisions relied upon by the assessee viz., Hon'ble Supreme Court in the case of CIT Vs Mcdowell Co Ltd (supra) and the Hon'ble Allahabad High Court in the cases of CIT Vs Mohanlal Mishrilal & Sons (87 taxman 194) & CIT Vs Mansukhlal Prahajibhai & Co. (227 ITR 429), are not relevant since the assessment years involved in these judgments were prior to the aforesaid amendment made by the Legislature in Section 43B of the Act. We note that in the cases of CIT Vs Mohanlal Mishrilal & Sons (supra) & CIT Vs Mansukhlal Prahajibhai & Co. (supra), the Court had allowed the claim of mandi fees on mercantile basis, by categorically observing that, the amendment bringing 'fees' under the fold of Section 43B had been brought in by the Finance Act, 1988 w.e.f. from 01.04.1989 and onwards, and hence the amendment could not be applied to these cases as the assessment years involved were prior to AY 1989-90. In the facts of the present case, the assessment year in question is AY 2016-17. Having regard to the provisions of Section 43B(1)(a) of the Act as applicable to this AY, we hold that 'fees' is indeed included within the fold of Section 43B of the Act and is therefore

allowable only on actual payment basis. For the reasons as aforesaid, this ground of appeal therefore stands dismissed.

47. The issue raised by assessee in Ground No.13 of the appeal is for giving the direction to AO for re-computation of the set off and carry forward of unabsorbed business loss and depreciation brought forward from the earlier years. In terms of the above findings, we direct the AO to re-compute the set off and carry forward of unabsorbed business loss and depreciation brought forward from the earlier years while giving effect to this appeal. Accordingly, this ground stands allowed for statistical purposes.

48. In the result, the appeal of the assessee is partly allowed.

Order is pronounced in the open court on 26th October, 2021.

Sd/-	Sd/-
(P. M. Jagtap)	(A. T. Varkey)
Vice-President	Judicial Member

Dated: 26.10.2021
SC SPS

Copy of the order forwarded to:

1. Appellant- Star Paper Mills Limited, Duncan House, 31 N.S. Road, Kolkata - 700001.
2. Respondent – DCIT, Circle-4(2), Kolkata
3. The CIT(A)- , Kolkata (sent through e-mail)
4. CIT- , Kolkata
5. DR, Kolkata Benches, Kolkata (sent through e-mail)

True Copy

By Order

Senior Private Secretary/DDO
ITAT, Kolkata Benches, Kolkata