

IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH, MUMBAI

BEFORE SHRI ABY T VARKEY, JM AND SHRI S RIFAUR RAHMAN, AM

आयकरअपीलसं/ I.T.A. No.1886 /Mum/2022
(निर्धारणवर्ष / Assessment Year: 2010-11)

Asst. Commissioner of Income Tax 6(1)(1) Room No. 504, Aaykar Bhavan, M.K.Road, Churchgate, Mumbai- 400020	बनाम/ Vs.	Century Textiles and Industries Ltd 2 nd Floor, Century Bhavan, Dr Annie Besant Road, Worli, Mumbai- 400030
स्थायीलेखासं./जीआइआरसं./PAN/GIR No. : AAACC2659Q		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

Assessee by:	Shri. Yogesh Thar
Revenue by:	Shri. Asif Karmani, Sr AR

सुनवाईकीतारीख / Date of Hearing: 26/10/2022
घोषणाकीतारीख /Date of Pronouncement: 29/11/2022

आदेश / ORDER

PER ABY T. VARKEY, JM:

This is an appeal preferred by the Revenue against the order of Ld.CIT(A)/NFAC at 30.05.2022 for AY 2010-11.

2. The grounds of appeal of Revenue are as under:-

1. On the facts and in the circumstances of the case and in law, the Ld, CIT(A) erred in holding that market price of power supplied to current unit for captive consumption was correctly adopted by applying the rate at which the State Electricity Board supply electricity, with regard to

deduction u/s 80IA, without considering that the assessee had shown the sale price of power in its books at cost price only"?

2. "On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in adopting the market price of power supplied to captive unit at the rate of which the State Electricity Board supplies electricity, with regard to deduction u/s 80IA, without excluding the government duties and taxes as such levy is involved in transfer of power from one unit to another"?

3. The appellant prays that the order of be the CIT(Appeals) on the above grounds setaside and that of the AO be restored

4. The appellant craves leave to amend or alter any ground or to submit additional new ground, which may be necessary

3. At the outset the Ld.AR of the assessee pointed out that the sole issue regarding the assessee's claim u/s 80IA of the Income Tax Act, 1961 (herein after "the Act") is no longer res-integra because the Tribunal had on an earlier occasion adjudicated the same in assessee's own case for AY 2007-08 to AY 2009-10 (ITA NO.s. 6158/M/10, 3021/M/13 & ITANO.3022/M/13 respectively) decided on 14.02.2018 wherein the Tribunal adjudicated this issue [assessee's appeal] wherein the grounds raised were as under:-

Ground IV: Deduction u/s 80IA of the Act

1. On the facts and circumstances of the case and in law, the CIT (A) erred in not annulling the action of the AO of recalculating the deduction u/s. 80-IA of taking the price at which the power generated by the Appellant would he sold in the market as

"Market Value" and not reducing the Appellant's claim u/s. BO-IA of the Act by Rs.8,36,47,008/

2. The appellant prays that the deduction u/s 80IA be allowed as claimed by the Appellant.

4. And the Tribunal decided the issue by allowing the same by holding as under

11. Under this issue the assessee has challenged the confirmation of the finding of the AO in which the claim of the assessee u/s 80-IA of the Act was reduced to the tune of Rs.8,36,47,008/-. The assessee has claimed the deduction u/s 80-IA of the Act in respect of following four power plants namely:

- i) Century Cement Thermal Power Plant (15 MW) Rs 10,47,38,366
- (ii) Century Cement Thermal Power Plant II (10MW) Rs 6,56,19,618
- (iii) Maihar Cement Thermal Power Plant (15.7 MW) Rs.14,58,24,883
- (iv) Maihar Cement Thermal Power Plant II (15.7 MW) Rs 10,20,52,172
Rs.41.82.35.030

12. The Assessing Officer was of the view that the assessee was selling the unit on the basis of Government Electricity Selling Authority and the Government Electricity Selling Authority was purchasing the electricity from the other agencies and distributing agencies was charging after considering the market value of 25% of the cost of purchases, therefore, the claim of the assessee to the of 25% mark up to the tune of Rs.8,36,47,008/- was declined and the admissible deduction u/s 80-IA of the Act was assessed to the tune of Rs.3,34,58,803/-The Ld. Representative of the assessee has argued that the AO has recalculating deduction u/s 80-IA by taking adhoc 25% markup price of Power Generating by appellant captively used following CIT directions vide his order dated 22.12.2008 passed u/s 263 of the Act for the A.Y. 2006-07 which has been quashed by Tribunal vide its order dated 14.06.2017. It is also argued that there is no basis for taking adhoc 25% as mark up of cost price of Power Generating Agency for determining market value u/s 80IA of the Act and appellant was not selling the power to the State Distribution Agency, therefore, the cost at which State Electricity Board purchases power

was not relevant to the appellant. It is also argued that the Electricity Board was independent body in different States and different electricity boards purchase power from different generating units according to the requirement which cannot be the basis to determine the cost of power generated by the appellant. The appellant has considered the prevailing market price of power in the area at which the power rate is charged by M.P. Poorv Kshetra Vidyut Vitaran Co. Ltd. (Electricity Board) during the A.Y. 2007-08 u/s 80IA i.e. profit of eligible basis has to be determined having regard to market value of the goods & service that are transferred by eligible business to other business carried on by assessee. It is also argued that explanation at the foot of Sec. 80IA(8) also elucidate on the concept of market value in the following such as for the purpose of the Sub-section, market value in relation to any goods & service means the price that such goods & service would ordinarily fetch in the open market. It is also argued that the case of the assessee has duly been covered by the assessee's own case for the A.Y. 2006-07 wherein Hon'ble ITAT in ITA. No.115/M/2011 dated 14.06.2017 has held that the market value of Electricity sold/supplied as provided u/s 80IA (8) of the Act can be adopted and the rate at which the assessee purchases electricity from the concerned State Electricity Board during the relevant period. There is no other method to find out the market values, it is rational and reasonable to adopt the rate at which the State Electricity Board Supplies electricity to similar types of consumers at the market value. The assessee also relied upon the cases i.e. Principle CIT Vs. Gujarat Alkalies & Chemicals Ltd. (395 ITR 247). West Coast Paper Mills Vs. Jt. CIT(100 TTJ 833). ACIT Vs. Jindal Steel & Power Ltd. (16 SOT 509) & CIT Vs. Godawari Power & Ispat Ltd., 42 Taxmann.com 551. However, on the other hand, the Ld. Representative of the Department has refuted the said contentions. Taking into account, facts and circumstances of the case, we noticed that the issue in question has duly been covered by the assessee's own case for the A.Y. 2006-07 decided by Hon'ble ITAT in ITA. No.115/M/2009 and 5473/M/2011 vide order dated 14.06.2017 in which it is specifically held that the market value of electricity sold/supplied as provided u/s 81A(8) can be adopted and the rate at which the assessee purchases electricity from the concerned state electricity board during the relevant period. When there is no other method to find out the market value, it is rational and reasonable to adopt the rate at which the State Electricity Board supplies electricity to similar type of consumers at market value. The other law relied by the ld. Representative of the assessee

also speak the same language. Taking into account, all the facts and circumstances of the case of assessee has duly been covered by the assessee's own case (supra). Therefore, the said circumstances, we set aside the finding of the CIT(A) on this issue and allowed the claim of the assessee u/s80IA of the Act. Accordingly, this issue is being decided in favour of the assessee against the revenue.

5. We note that the Ld.CIT(A) has decided the issue by passing the impugned order as under on the same issue:-

Disallowance under 80IA

For its own consumption of electricity, the assessee has set up two captive power plants in the name and style of Century Cement Thermal Power plant which supplies power to Century Cement Plant, where as Maihar Cement Power Thermal Plant supplies power generated to Maihar Cement Plant For the power supplied to cement plants for captive consumption the assessee charges at cost price. For claiming deduction u/s 80IA for power generation plant the assessee calculates the cost of power supplied to two cement plants at market value by adopting the rate per unit at which it purchases power from SEB's during the relevant period. In the revision order u/s 263 passed the hon CIT held that the rate at which assessee purchases power from SEB's cannot be the market value of power supplied/ sold by the assessee to cement plants. The CIT u/s 263 alleged that the AO while allowing the assessee's claim under soc BOLA has not examined whether the market value of power generated by the captive power plants can be adopted on the basis of rate of electricity supplied by the respective SEB's. The ITAT held against this finding of CIT u/s 263. The ITAT held that on a perusal of material placed on record, during the course of assessment proceedings, AO has specifically enquired into the computation of deduction under sec 80IA in respect of power generation units. The assessee has furnished all necessary details relating to the computation of deduction and the basis for the rate applied for computing the quantity of electricity sold/supplied to Cement Units. Thus allegation of CIT that AO has not examined the market value is totally unfounded according to ITAT. Assessee had clearly stated the basis of deriving market value of electricity supplied to the Cement units is the rate at which assessee purchases electricity from the respective SEB's. The ITAT held that under given circumstances, the market

value of electricity sold supplied as provided under 80IA(6) can be adopted at the rate at which the assessee purchases electricity from concerned SEB's during the relevant period. When there is no other method to find out the market value, according to ITAT it is rational and reasonable to adopt the rate at which SEB's supplies electricity to similar types of consumers as the market value. The ITAT relied on the decisions of-

CIT VS Godavari Power and Ispat (2004) 42 taxmann.com 551

According to the ITAT the computation of deduction u/s 80IA in respect of sale/supply of electricity to its own units adopting the rate at which SEB's supply electricity to other consumers and the AO having accepted the same after due enquiry, the assessment cannot be held to be erroneous and prejudicial to the interest of revenue. Moreover the determination of market value by adopting the aforesaid method can very well be considered to be one of the possible views. There fore only because of the adoption of such view there might be some prejudice to the interests of revenue for that reason alone the assessment order cannot be held to be erroneous. Thus, one of the conditions of sec 263 is not satisfied. Relying on the decision of SC in Max India, the exercise of power under sec 263 to revise the assessment order cannot be sustained. Accordingly the impugned order of CIT(Appeals) was quashed and assessment order was restored. In effect the ITAT has adopted the selling rate of electricity to SEB's as the market rate rejecting the department's finding that the rate adopted by Power Distribution Agencies is the market rate to be adopted. Following this finding of the ITAT for AY 2006-07 in order dtd 14/6/2017, the 80IA deduction disallowed by the assessing officer @Rs 2,92,15,387 is deleted.

6. We note that on this issue the Ld.CIT(A) has decided in favour of assessee by following the decision of the Tribunal in AY 2006-07 by order at 14.06.2017 and deleted Rs. 2,92,15,387/- which was disallowed by AO. We note that the Tribunal in AY 2007-08 to AY 2009-10 (supra) has allowed assessee's appeal regarding this issue. Since the Ld.DR could not point out any change in facts or

law *vis a vis* that of the earlier years as decided by the Tribunal in assessee's case as noted (supra), we are inclined to uphold the impugned action of Ld.CIT(A).

7. In the result, the appeal of the Revenue stands dismissed.

Order pronounced in the open court on this 29/11/2022.

Sd/-

(S RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Sd/-

(ABY T. VARKEY)
JUDICIAL MEMBER

मुंबई Mumbai;

दिनांक Dated : 29/11/2022.

Shubham Lohar

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार / (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai