

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

SHRI S RIFAUR RAHMAN, ACCOUNTANT MEMBER
SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER

ITA No. 547/MUM/2017
(Assessment Year: 2006-07)

West Coast Paper Mills Ltd.,
Shreeniwas House,
Hazarimal Somani Marg, Fort,
Mumbai - 400001
[PAN: AA ACT4179N]

..... Appellant

The Deputy Commissioner of Income-Tax,
1(3)(2), Mumbai,
Room No. 540, Aayakar Bhavan,
Mumbai - 400020

Vs

..... Respondent

ITA No. 328/MUM/2017
(Assessment Year: 2006-07)

The Deputy Commissioner of Income-Tax,
1(3)(2), Mumbai,
Room No. 540, Aayakar Bhavan,
Mumbai - 400020

..... Appellant

M/s The West Coast Paper Mills Ltd.,
3rd Floor, Shreeniwas House,
Hazarimal Somani Marg, Fort,
Mumbai - 400001
[PAN: AA ACT4179N]

Vs

..... Respondent

Appearances

For the Assessee/Appellant : Shri Ashish Jhawar &

Shri Alpesh Dharod

For the Respondent/Department : Mrs. Smiti Samant

Date of conclusion of hearing : 06.12.2022

Date of pronouncement of order : 03.03.2023

ORDER

Per Rahul Chaudhary, Judicial Member:

1. These are cross appeals arising out of the order, dated

19.10.2016, passed by the Ld. Commissioner of Income Tax (Appeals)-3, Mumbai [hereinafter referred to as 'the CIT(A)'] for the Assessment Year 2006-07, whereby the Ld. CIT(A) had partly allowed the appeal of the Assessee against the Assessment Order, dated 29.12.2008, passed under Section 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act').

2. The relevant facts, in brief, are that the Assessee the public limited company engaged in the business of manufacture/sale of paper, paper board, and optical fibers, as well as power generation and leasing. The Assessee filed return of income for the Assessment Year 2006-07 on 25.11.2006 declaring total income of INR 35,35,224/- computed under normal provisions of the Act and Book Profits of INR 19,98,81,285/- computed in terms of Section 115JB of the Act. Since 7.5% of Book Profits were more than tax payable on total income computed as per normal provisions of the Act, tax was paid by the Assessee as per Book Profits in terms of Section 115JB of the Act. The aforesaid return of income was processed under Section 143(1) of the Act on 29.11.2017. The case of the Assessee was selected for scrutiny and notice under Section 143(2) of the Act issued on 08.10.2007 was served on the Assessee. The Assessing Officer completed the assessment vide order dated 29.12.2008 under Section 143(3) of the Act determining total income at INR 40,91,31,640/- under normal provisions of the Act while computing Book Profits at INR 31,63,93,812/- under Section 115JB of the Act after making various additions/disallowances.

3. Being aggrieved, the Assessee preferred appeal before CIT(A), against the Assessment Order dated 29.12.2008. The CIT(A) vide order dated 19.10.2016 partly allowed the appeal preferred by the Assessee.
4. Now, both, the Revenue and the Assessee are before us in cross appeals against the order dated 19.10.2016, passed by the CIT(A).

ITA No. 547/Mum/2017

5. We would first take up appeal preferred by the Assessee [ITA No. 547/Mum/2017]. The Assessee has raised following grounds in the appeal:

"A. Deduction u/s 80JJA

Ground No.1:

That on the facts and in the circumstances of the case Ld. CIT(A) was not justified in disallowing the claim of deduction u/s 80JJA in respect of Chemical Recovery Boiler installed at Power unit No. 6A.

Ground No.2:

That on the facts and in the circumstances of the case Ld. CIT(A) was not justified in contending that wood lingin can't be considered as bio-degradable waste.

Ground No.3:

That on the facts and in the circumstances of the case Ld. CIT(A) was not justified in contending that deduction u/s 80JJA is not available on generation of steam since steam is not power as required for availing deduction u/s. 80JJA.

Ground No.4:

That on the facts and in the circumstances of the case Ld. CIT(A) was not justified in holding that Power unit no. 6A is not

an independent unit.

Ground No. 5:

That on the facts and in the circumstances of the case Ld. CIT(A) was not justified in contending that realizable value of steam computed by Assessee is hypothetical."

B. Disallowance of profit on sale of fixed asset and investments in computing book profit u/s 115JB Ground

Ground No. 6

That on the facts and in the circumstances of the case Ld. CIT(A) was not justified in adding back profit on sale of investment and fixed assets in computing book profit under Section 115JB of the Act.

C. Disallowance of expenditure on repairs and maintenance of plant and machinery and other assets

Ground No.7:

That on the facts and in the circumstances of the case and in law, the Hon'ble CIT(A) was not justified in holding that out of the total expenditure on repairs and maintenance of P & M, furniture and other assets, expenditure of INR. 6,45,143 is capital expenditure.

Ground No.8:

That on the facts and in the circumstances of the case and in law, the Hon'ble CIT(A) failed to appreciate that by incurring such expenditure of INR. 6,45,143 the Assessee did not bring into existence any new assets of enduring benefits in future and hence, no part of the said expenditure be treated as capital expenditure.

D. Imposition of Interest u/s 234B, 234D

Ground No.9

That on the facts and in the circumstances of the case and in

law, the Hon'ble CIT(A) failed to give directions to the Assessing Officer to re-compute interest under section 234B after considering self assessment tax paid u/s 140A and also on imposition of interest under section 234D on the disposal of appeal or otherwise."

5. Ground No.1 to 5

- 5.1. Ground No.1 to 5 are pertain to claim of deduction of INR.34,46,21,995/- under Section 80JJA of the Act in respect of Chemical Recovery Boiler Unit. During the financial year 2001-02 relevant to the Assessment Year 2002-03, a Chemical Recovery Boiler was installed as Power Unit No. 6 by the Assessee. Further, during the previous year relevant to Assessment Year 2004-05 a 14MW Triveni-II Turbine and Fludised Bed Combustion Boiler (FBC)-II (hereinafter referred to as 'Power Unit No. 6A') was installed and integrated with Power Unit No. 6. In the return of income for the Assessment Year 2006-07, the Assessee claimed deduction under Section 80JJA in respect of Power Unit No. 6A claimed to be engaged in the generation of power in the form steam and/or electricity. In alternative, the Assessee, on without prejudice basis, also set up claim for deduction under Section 80IA of the Act in respect of Power Unit No. 6A. The Assessing Officer denied the claim of deduction under Section 80JJA of the Act holding that as wood residue cannot be considered as biodegradable waste as envisaged under Section 80JJA of the Act; that steam is a form of power; that the realizable value of steam computed by Assessee is hypothetical, and that the Power Unit No. 6A is not an independent unit. However, the Assessing Officer allowed the alternative claim of the Assessee under Section 80IA of the Act. The Assessee preferred appeal before CIT(A) against the

rejection of claim of deduction under Section 80JJA of the Act which was disposed off as being infructuous in view of the fact that the alternative claim of the Assessee for deduction under Section 80IA of the Act was accepted by the Assessing Officer. Therefore, the Assessee is before us in appeal on this issue. We note that in earlier year also similar ground raised by the Assessee was disposed off by the Tribunal as being infructuous on account of alternative claim of deduction under Section 80IA of the Act having been accepted by the Assessing Officer. The Assessee has placed on record orders for the Tribunal passed in Assessment Year 2002-03 to 2005-06 {[2014] 33 ITR (T) 560 (Mum) & MA No. 324/Mum/2014 arising out of ITA No. 5271/Mum/2008} and for Assessment Year 2007-08 (ITA No. 2993/Mum/2011). We do not see any reason to depart from the view taken by the Tribunal in the aforesaid decisions. Accordingly, Ground No. 1 to 5 raised by the Assessee are disposed off as being infructuous.

6. Ground No.6

- 6.1. Ground No. 6 is directed against the order of CIT(A) confirming the order passed by the Assessing Officer denying exclusion of profit on sale of fixed assets and investment amounting to INR 8,72,09,156/- and INR 3,19,27,181/-, respectively, credited to the Profit & Loss Account, while computing Book Profits under Section 115JB of the Act.
- 6.2. In computing the Book Profits under Section 115JB of the Act the Assessee has claimed exclusion of the aforesaid amount. Whereas, the Assessing Officer denied the exclusion holding that profit on sale of fixed asset and investment does not find mentioned in any of the exclusion stated in Explanation 1 to

Section 115JB of the Act. The CIT(A) confirmed the order passed by the Assessing Officer in this regard. In appeal before us, the Ld. Authorised Representative for the Assessee fairly stated that this issue stand decided against the Assessee by the decision of the Tribunal in the case of the Assessee for the Assessment Year 2005-06 and also by the decision of the Special Bench of the Tribunal in the case of Rain Commodity Limited vs. DCIT : [2010) 131 TTJ 514 (HYD) (SB). Accordingly, Ground No. 6 raised by the Assessee is dismissed.

7. Ground No.7 & 8

- 7.1. Ground No. 7 & 8 are directed against the disallowance claim of deduction aggregating to INR 6,45,143/- in respect of expenditure on repair and maintenance of plant and machinery and other assets.
- 7.2. The Assessee had claimed deduction for INR. 8,14,52,873/- as repairs and maintenance expenses. During the assessment proceedings, the Assessing Officer requisitioned the details of the aforesaid expenditure which were furnished. On examining the same, the Assessing Officer disallowed expenditure of INR 6,54,143/- holding the same to be of capital in nature. According to the Assessing Officer the aforesaid expenditure was incurred for obtaining a new advantage of enduring nature, and for bringing into existence new assets. The appeal preferred by the Assessee before CIT(A) on this issue was dismissed by the CIT(A) recording that the Appellant had not produced any evidence to substantiate that the expenditure incurred by the Assessee was of the revenue in nature. In appeal before us, the Ld. Authorised Representative for the Assessee provide item-wise details of repair and maintenance

expenditure disallowed by the Assessing Officer which read as under:

1. Expenditure on computer maintenance

<i>Sl No.</i>	<i>Job Details</i>	<i>Amount (INR)</i>	<i>Sl No, in order u/s 143(3)</i>
<i>1</i>	<i>Cost of Norton Antivirus software</i>	<i>26,500</i>	<i>6</i>
<i>2</i>	<i>Software maintenance charges</i>	<i>1,21,450</i>	<i>8</i>
<i>3</i>	<i>Software maintenance charges</i>	<i>1,16,550</i>	<i>9</i>
<i>4</i>	<i>AMC repair parts supplied</i>	<i>28,950</i>	<i>10</i>
<i>5</i>	<i>AMC repair and various parts supplied</i>	<i>52,672</i>	<i>11</i>
	<i>Total</i>	<i>3,46,122</i>	

1. Expenditure on small computer spares and other assets

<i>Sl No.</i>	<i>Job Details</i>	<i>Amount (INR)</i>	<i>Sl No, in order u/s 143(3)</i>
<i>1</i>	<i>Towards cost of drumstick</i>	<i>9,000</i>	<i>1</i>
<i>2</i>	<i>Drum purchase of Xerox</i>	<i>9,000</i>	<i>2</i>
<i>3</i>	<i>Cost of Toshiba drumstick</i>	<i>18,113</i>	<i>3</i>
<i>4</i>	<i>5 nos. data cartage</i>	<i>12,740</i>	<i>4</i>
<i>5</i>	<i>AMC repair parts supplied</i>	<i>65,625</i>	<i>5</i>
<i>6</i>	<i>Rack Painting Charges</i>	<i>6,750</i>	<i>7</i>
<i>7</i>	<i>AMC for AC</i>	<i>78,834</i>	<i>12</i>
<i>8</i>	<i>Cable for office telephone Line</i>	<i>2,692</i>	<i>13</i>
<i>9</i>	<i>Repairing charges for AC</i>	<i>6,796</i>	<i>14</i>
<i>10</i>	<i>AMC and repairing of fax machine</i>	<i>4,000</i>	<i>15</i>
<i>11</i>	<i>Door and repairing charges</i>	<i>2,080</i>	<i>16</i>
<i>12</i>	<i>AMC charges</i>	<i>5,000</i>	<i>17</i>
<i>13</i>	<i>AMC charges</i>	<i>10,500</i>	<i>17</i>
<i>14</i>	<i>UPS Line repairing</i>	<i>2,196</i>	<i>18</i>
<i>15</i>	<i>Refilling of fire extinguisher</i>	<i>8,555</i>	<i>19</i>
<i>16</i>	<i>Maintenance charges for AC</i>	<i>28,500</i>	<i>20</i>
<i>17</i>	<i>Maintenance charges for AC</i>	<i>23,440</i>	<i>21</i>
<i>18</i>	<i>Maintenance charges for AC</i>	<i>10,200</i>	<i>22</i>
<i>19</i>	<i>Total</i>	<i>2,99,021</i>	

7.3. Relying upon the above details, the Ld. Authorised Representative for the Assessee submitted that the above expenditure was incurred for repair of existing assets and for replacement of the damage part. By incurring the said

expenditure no new income or advantage had come into existence and therefore, the expenditure incurred were revenue in nature for which deduction should have been allowed to the Assessee. The Ld. Departmental Representative relied upon the order passed by the Assessing Officer and the CIT(A). She submitted that the Assessee had failed to furnish document in support of the claim for deduction of expenditure and therefore, the authorities below were justified in denying the deduction. In rejoinder, the Ld. Authorised Representative for the Assessee submitted that deduction for identical expenditure was allowed by the Tribunal in appeal preferred by the Assessee for the Assessment Year 2005-06.

- 7.4. We have considered the rival submissions and perused the material on record. On perusal of the details of expenditure incurred by the Assessee given in Paragraph 4.C. of the order passed by the CIT(A) wherein the submissions of the Assessee have been recorded we find that expenses have been incurred on repair, maintenance of plant & machinery and other assets, and software anti-virus licenses and software upgrade/maintenance. The expenses incurred by the Assessee do not bring into existence any new capital assets, and are in the nature of expenses incurred to preserve the plant & machinery, software and other assets. Since the expenditure has been incurred for maintaining the assets in working condition, the same are allowable as revenue expenditure.
- 7.5. We also find that the Tribunal has allowed similar claim for deduction for expenses in appeal for the Assessment Year 2005-06 [(2014) 33 ITR (T) 560] holding as under:

"37. The assessee has claimed repair and maintenance charges of plant and machinery on the ground that these expenses incurred was in relation to the assets acquired earlier and is in the nature of current repairs. Detailed explanation in this regard was furnished before the Assessing Officer. The Assessing Officer, after verifying the details of repairs and maintenance held that sums aggregating to Rs..74,83,857 are in the nature of capital expenditure. These details have been given from pages 3 to 6 of the assessment order. The learned Commissioner (Appeals), based on the reasoning given in the assessment year 2001-02, has affirmed the findings of the Assessing Officer.

38. Before us, it has been submitted that similar issue on account of disallowance under the head "repair and maintenance" had come up for consideration before the Tribunal in the assessment years 2000-01 and 2001-02. Most of these expenses of repairs and maintenance were incurred in connection with the roads, drainages, boundary wall and buildings, platform, plant and machinery, coal yard, etc. The Tribunal, on similar set of expenditures on account of repair and maintenance, has treated it to be revenue expenditure after observing and holding as under :

"6. The next dispute in the assessment year 2000-01 relates to the expenditure on repairs and maintenance of plant and machinery, building and other assets to the extent of Rs. 95,34,778. Such sum for the assessment year 2001-02 is Rs. 1,42,15,761. The assessee has explained the nature of these expenses in the compilation filed at pages 622 to 672 of the paper book. We have heard both sides and have gone through the relevant orders. We find that these expenditure were incurred in connection with the roads, drainages, boundary walls and building, concert platform, plant and machinery, coal yard, bamboo yard, etc. The Revenue has treated all these expenses as capital in nature whereas, the assessee claims it as revenue expenditure. The main submission of the assessee is that the expenditure in question have been incurred because of frequent rains in the assessee's place of business. As a result of these rains and constant movement of trucks the roads are damaged and easily washed away. It is the contention of the assessee that the expenses incurred on the repair of such roads are only in the nature of current repairs. Learned counsel further pleaded that none of these expenditures had resulted in acquiring any new

asset of enduring nature. Hence the expenditure in question, according to him, should be treated as revenue expenditure. The assessee has filed the details of the disallowance; in a separate statement for the assessment years 2000-01 and 2001-02. Having regard to these details we are unable to accept the view of the Revenue that all these expenditures have resulted in acquisition of asset of permanent or semi-permanent nature having overlasting values. The expenditure was incurred as part of maintenance expenditure on the existing road, drainages, etc. In our view, having regard to the details furnished, the expenditure in connection is to be considered as revenue in nature. In fact, if we look at the details of the amount in question, it appears to be tall-treated. If we look at the individual items of expenditure, they are not that significant to be treated as expenditure of capital nature but is to be treated operational expenses. The disallowance sustained by the Commissioner of Income-tax (Appeals) is deleted."

39. After hearing both parties, we find that identical issue and similar set of expenditures, had come up for consideration before the Tribunal in assessee's own case for the assessment years 2000-01 and 2001-02, wherein the said issue has been decided by the Tribunal against the Revenue and in favour of the assessee. Therefore, consistent with the view taken therein, we set aside the order passed by the learned Commissioner (Appeals) and treat the expenditure under the head repairs and maintenance as revenue expenditure. Thus, ground Nos. 10, 11 and 12 raised by the assessee are allowed. (Emphasis Supplied)

7.6. In view of the above, we overturn the order passed by the CIT(A) to this extent. Disallowance of the repair and maintenance expenses aggregating to INR 6,45,143/- is deleted. Accordingly, Ground No. 7 and 8 raised in appeal by the Assessee are allowed.

8. Ground No.9

8.1. Ground No. 9 pertain to levy of interest under Section 234B and 234D of the Act and therefore, the same is disposed off as consequential in nature.

ITA No. 328/Mum/2017

9. We would now take up the appeal of the Revenue (ITA No. 328/Mum/2017). The Revenue has raised following grounds in the appeal:

1. *Whether on facts and circumstances of the case and in Law, the Ld.CIT(A) is justified in granting deduction u/s 80IA of the Act on power generation undertakings when as a matter of fact the assessee has admittedly integrated all six units engaged in manufacturing power (admitted in Exhibit 1 to note no. 5 of the revised return of income for A.Y. 2002-03) resulting in a consolidated power manufacturing undertaking which is hit by Section 80IA(3)(ii) since the consolidated power manufacturing undertaking has been constituted out of plant and machinery previously in use making all six units ineligible for deduction u/s 80IA of the Act.?"*
2. *Whether on facts and circumstances of the case and in Law, without prejudice to (1) above, the Ld. CITA(A) is justified in granting deduction u/s 80IA on power generated for captive consumption?"*
3. *Whether on facts and circumstances of the case and in Law, and without prejudice to question no. 1 and 2 above, the Ld.CIT(A) is justified in granting deduction u/s 80IA in respect of power generating units no. 2, 3 and 4 when the assessee does not own these assets, being on lease with assessee from IFCI ?"*
4. *Whether on facts and circumstances of the case and in Law, and without prejudice to question no. 1, 2 and 3 above, the Ld.CIT(A) is justified in granting deduction u/s 80IA in respect of power generation units no. 3, 4 and 5 when these units are not operated upon by assessee being operated and maintained under a contract by Powerica and Wartsila who are third parties ?"*
5. *Whether on facts and circumstances of the case and in Law, and without prejudice to question at (1) to (4) above, the Ld.CIT(A) is justified in granting deduction u/s 80 IA in respect of*

power generating units no. 6, being Chemical Recovery Boiler, the same, being on lease from ICICI, the assessee is not the owner of these assets ?"

6. *"Whether on facts and circumstances of the case and in Law, and without prejudice to question at (1) to (5) above, the Ld.CIT(A) is justified in allowing the assessee's objection to determination of inter unit transfer price of per unit of power at INR.3.50/- and adoption of rate of power purchase at rate at which Karnataka Power Transmission Ltd (KPTL) is purchasing power from third parties?"*
7. *Whether on facts and circumstances of the case and in Law, and without prejudice to question at (1) to (6) above, the Ld.CIT(A) is justified in allowing the assessee's objection to not quantifying deduction u/s 801A for Chemical Recovery Boiler and Integrated Power Unit no.6 ?"*
8. *Whether on facts and circumstances of the case and in Law, and without prejudice to question at (1) to (7) above, the Ld.CIT(A) is justified in allowing the assessee's objection to reduction of pro rated indirect expenses of the assessee for computing deduction u/s 801A for profits of the power units.*
9. *Whether on facts and circumstances of the case and in Law, and without prejudice to question at (1) to (8) above, the Ld.CIT(A) is justified in allowing the assessee's plea that if it is held that power unit nos 2 & 5 are mere expansions to Power Unit no.1, the combined profit of Power units 1 and 5 should be deemed to be the profit of the Power unit no.1 and deduction u/s 801A to be allowed accordingly?"*
10. *Whether on facts and circumstances of the case and in Law, the CIT(A) was correct holding that, the disallowance u/s 14 A be restricted to INR.50,000/- as against the amount of INR.56,78,036/- disallowed by the A.O under section 14A r.w.r 8D ?"*

10. Ground No. 1 to 9

10.1. Ground No. 1 to Ground No. 9 pertains to claim of deduction

under Section 80IA of the Act. The contention is the Revenue is that the CIT(A) has erred in allowing/computing deduction under Section 80IA of the Act on account of the following:

- (i) The Assessee has integrated all six units engaged in manufacturing power resulting in a consolidated power manufacturing undertaking which is hit by Section 80IA(3)(ii) and therefore, deduction under Section 80IA cannot be allowed since the consolidated power manufacturing undertaking has been constituted out of plant and machinery previously in use (referred to Ground No. 1)
- (ii) The Power Unit Nos. 2 to 5 were mere expansions to Power Unit No.1 and thus no deduction under Section 80IA of the Act was allowable. (referred to Ground No. 9)
- (iii) The CIT(A) was not justified in allowing deduction under Section 80IA of the Act for Chemical Recovery Boiler and Integrated Power Unit No. 6A. (referred to Ground No. 7)
- (iv) Deduction under Section 80IA of the Act cannot be allowed since the power generated is for captive consumption (referred to Ground No. 2)
- (v) The power generating Units No. 2, 3 and 4 are lease with Assessee from IFCI and therefore, deduction under Section 80IA cannot be allowed in respect of the aforesaid units since the Assessee does not own these assets. Similarly, the Unit No. 6, being Chemical Recovery Boiler Unit, has been taken on lease from ICICI Bank. The assessee is not the owner of these assets, and therefore, deduction under Section 80IA cannot be allowed in respect of Unit No. 6 as well. (3 and 5)
- (vi) Units No. 3, 4 and 5 are operated and maintained under a contract by Powerica and Wartsila who are third parties, and not by the Assessee. Therefore, deduction under Section 80IA of the Act cannot be allowed in respect of power generation by the aforesaid units. (referred to Ground No. 4)

- (vii) The Assessing Officer was correct in computing the amount of deduction under Section 80IA of the Act by taking inter-unit transfer price of per unit of power at INR.3.50/- as opposed to INR 5.96 per unit as adopted by the Assessee by taking price at which electricity was being procured from Karnataka Electricity Board (KEB) (referred to Ground No. 6)
- (viii) The Assessing Officer was justified in reducing the profit of power units by pro-rata indirect expenses (referred to Ground No. 8)

10.2. Ground No. 1 to 5 and Ground No. 9 pertain to the contentions and alternative contentions raised by the Revenue to challenge the claim raised by the Assessee for Deduction under section 80IA of the Act. Whereas Ground No. 6, 7 & 8 pertain to computation of deduction under Section 80IA of the Act.

10.3. We would first take up Ground No. 1-5 and Ground No. 9. We note that in preceding as well as subsequent Assessment Years, the identical grounds as raised by the Revenue in Ground No. 1-5 and 9 have been decided in favour of the Assessee and against the Revenue in appeal preferred by the Revenue/Assessee. For the Assessment Year 2006-07 before us, the CIT(A) has granted relief to the Assessee by relying upon the orders of the Tribunal in the case of the Assessee holding as under:

"7. Ground No. 2,3,4,5,6,7,8,9,10,11,12,13 and 14 relate to denying the deduction claimed u/s 80-IA. These issues were covered by the ITAT's order for the AY 2002-03 to 2005-06 and AY 2007-08 vide Para No. 23 (Page No. 12 to 24) and Para No. 37 (Page No. 16 to 22) of the said order. Further, with regard to non justification in holding that Power Units No. 2 to 5 and 6 are not independent units, this matter has already been adjudicated by my predecessor in the AY 2007-08 and by the undersigned in the AY 2012-13. Moreover, the claim of the appellant in relation to Power Unit No. 2, 3, 4 and 5 has been allowed by the Hon'ble

ITAT, Mumbai. Since the Hon'ble ITAT has adjudicated this issue in favour of the appellant, respectfully following the directions of the Hon'ble ITAT, Mumbai Bench, Ground No. 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14 are allowed."

10.4. We have perused the common order dated 30.05.2014, passed by the Tribunal while disposing appeals for the Assessment Year 2002-03 to 2005-06 {[2014] 33 ITR (T) 560 (Mum) & MA No. 324/Mum/2014 arising out of ITA No. 5271/Mum/2008}. We note that the Tribunal has allowed deduction for all the units (i.e. Unit 1,2,3,4,5,6 and 6A). The relevant observations and findings of the Tribunal are as under:

- (a) As regards the claim of deduction for Units Nos. 2, 3, 4, 5 and 6 are concerned, we find that the same is squarely covered by the decision of the Tribunal rendered in the Assessee's own case right from the assessment years 1997-98 to 2001-02, respectively [Paragraph 8 &9 read with Paragraph 20-23,]
- (b) Alternative Contention that Unit No. 2, 3, 4, 5 and were mere extension of the Unit No.1 and therefore, not eligible for deduction under Section 80IA of the Act was disposed off as being infructuous. [Paragraph 11 & 23]
- (c) The contention of the Revenue that the conditions specified in Section 80IA(3)(iii) of the Act were not complied with has been rejected by the Tribunal in the earlier years. [Paragraph 85]
- (d) In the case of the Assessee for the Assessment Year 1997-98 to 2002-03 it has been held by the Tribunal that the captive power generation units were eligible for deduction under Section 80IA of the Act [Paragraph 81]
- (e) The contention of the Revenue that the assets forming part of the units were taken on lease and/or that operation/maintenance of the units was given to third parties would not affect the eligibility of the units to claim deduction under Section 80IA of the Act in the facts and circumstances of the case. [Paragraphs 7 to 9],

10.5. To the same effect, are the observations/findings of the

Tribunal in the case of the Assessee for the Assessment Year 2007-08 (ITA No. 2993 & 3843/Mum/2011, dated 15.10.2015).

- 10.6. In view of the above, respectfully following the above decision of the Tribunal in the case of the Assessee, Ground No. 1 to 5 and Ground No. 9 raised by the Revenue are rejected.
- 10.7. Ground No. 6 the Assessee had computed deduction under Section 80IA of the Act by taking the sale price of power for the purpose of Section 80IA of the Act at INR 5.96 per unit being the price at which electricity was being procured by the Assessee from Karnataka Electricity Board. The Assessing Officer following the order passed by his predecessor, adopted at the rate of INR 3.50 per unit of electricity being the rate at which Karnataka Electricity Board purchased power from third party during the year. In appeal preferred by the Assessee, the CIT(A) decided the issue in favour of the Assessee by following the decision of the Tribunal in the case of the Assessee for the Assessment Year 2002-03 to 2005-06 and Assessment Year 2007-08. We have perused the aforesaid orders of the Tribunal wherein identical issue has been decided in favour of the Assessee. The relevant extract of decision of the Tribunal in the case of the Assessee for the Assessment Year 2007-08 (ITA No. 2993 & 3843/Mum/2011, dated 15.10.2015) read as under:

"5. So far as the issue raised vide ground no.1, whether electricity duty should be excluded while calculating the transfer price of electricity duty for computing the deduction u/s 80IA.

6. This issue has been decided in favour of the assessee by the Tribunal vide order dated 30.05.2014 in assessee's own case for AYs 2002-03 to 2005-06. The relevant conclusion and finding of the Tribunal as given in para 32 and 33 reads as under:- "

32. We have heard the rival submissions and also perused the relevant findings of the authorities below and the material available on record. The assessee has worked out the notional sale of power supplied by its power unit to its paper division @ Rs. 5.80 per unit. This was on the basis of average actual grid charges charged by Karnataka Electricity Board for supplying the electricity to the assessee. This was shown from the amount of the bill and the total number of units consumed. From the said bills, the Assessing Officer noted that the assessee is paying fuel excavation charges, taxes, etc., which should be reduced for working out the average price per unit for working out the sale price of the electricity supplied by its power unit to the paper division. Besides this, he has also apportioned indirect expenses on the basis of the total turnover for quantifying the deduction under section 80IA claimed by the assessee in respect of power units no.3, 4 and 5. This apportionment of indirect expenses is a separate ground which is ground no.9 and the same shall be discussed subsequently. The basic issue in ground no.8 is what should be the transfer price for the purpose of computing the deduction under section 80IA within the ambit and parameter of sub-section (8) of section 80IA. Section 80IA(8), provides that, where any goods or services held for the purposes of eligible business are transferred to any other business carried on by the assessee, the consideration if any, for transfer, does not correspond to the market value of such goods or services as on the date of transfer, then the Assessing Officer can make adjustments in the profits after determining the market value of such transfer. The said section in other words, empowers the Assessing Officer where the transfer of goods and services as recorded in the accounts of the eligible business does not correspond to the market value, then the profits declared for the eligible business can be adjusted by the Assessing Officer on such basis so as to ensure that the goods and services are transferred to its own unit at the market value of such goods and services. In the Explanation to section 80IA(8), the "market value" has been defined as a price that such goods or services would ordinarily fetch in the open market. Fetching of the price in the open market has to be seen from the factors which are determined through negotiation between the

parties and mutual agreement as arrived at a price which is acceptable between the buyer and the seller in the open market conditions i.e., in an unrelated and uncontrolled transactions. Open market conditions refer to the conditions and price available for the public at large. In the present case, the market value of supply of electricity by power unit of the assessee to the paper division of the assessee has to be seen from the angle, if the paper unit has to purchase the electricity directly from the Karnataka Electricity Board (as both the power units as well as the paper units are situated in Karnataka), then what is the price which would be paid by the paper unit to the Karnataka Electricity Board. The transfer of the price as contemplated in section 80IA(8) has to be seen having regard to the arm's length condition i.e., what would be the price under uncontrolled transactions in the open market. If the paper division has been purchasing the electricity from the Karnataka Electricity Board at an average cost of Rs.5.80, which fact is not in dispute, then the same price should be considered as market value for bench marking the price at which power units are supplying the electricity to the paper division. If the taxes and duties are part of the price at which the power / electricity is supplied by the Karnataka Electricity Board to the paper division, then the same price is the indicator of the market value which is fetchable in the open market. We do not find any reason for excluding the element of tax and duty while determining the "market value" of the electricity price per unit supplied by the power unit to the assessee as contemplated in sub-section (8) of section 80IA. 33. Coming to the arguments of the learned Departmental Representative, which is mostly based on the findings of the Assessing Officer in the assessment order for the assessment year 2005-06, the same cannot be accepted for the reason that firstly, the price of electricity per unit supplied by the Tamil Nadu and private parties to the Maharashtra Government, cannot be held to be applicable in Karnataka and, secondly, the rate at which private parties are selling the power to Karnataka Electricity Board cannot be the bench mark for determining the market price because the terms and conditions in which the Karnataka Electricity Board is procuring the electricity from such parties is not known.

Further the market price has to be seen as a price at which the customers are getting the electricity in the open market. That should be the criteria for bench marking the "market price" under section 80IA(8). As pointed out by the learned counsel that in the earlier years, there are two different opinions and conclusions drawn by the Tribunal. First, in the assessment year 1997- 98 and 1998- 99 which are in favour of the assessee and has attained finality as no further appeal has been filed by the Department and other in the assessment year 1999-2000 and 2000-01. In the subsequent orders, the Tribunal has not taken note of the decision of the earlier orders. Further, the provisions of section 80IA(8) has also not been considered for arriving at a different conclusion. Under these facts and circumstances, we are rendering our decision purely on the basis of our interpretation of statutory provisions, sans going by any earlier year precedence. Thus, in our opinion, we have to follow the provisions as contained in section 80IA(8) for determining the market price, which cannot be arrived by reducing the price by any other factors like taxes, duties, etc., as the same are embedded in the price. Thus, we set aside the impugned order passed by the learned Commissioner (Appeals) on this issue and allow the ground no.8, is treated as allowed".

7. Thus, respectfully following the precedence of earlier years, we decide this issue in favour of the assessee."

- 10.8. In view of the above, we do not find any infirmity in the order passed by the CIT(A). Respectfully following the decision of the Tribunal in the case of the Assessee for the Assessment Year 2002-03 to 2005-06 and Assessment Year 2007-08, Ground No. 6 raised by the Revenue is dismissed.
- 10.9. Ground No. 8 pertains to reduction of profit of power units by prorating indirect expenses of the Assessee. The Assessing Officer relying on stand taken by his predecessor reduced the profits of the eligible Units by prorating indirect expenses. The CIT(A) allowed the grounds raised by the Assessee without

appreciating that Identical issue has been decided against the Assessee by Tribunal in the case of the Assessee for the Assessment Year 2007-08 [ITA No. 2993 & 3843/Mum/2011, dated 15.10.2015] wherein it has been held as under:

“8. In ground no. 2, the assessee has challenged the calculation of deduction u/s 80IA for reducing the pro-rated indirect expenses of the company from the profit of the power units.

9. This issue has been decided against the assessee by the Tribunal in assessee’s own case for the earlier years in the following manner:-

34. Ground no.9 reads as under:-

“9. That on the facts and in the circumstances of the case the Ld. CIT(Appeals) was not justified in holding that for computing deduction u/s 80IA, the prorated indirect expenses of the company should be reduced from the profit of the Power Unit.”

35. After hearing both the parties, we find that the present issue has been decided by the Tribunal against the assessee right from the assessment year 1999-2000 to 2001-02. The Assessing Officer has apportioned indirect expenses which are to be reduced from the profits of the power unit as worked out in detail at Page-20 of the assessment order. This allocation of indirect expenses to arrive at the profit of power unit has been decided by the Tribunal in the earlier years and, therefore, consistent with the view taken therein, we find no reason to disturb the order passed by the learned Commissioner (Appeals) and, accordingly, the same is affirmed on this issue. Thus, the ground no.9, raised by the assessee is dismissed”. (Emphasis Supplied)

10.10. Respectfully following the above decision of the Tribunal in the case of the Assessee, the order passed by the CIT(A) is set aside, and the order passed by the Assessing Officer in this regard is reinstated to the extent the Assessing Officer computed amount of deduction under Section 80IA of the Act

by reducing the amount of indirect expenses on pro-rata basis. Accordingly, Ground No. 8 raised by the Revenue is allowed.

10.11. Ground No. 7 pertains to Quantification of deduction under Section 80IA of the Act in respect of CRB and integrated Power Unit No. 6. In respect of Ground No. 7 we note that the Assessee had claimed deduction under Section 80IA of the Act in respect of Unit No. 6. In paragraph 2.8 of the Assessment Order, the Assessing Officer recomputed deduction under Section 80IA of the Act by adopting sale rate @ 3.50 per unit in respect of Unit No. 1 to 5 but omitted to re-compute deduction under Section 80IA of the Act in respect of Unit No. 6. The CIT(A) allowed the appeal preferred by the Assessee and set aside the re-computation made by the Assessing Officer. Since, we have sustained the order passed by the CIT(A) in respect of allowability of deduction under Section 80IA of the Act in respect of Unit No. 6. The Assessing Officer is directed to quantify the amount of deduction available to the Assessee in respect of Unit No. 6 after taking into account. Our findings/adjudication in relation to Ground No. 6 and 8 above. With the aforesaid direction, Ground No. 7 raised by the Revenue is treated as allowed for statistical purposes.

10.12. Ground No. 10 pertains to deletion of disallowance under Section 14A (INR 56,78,036/-). Assessee had earned dividend income amounting to INR 6,89,552/- which was claimed as exempt under section 10(34)/10(35). No disallowance had been computed by the Assessee against the said exempt income. However, the Assessing Officer computed disallowance under Section 14A of the Act by applying Rule 8D of the Income Tax Rules, 1962 and made disallowance of INR 34,08,129 under

rule 8D(2)(ii) and INR 22,69,908/- under Rule 8D(2)(iii) of the Rules. In appeal the CIT(A) restricted the amount of disallowance under Section 14A of the Act to INR 50,000/- by following the decision in the case of the Assessee for the Assessment Year 2004-05, 2007-08 and 2009-10.

10.13. We have perused the orders in the Tribunal in the case of the Assessee on which reliance has been placed by the CIT(A). We note that the Tribunal has in the case of the Assessee for the Assessment Year 2007-08 [ITA No. 2993 & 3843/Mum/2011, dated 15.10.2015] has held as under:

“19. In ground no. 5, the assessee has challenged the disallowance u/s 14A on account pro-rated indirect expenses. It has been submitted that, said disallowance has been made by the AO and confirmed by the CIT(A) after invoking the formula laid down in 8D, which is not applicable for AY 2007-08. Further, the Tribunal in assessee’s own case for the earlier years has clearly held that Rule 8D is not applicable and for the purpose of allocating indirect expenses, a sum of Rs. 50,000/- was considered to be reasonable disallowance on the facts of the case. The relevant observation of the Tribunal in this regard were as under :-

172. After carefully considering the rival submissions, we find that insofar as the disallowance of interest is concerned, the same cannot be made under section 14A, on the facts of the present case. The assessee has, admittedly, huge interest free surplus funds, which is evident from the fact that it has its own funds of Rs.149.29 crores. Besides this, it also had sum of Rs.63.20 crores on account of retention of sales tax difference in this year. In view of such huge surplus funds, the investment to the tune of Rs.49 crores that too major portion is coming from the earlier years, it can be said to be made out of the surplus funds only. Thus, according to the principles laid down by the Bombay High Court in Reliance Utilities and Power Pvt. Ltd. (supra), no disallowance on account of interest can be made. 173. Insofar as the disallowance on account of administrative expenses are concerned, we find

that the Assessing Officer has taken all the administrative expenses for apportioning the disallowance on pro-rata basis without even looking to the nature of expenses. For e.g., vehicle maintenance, charity and donation, misc. expenses, etc., cannot be said to have been incurred for the purpose of investment in shares, etc. At the most, directors' fees and expenses and auditor's remuneration can be said to be attributable for the purpose of disallowing the administrative expenses for the purpose of earning exempt income on the investments made. From the details mentioned above, it is seen that the directors' fees and expenses is Rs.13 lakhs whereas, auditor's remuneration is Rs.5.53 lakhs. If the ratio on which the Assessing Officer has worked out the disallowance on entire expenditure, then on that ratio, the disallowance under the administrative expenses will come down to Rs.33,253. Thus, on a reasonable basis, we hold that the sum of Rs.50,000 is quite reasonable for allocating administrative expenses for the purpose of making the investment on which the assessee has earned exempt income. Consequently, the disallowance is restricted to Rs.50,000. Thus, ground no.4, is treated as partly allowed".

20. After considering the relevant finding given in the impugned order and also the reasoning given in the order of the Tribunal, we find that the assessee has earned dividend income of Rs. 48,74,295/-(treated as exempt) as compared to AY 2004-05 which has been dealt by the Tribunal wherein the assessee has earned dividend income of Rs. 7.87 lakhs. The Tribunal has worked out the disallowance on account of administrative expenses after considering the director's fee and auditor's remuneration vis-a-vis the earning of dividend income. If we analyze the figures of 2004- 05 and the finding of the Tribunal, then disallowance if at all is required to be made in this year looking to the nature of expenses then on reasonable basis it may not be more than 20,000/-. The assessee itself has offered Rs. 8,187/- for disallowance before the AO. Thus, looking into the facts and circumstances, we propose to disallow Rs. 50,000/- for this year also, which will include the disallowance already offered by the assessee at Rs. 8,187/-. Thus, ground no. 5 is treated as partly allowed."

10.14. Both the sides agreed that there is no change in the facts and circumstances of the case as compared to Assessment Year 2007-08. Therefore, in view of the above, we do not find any infirmity in the order passed by the CIT(A). Respectfully following the decision of the Tribunal in the case of the Assessee Assessment Year Assessment Year 2007-08, Ground No. 10 raised by the Revenue is dismissed.

In the result, the appeal preferred by the Assessee [ITA No. 547/Mum/2017] and the appeal preferred by the Revenue [ITA No. 328Mum/2017] is partly allowed.

Order pronounced on 03.03.2023.

Sd/-
(S Rifaur Rahman)
Accountant Member

Sd/-
(Rahul Chaudhary)
Judicial Member

मुंबई Mumbai; दिनांक Dated : 03.03.2023
Alindra, PS

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

1. अपीलार्थी / The Assessee
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.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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