आयकर अपीलीय अधिकरण, कोलकाता पीठ "सी", कोलकाता

IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH: KOLKATA

डॉ मनीष बोरड, लेखा सदस्य एवं श्री अनिकेश बनर्जी, न्यायिक सदस्य के समक्ष

[Before Dr. Manish Borad, Accountant Member &Shri Anikesh Banerjee, Judicial Member]

I.T.A. Nos. 490 & 491/Kol/2019

Assessment Years: 2013-14 & 2014-15

DCIT, Circle-6(1), Kolkata	Vs.	M/s IFB Agro Industries Ltd. (PAN: AAACI 6487 L)
Appellant / (अपीलार्थी)		Respondent / (प्रत्यर्थी)

Date of Hearing / सुनवाई की तिथि	01.02.2024
Date of Pronouncement/ आदेश उद्घोषणा की तिथि	08 .02.2024
For the Appellant/ निर्धारिती की ओर से	Shri J.P. Khaitan, Sr. Counsel Shri P. Jhunjhunwala, Advocate Smt. Sritapa Sinha, Advocate
For the Respondent/ राजस्व की ओर से	Shri Kiran Chatrapoty, JCIT, Sr. D.R

ORDER / आदेश

Per Anikesh Banerjee, Judicial Member:

Both the appeals of the revenue were filed against the order of Ld. Commissioner of Income-tax (appeals)-22, Kolkata [in brevity ld. 'CIT(A)'] dated 31.12.2018 passed u/s 250 of the Income Tax Act, 1961 (in brevity the 'Act') for assessment years2013-14 & 2014-15. The impugned order was

emanated from the order of the ld. DCIT, Circle-6(1), Kolkata (in brevity the 'AO') passed u/s 143(3)of the Act dated 29.12.2017.

2. The Registry has informed us that the appeal was filed with a delay of 2 days. The assessee filed an Affidavit and the reason cited as below:

11.03.2019	*File was with the Principal Commissioner of Income Tax-2, Kolkata*
12.03.2019	*File received from the Principal Commissioner of Income Tax-2, Kolkata suggesting 2nd Appeal.*
13.03.2019	*Processing of papers for filing of appeal and appeal filed*

So, the delay was for two days. The Ld. AR had not made any objection for condoning of delay. The reason for the delay is accepted by the bench. Accordingly, we condone the delay of two (2) days to filing the appeal.

3. At the outset, the revenue placed that both the appeals are in the same nature and have a common factual background. Accordingly, we have taken together, heard together and disposed of together. ITA No. **490/Kol/2019**is taken as lead case.

4. The revenue has taken the following grounds of appeal:

1. Whether on the facts and in the circumstances of the case, the Ld. CIT(A) has erred in law in holding that deduction u/s 80IA of the Act will be allowed as claimed by the assessee.

2. Whether on the facts and in the circumstances of the case, the Ld. CIT(A) has erred in law in deleting the addition made by AO u/s 14A under Rule 8D without appreciating the CBDT Circular No. 5/2014.

3. Whether on the facts and in circumstances of the case, Ld. CIT(A) has erred in law in holding that adding back the disallowance computed under rule 8D while assessing the book profit is unjustified.

4.Whether on the facts and in the circumstances of the case, Ld. CIT(A) has erred in law in holding that the Education Cess paid on Income Tax is an allowable expenditure under the Head Business & profession.

5.That the appellant craves leave to add, delete and modify any of the grounds of appeal before or at the time of hearing.

5. Brief fact of the case is that the assessee engaged in the business of manufacturer of rectified spirit, Indian made foreign liquor, marine products and trading of marine feed and generation & distribution of Thermal Power for captive consumption. The assessee set up of power generation plant, captive power plant (CPP) is to make the company to sufficient in supply of electricity power. The power is generated by ignition of coal and the heat generated is used for boilers, in turn , the boiler steam transfer to turbine generators. The power generated from turbines is transferred and consumed in main manufacturing unit. The determination of selling price per unit of power used for captive consumption is determined on average price of electricity purchase for State Electricity Board which is fixed at 8.48% per unit. Accordingly, the assessee had entered into specific domestic transaction during the relevant financial year.

And the case was transferred to TPO for determination of the Arms Length Price (ALP) as per provision of Section 92CA of the Act. The TPO passedthe order dated 28.10.2016 u/s 92CA(3) and observed and compared that eligible unit of the assessee with same companies amount to Rs. 3.23 per unit has been adopted as ALP and in the way the transfer price of power for eligible unit was reduced to Rs. 2,26,20,150/-. Considering the effect, the assessee was asked to recompute the deduction u/s 80IA of the Act and sale price of unit was taken amount to Rs. 3.23 per unit and the profitability comes to negative figure. Accordingly, the total claim of Rs. 80IA is dropped down to Rs. 1,89,63,191/- and added back with the total income of the assessee. Further the assessee earned the dividend of Rs. 25,000/- on share and mutual funds. The computation u/s 14A was initiated and as per Rule 8D(2)(iii) considered @0.5% of the average investment which is amount to Rs. 296.17 lakh equals to Rs. 1,48,085/- was calculated and added back to the total income of the assessee. The assessee has grievance about both the additions and filed appeal before the Ld. CIT(A). Ld. CIT(A) allowed the grounds of the assessee related to issues u/s 80IA of the Act and in case of addition u/s 14A the Ld. CIT(A) upheld the views of Ld. AO for AY 2013-14. For AY 2014-15 only addition u/s 80IA was deleted by the Ld. CIT(A). There is no issue u/s 14A related to AY 2014-15.

Being aggrieved on the appeal order the revenue has filed an appeal before us.

6. The Ld. D.R, Mr. Kiran Chatrapoty, JCIT, Sr. D.R vehemently argued and fully relied on the order of assessing authority. The relevant paragraph of the assessment order is duly enclosed as below:

> *"3.Theassessee company, during the relevant previous year, engaged in the businessof manufacture of rectified spirit, Indian made foreign liquor, marine products and trading of marine feed and generation & distribution of Thermal Power for captive consumption.*
>
> *3.1. The purpose of set up of power generation plant is to make the company to sufficient in supply of electricity power. The power is generated by ignition of coal and die heat generated is used for boilers, in turn, the boiler steam transfer to turbine generators. The power generated from turbines are transferred and consumed in main manufacturing unit. The determination of selling price per unit of power used for captive consumption is determined on average purchase price of electricity purchased from the State Electricity Boards which was fixed at Rs 8.48 per unit for 43,08,600 units transferred in the way to other business units.*
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> *3.2 In the way, the assessee had entered into Specified Domestic Transactions during the relevant financial year. Under the circumstances, the case was referred to the Transfer Pricing Officer (TPO) for determination of Arms Length Price as per provisions of Section 92CA of the LT.Act,i96i.*
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> *3.3. The TPOin its order dated 28.10.2016 u/s 92CA(3) of the I T Act,1961 hasobserved and compared the eligible unit of the assessee with some companies and Rs 3.23 per unit has been adopted as ALP and in the way, the transfer price of power for the eligible unit is reduced by Rs 2,26,20,150/-.*
>
> *3.4. Accordingly, the assessee was asked to compute the profit of the eligible unit forthe deduction claimed u/s 80IA of the IT Act,1961.The assessee submitted the sametaking into account the sell price of the unit at Rs 3.23 per unit and the profitability comes to a negative figure. Hence the total deduction claimed by the assessee u/s 80IA of the I T ACT1961,amounting to Rs 1,89,63,191/- is disallowed and added back to the total income of the assessee."*

7. The Ld. A.R, Mr. J.P. Khaitan, Sr. Advocate vehemently argued and invited our attention in the appeal order page 20 to 22 which is reproduced as below:

"1. I have carefully considered the action of the Ld. TPO as also equally carefully perused the submissions made by the Ld. A.R.s, and the documents available in the paper book filed by the appellant. The subject matter of dispute in the present case is the determination of tariff rate for the purpose of computing profits of the CPP. From the orders of the lower authorities as also from the contentions of the appellant, it is noted that both the parties have in principle accepted and agreed that the most appropriate method for determination of ALP of power tariff is CUP Method. IN the Ld. TPO's opinion the power tariff rates/orders of the electricity generating undertakings was the most relevant indicator of the arm's length price for power supplied by CPPs. Apart from relying on the orders of the regulatory authorities determining the tariff, the Ld. TPO also took into account the judgment of the Hon'ble Calcutta High Court in ITC Limited reported in (2015) 64 Taxman.com 214wherein the Hon'ble Court had held that the CPPs were not permitted to sell power to anyone else but to power distribution companies and that too at the controlled rates notified by the regulatory authorities. The Ld. AO/ TPO therefore concluded that the rate adopted by the appellant at Rs.8.48 per unit for the CPP at West Bengal was excessive and did neither represent fair market value nor the ALP of the power supplied by CPP. On the contrary he adopted Rs.3.23 per unit as the ALP for the power generated by Unit located in the State of West Bengal.

2. Per contra, the Ld.- ARs of the appellant has made detailed submissions rebutting the Ld. TPO's conclusion, which have extensively been extracted in the earlier paragraphs. From the foregoing the question to be decided is thatfor application of CUP Method what should be the most appropriate data and the price to be adopted. It is well understood that CUP 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, as is being done between the AEs. The CUP Method, can be broadly classified into two categories i.e. Internal CUP Method & External CUP Method. Under the Internal CUP Method, the transaction between the AEs involving buy or sell of goods & services are comparable to thetransacted conducted by any of the AEs with unrelated parties for buy or sell of similar goods or services under similar conditions. However when such internal data is not available, then one may apply external CUP which involves comparison of prices paid/ charged between two unrelated third parties in uncontrolled conditions with the transaction conducted between the AEs.

3. Under Chapter X of the Act which became applicable to specified domestic transactions, not only the assessee is required to demonstrate that the profits are arrived at by adopting fair value of the goods & services provided to related parties but it is also incumbent to prove that the price charged to the related parties was on arm's length. In this regard, the provisions of Chapter X that the arm's length price for the goods or services should be determined on the basis of methods prescribed in Section 92C of the Act. In the circumstances therefore apart from the fact that the power tariff should be shown to- be fair value, it must also be demonstrated that the price adopted for determination of profits of the eligible undertaking, the assessee had adopted power tariff which could be said to be arrived at on arm's length principle. In the facts of the present case, the transaction in question involves supply of power by the eligible unit at West Bengal to the non-eligible unit of the appellant in

the. same State. From the facts on record, it is noted that the eligible unit at West Bengal supplied power only to the AE i.e. the non-eligible unit and it did not have any transaction with any unrelated enterprises. In the circumstances the unit at West Bengal cannot be considered as the tested party for the purposes of application of CUP. On the contrary, it is noted that the non-eligible unit was sourcing power both from the AE i.e. the eligible undertaking as well as unrelated enterprises i.e. the SEB. In the circumstances it is noted that reliable internal CUP data was available with the appellant to. benchmark the ALP of the power generated & supplied by the eligible undertaking to the non-eligible unit.

4. In respect of the basis and benchmarking exercise followed by the Ld. AO/TPO, I note that it suffered from apparent infirmities, From the facts on record I note that the Ld. TPO wrongly assumed that the CPP was neither discharging distribution functions nor transmission functions and therefore sought to functionally distinguish it from the SEBs. It is however found from the facts on record that the CPP was indeed distributing and supplying power to the non-eligible undertaking through transmission lines and hence the FAR analysis performed by the Ld. AO/TPO was unjustified. It is also observed that the Ld. TPO/AO erred in considering different forms of power units such as coal based, waste heat gas based etc. to be comparable to the assessee CPP when the jurisdictional fact remained that the assessee's CPP was a thermal based power plant. The Ld. TPO/AO also selected the tariff schedule on random & pick and chose basis without ascertaining as to whether the Tariff schedule was for Low Tension or for High Tension or for that matter for which class of consumers was the tariff rates notified. It is evident from the tariff orders that depending on the class of consumers e.g., Railways, Mines, Seasonal, Industrial /Non-industrial, agriculture etc. the rates varied from Rs.1.80 to Rs.5,30 per unit. I therefore find merit in the contention of the Ld. AR. that the FAR as well as the Economic Analysis performed by.Ld. TPO was fundamentally flawed and unsustainable on facts and in law.

5. On the other hand, I find that the benchmarking exercise followed by the appellant not only fulfils the internal CU-P, parameters but reliable data is also available in this regard. Furthermore this benchmarking exercise followed by the appellant and their contention that the ALP of transfer of power by CPP to be equivalent to the landed cost of power at which the non-eligible unit procured power has been judicially approved by the jurisdictional ITAT, Kolkata in the cases of Birla Corporation Ltd for AYs 2008-09 to 2010-11 in ITA Nos, 971/Kol/ 2012 & 298/Kol/2013and Kesoram Industries Limited in ITA No. 1722/KoI/2012. In both these judgments the Hon'ble Tribunal has discussed in detail the provisions of amended Electricity Act, 2003, relevant regulations of State Electricity Commission and the judgment of the Hon'ble Calcutta High Court in the case of CIT Vs ITC Ltd (supra) and thereafter concluded that the landed ,cost at which the electricity was supplied by SEBs to the assessee was the appropriate transfer rate to benchmark for the purposes of Section 80IA(8) of the Act

6. For the reasons set out in the foregoing therefore and respectfully following the decisions of the ITAT, Kolkata (supra), I hold that the methodology and benchmarking performed by the appellant was justified. Accordingly the Ld. AO/TPO

is directed to delete the transfer pricing adjustment of Rs.2,26,20,150/-and further direct the Ld. AO/TPO to grant the deduction u/s 80IA of Rs. 1,89,63,191/- based on the transfer price of Rs,8,48 per unit in respect of CPP at West Bengal. While computing the deduction permissible, the Ld. AO/TPO shall give an opportunity of hearing to the appellant and will re-compute the deduction in terms of the directions above. Ground No. 1 is therefore allowed."

Mr. Khaitan argued andplaced that the issue is already covered by the order of Co-ordinate Bench of ITAT, Kolkata and the order of Hon'ble **Supreme Court** in the case of **CIT vs. Jindal Steel and Power Ltd. in [2024] 460 ITR 162 (SC).** Mr. Khaitan further placed that the assessee is charging electricity finally amount to @ Rs. 8.28 per unit. The same rate as charged by West Bengal State Electricity Board (in short WBSEB) the other bench marking of the companies are not similar related to nature of generation of power. Factually they are different. Mr. Khaitan invited our attention in the order of **Co-ordinate Bench "C" Benc**h in the case of **DCIT vs. Birla Corporation Ltd. in ITA Nos. 2142 & 2143/Kol/2018 for AY 2013-14 and 2014-15 date of order 07.02.2023**. The relevant paragraphs are reproduced as below:

9.4. We, further, observe that ld. CIT(A) after considering the facts of the case for the year under appeal as well as the decision of this Tribunal in assessee's own case for the preceding years deleted the addition towards transfer pricing adjustment of Rs. 107,46,72,729/- observing as follows:

"08. FINDINGS &DECISION:

1. I have carefully considered the action of the Ld. TPO as also equally carefully perused the submissions made by the Ld. A.Rs, and the documents available in the Paper Book filed by the appellant. The claim of the appellant for deduction u/s 80IA in respect of profits of captive power plants ('CPPs') has been subject matter of dispute in the past as well. In the AYs 2008-09 & 2009-10, the matter with regard to determination of tariff rate for the purpose of computing profits of the CPPs travelled upto the Hon'ble ITAT, Kolkata, which vide its order dated 25.08.2017 in ITA No.971/Kol/2012 accepted the proposition put forth by the assessee that the profits of

the eligible undertaking should be computed by adopting power tariff equal to monthly average landed cost of the power supplied to the other undertakings by the State Electricity Boards. The material difference during the year under consideration is that in the years decided by the Hon'ble ITAT, Kolkata. the adjustments were carried out by the Ld. AO in terms of Section 80IA(8) of the Act and there was no transfer pricing regulations in force. However the appeal relates to AY 2013-14 when the transfer pricing provisions contained in Chapter X of the Act became applicable to specified domestic transactions and therefore not only the assessee is required to demonstrate that the profits are arrived at by adopting fair value of the goods & services provided to related parties but it is also incumbent to prove that the price charged to the related parties was on arm's length. In this regard, the provisions of Chapter X that the arm's length price for the goods or services should be determined on the basis of methods prescribed in Section 92C of the Act. In the circumstances therefore apart from the fact that the power tariff should be shown to be fair value, it must also be demonstrated that the price adopted for determination of profits of the eligible undertaking, the assessee had adopted power tariff which could be said to be arrived at on arm's length principle.

2.From the orders of the lower authorities as also from the contentions of the appellant, it is noted that both the parties have in principle accepted and agreed that the most appropriate method for determination of ALP of power tariff is CUP Method. In the Ld. TPO's opinion the power tariff orders issued the relevant SECs was the most relevant indicator of the arm's length price for power supplied by CPPs. Apart from relying on the orders of the regulatory authorities determining the tariff, the Ld. TPO also took into account the judgment of the Hon'ble Calcutta High Court in ITC Limited reported in (2015) 64 Taxman.com 214wherein the Hon'ble Court had held that the CPPs were not permitted to sell power to anyone else but to power distribution companies and that too at the controlled rates notified by the regulatory authorities. The Ld. TPO also took into consideration the fact that during the relevant year the appellant itself had sold 3,32,891 units generated by CPP in Rajasthan on IEX where per unit price realized was Rs.4.95. Keeping in view these facts and documents the Ld. AO concluded that the rates adopted by the appellant at Rs.6.76/6.85 per unit & Rs.6.79/Rs.6.84 per unit for the CPPs at Rajasthan & Madhya Pradesh was excessive and did neither represent fair market value nor the ALP of the power supplied by CPP. On the contrary he adopted Rs.4.13 per unit8i Rs.2.45 per unit as the ALP for the power generated by Units located in the States of Rajasthan & Madhya Pradesh respectively.

3.Per contra, the Ld. AR of the appellant has made detailed submissions rebutting the Ld. TPO's conclusion, which have extensively been extracted in the earlier paragraphs. From the foregoing the question to be decided is that for application of CUP Method what should-be the most appropriate data and the price to-be adopted. It is well understood that CUP 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, as is being done between the AEs. The CUP Method, can be broadly classified into two categories i.e. Internal CUP Method & External CUP Method. Under the Internal CUP Method, the transaction between the AEs involving buy or sell of goods 8i services are comparable to the transacted conducted by any of the AEs with unrelated parties for buy or sell of similar goods or services under similar conditions. However when such internal data is not available, then one may apply external CUP which involves

comparison of prices paid/ charged between two unrelated third parties in uncontrolled conditions with the transaction conducted between the AEs.

4.In the facts of the present case, the transaction in question involves supply of power by the eligible units at Rajasthan & Madhya Pradesh to the non-eligible cement units of the appellant in the same States. From the facts on record, it is noted that the eligible unit at Madhya Pradesh supplied power only to the AE i.e. the non-eligible unit and it did not have any transaction with any unrelated enterprises. In the circumstances the unit at Madhya Pradesh cannot be considered as the tested party for the purposes of application of CUP. On the contrary, it is noted that the non-eligible unit i.e. cement unit was sourcing power both from the AE i.e. the eligible undertaking as well as unrelated enterprises i.e. the SEB. In the circumstances it Is noted that reliable internal CUP data was available with the appellant to benchmark the ALP of the power generated & supplied by the eligible undertaking to the non-eligible unit. Similarly in the case of CPP at Rajasthan, it is noted that the eligible unit had supplied power to the AE as well as unrelated enterprises i.e.lEX/Grid. It is however noted that the power which the eligible undertaking supplied to non-AEs did not even constitute 0.11% of the total power generated by the CPP during the relevant year. In the circumstances therefore the rate at which the transaction was conducted by the eligible unit with non-AEs cannot be considered to be reliable data because the facts indicate that such sale was more in nature of reducing effective cost of generation by selling the excess power generated rather than incurring the generation loss. On the contrary however, in the case of CPP at Rajasthan also it is noted that the cement manufacturing undertaking to which the eligible unit supplied power, had procured substantial quantity of power throughout the year from unrelated enterprise i.e. SEB and therefore the tariff at which the said AE, i.e. non-eligible unit purchased power from SEB represented reliable internal CUP. I therefore find that even after introduction of domestic transfer pricing provisions to specified domestic transactions and becoming applicable to the appellant, the ratio laid down by the Hon'ble ITAT, Kolkata in the appellant's own case for AYs 2008-09 & 2009-10 remains equally valid.

5.For the reasons set out in the foregoing therefore I hold that the methodology and benchmarking performed by the appellant (also judicially approved by higher judicial forums in its own case) was justified. Accordingly the Ld. AO/TPO is directed to delete the transfer pricing adjustment and further direct the Ld. AO/TPO to grant the deduction u/s 80IA based on the transfer price of Rs.6.76/6.85 per unit & Rs.6.79/Rs.6.84 per unit in respect of CPPs at Rajasthan 8i Madhya Pradesh respectively. While computing the deduction permissible, the Ld. AO/TPO shall give an opportunity of hearing to the appellant and will re-compute the deduction in terms of the directions above. Ground Nos. 2 to 5 are therefore allowed."

9.5. As relied by ld. Counsel for the assessee, we observe that similar issue came up before this Tribunal in the case of DCIT vs. M/s. Dhunseri Ventures Ltd.in ITA No. 1989/KOL/2019 order dated 29.08.2022 regarding the transfer pricing adjustment in relation to specified domestic transactions of transfer of power for captive consumption by eligible units to non-eligible units. This Tribunal after considering the catena of judgments held as follows:

"9.5. We have heard rival submissions and perused the material as placed before us carefully including the impugned order and case laws relied upon by the assessee and the revenue. The undisputed facts in brief are that the assessee has two CPPs or

eligible units generating electricity which was consumed captively by other non-eligible units i.e. PET Resin Manufacturing Unitshereinafter referred to as Non Eligible Units), for carrying out the manufacturing. Noteworthy that non eligible units have also consumed power by purchasing the same from SEB. We observe that the assessee determined the ALP of specified domestic transactions at rate ranging from Rs. 7.66 per unit to Rs. 7.87 per unit which was the Average Annual Landed Cost (AALC) at which the non-eligible unit procured power from SEB. Thus , the assessee followed internal CUP for bench marking the specified domestic transactions of transfer of power from CPPs to non eligible unit at average landed cost at which the non eligible units procured electricity from the SEB by taking non eligible units as the tested party in the TP Study Report and accordingly ALP of the power captively consumed has been benchmarked at ALC of power purchased by the tested party from SEB. The assessee also duly reported these transactions in the audited report in Form 3CEB. Accordingly to the TPO the average rate of Rs. 3.47 per unit calculated on the basis of sale data of power by independent CPPs/IPPs as determined by various tariff orders would be the ALP of the domestic specified transactions. Accordingly the TPO recommended adjustment to the tune of Rs. 6,75,22,00,000/- and the AO passed the draft assessment accordingly. According to the assessee the internal CUP has to be used for the determination of ALP at which the non-eligible units/manufacturing units procured the power from unrelated party i.e. SEB. Now the issue before us whether the CUP method can be applied to bench mark specified domestic transactions of transferring power by CPPs to non eligible units. We have also perused the provisions as contained in Rule 10B of the Income Tax Rules which provide as to where the CUP can be and has to be applied. We observe from the said rule 10B that we have to see the price at which the property, goods or service has been acquired under similar market conditions. It is also settled that choice of tested party is of lesser significance for the purpose of application of CUP method but instead key factor in application of CUP is product comparability and similar market conditions. Further the CUP method can be classified into two categories i.e. internal CUP method and external CUP method. Under internal CUP method the transactions between the AE's involving buying or selling of goods and services are comparable to the transactions entered into by the AE's with the unrelated parties for buying and selling similar goods and service under similar circumstances. However when such internal data was not available then one may apply external CUP which involves comparison of price paid/charged between the two unrelated parties in uncontrolled condition for transactions entered into between the AE's. In the instant case as noted elsewhere hereinabove that the CPPs bench marked the transactions with non eligible units at a rate at which power is supplied by the SEB to the non eligible units and therefore is the prevailing rate at which the power has been supplied by the SEB to other parties/factories located in the same geographical areas/location. It is also undisputed that both CPPs as well as SEB supplied/sold power during the year and thus there is no timing difference as well. Thus we are in agreement with the conclusion of Ld. CIT(A) that transactions of purchase of power by the non eligible units from SEB fulfil the internal CUP parameters vis product comparability and similar market conditions and thus the ALC paid by the non eligible units to the SEB represented the internal comparable ALP.

9.6. According to Ld. CIT(A), the excess surplus power sold in the open market at a price which was lower than the price at which the manufacturing units procured electricity from the SEB cannot the arm's length price of the power. Thus, the Ld. CIT(A) reversed the order of TPO/AO by directing that the price at which the SEB

sold power in the open market under uncontrolled conditions is reliable internal CUP and accordingly came to the conclusion that ALC notified by the SEB is a fair, reliable and reasonable basis to bench mark the power procured by non-eligible unit from the eligible unit. The Ld. CIT(A) while allowing the appeal of the assessee has relied on the series of decisions namely PCIT vs. Gujarat Alkalies& Chemicals Ltd. (supra), CIT vs. Godawari Power & Ispat Ltd. (supra) and Reliance Infrastructure Ltd. in ITA No. 2180 of 2011 (Bombay-High Court) and the decision of Coordinate Bench of Kolkata in the case of DCIT vs. Birla Corporation Ltd. in ITA No. 971/Kol/2012 for AY 2008-09. We note that in all the above decisions, the AALC at which the power is purchased by the non-eligible unit of the assesseewas considered to be the fair market value / transfer price of power supplied by the eligible unit to the non-eligible unit. Before us, the Ld. A.R also argued that non-eligible units has to be held as a tested party and AALC at which the power was purchased by the tested party from SEB/ third party is the most appropriate ALP to bench mark the transfer of power supplied by eligible unit to non-eligible unit. The said view of the assessee is squarely covered by the two decisions of Hon'ble Benches namely Star Paper Mills Ltd. vs. DCIT (supra) and DCIT vs. Balrampur Chini Mills Ltd. (supra). Having considered the ratio laid down, we are of the view that there is no infirmity in the order of Ld. CIT(A) which is a very reasoned and speaking order passed after following the decision of various Hon'ble High Courts and decision of Co-ordinate Benches of the Tribunal. We have also noted the arguments advanced by the Id DR that average rate of Rs. 3.47 per unit as calculated on the basis of sale data of power by independent CPPs /IPPs as determined by various tariff orders should be taken as ALP however can not overlook the fact that the said transactions did not take place under similar market conditions and that price cannot be taken as ALP under CUP method. The power supplied by the CPPs to non eligible units was business to consumer (commonly known As B2C) meaning thereby the rate at which the ultimate consumers can purchase the power for their consumption is relevant. In the instant case before us, the B2C market comprises the sale of power by SEB and other distribution companies to different categories of consumers. Thus the power sold by other CPPs/IPPs to unrelated parties was in altogether different market conditions which is business to business commonly known as B2B model and the said rate represented the rate at which the distribution companies purchased power from generation companies. Further no consumer can buy the power in the open market at a rate generation companies sell power to distribution companies. Thus we do not find any force in the contentions of the Id DR that rate at which the power was sold to unrelated parties by the CPP is the ALP. We also note that decision of the Calcutta High court in the case of CIT Vs ITC 236 Taxman 612 which was relied by the TPO/AO and the functional dissimilarity between CPPs and SEB have been considered by the coordinate bench of the tribunal in the case of Star Paper Mills Ltd Vs DCIT in ITA No. 127/Kol/2021. Therefore, we are inclined to uphold the order of Ld. CIT(A) by holding that the ALC at which the power is procured by non-eligible units from SEB is the most appropriate ALP to bench mark the specified domestic transactions and accordingly the order passed by Ld. CIT(A) is upheld by dismissing the revenue's appeal on this issue. The grounds of appeal pertaining to this issue are dismissed."

9.6. Thus, respectfully following the consistent view taken by this Tribunal and since the issues raised before us are squarely covered by the decision of this Tribunal in assessee's own case for preceding assessment year i.e. AY 2011-12 & 2012-13 and Revenue being unable to controvert this fact by placing any other binding precedence in its favour, we fail to find any infirmity in the finding of ld. CIT(A). Thus, common

ground no. 2 for AY 2013-14 & 2014-15 regarding transfer pricing adjustment made for deduction u/s 80IA of the Act raised by the Revenue are dismissed.

8. Mr. Khaitan further invited our attention in the order of **Hon'ble Apex Court** in the case of **CIT vs. Jindal Steel & Power Ltd**. (supra) the relevant paragraphs are reproduced as below:

"27. Another way of looking at the issue is, if the industrial units of the assessee did not have the option of obtaining power from the captive power plants of the assessee, then in that case it would have had to purchase electricity from the State Electricity Board. In such a scenario, the industrial units of the assessee would have had to purchase power from the State Electricity Board at the same rate at which the State Electricity Board supplied to the industrial consumers i.e., Rs. 3.72 per unit.

28. Thus, market value of the power supplied by the assessee to its industrial units should be computed by considering the rate at which the State Electricity Board supplied power to the consumers in the open market and not comparing it with the rate of power when sold to a supplier i.e., sold by the assessee to the State Electricity Board as this was not the rate at which an industrial consumer could have purchased power in the open market. It is clear that the rate at which power was supplied to a supplier could not be the market rate of electricity purchased by a consumer in the open market. On the contrary, the rate at which the State Electricity Board supplied power to the industrial consumers has to be taken as the market value for computing deduction under section 80-IA of the Act.

29. Section 43A of the 1948 Act lays down the terms and conditions for determining the tariff for supply of electricity. The said provision makes it clear that tariff is determined on the basis of various parameters. That apart, it is only upon granting of specific consent that a private entity could set up a power generating unit. However, such a unit would have restrictions not only on the use of the power generated but also regarding determination of tariff at which the power generating unit could supply surplus power to the concerned State Electricity Board. Thus, determination of tariff of the surplus electricity between a power generating company and the State Electricity Board cannot be said to be an exercise between a buyer and a seller under a competitive environment or a transaction carried out in the ordinary course of trade and commerce. It is determined in an environment where one of the players has the compulsive legislative mandate not only in the realm of enforcing buying but also to set the buying tariff in terms of the extant statutory guidelines. Therefore, the price determined in such a scenario cannot be equated with a situation where the price is determined in the normal course of trade and competition. Consequently, the price determined as per the power purchase agreement cannot be equated with the market value of power as understood in the common parlance. The price at which the surplus power supplied by the assessee to the State Electricity Board was determined entirely by the State Electricity Board in terms of the statutory regulations and the contract. Such a price cannot be equated with the market value as is understood for

the purpose of Section 80IA (8). On the contrary, the rate at which State Electricity Board supplied electricity to the industrial consumers would have to be taken as the market value for computing deduction under section 80-IA of the Act.

30. Thus on careful consideration, we are of the view that the market value of the power supplied by the State Electricity Board to the industrial consumers should be construed to be the market value of electricity. It should not be compared with the rate of power sold to or supplied to the State Electricity Board since the rate of power to a supplier cannot be the market rate of power sold to a consumer in the open market. The State Electricity Board's rate when it supplies power to the consumers have to be taken as the market value for computing the deduction under section 80-IA of the Act.

31. That being the position, we hold that the Tribunal had rightly computed the market value of electricity supplied by the captive power plants of the assessee to its industrial units after comparing it with the rate of power available in the open market i.e., the price charged by the State Electricity Board while supplying electricity to the industrial consumers. Therefore, the High Court was fully justified in deciding the appeal against the revenue.

32. Revenue has relied upon the decision of the Calcutta High Court in ITC Ltd. (supra). In that case, the High Court rejected the first contention of the revenue that the assessee therein was not entitled to the benefit under section 80-IA of the Act because the power generated was consumed at home or by other business of the assessee. After holding so, the High Court however, answered the question on the point of computation of profits and gains of the eligible business against the assessee. On going through the judgment, we find that facts of that case are clearly distinguishable from the facts of the present batch of appeals. It is noticeable that though an opportunity was granted by the assessing officer to the assessee to adduce evidence to justify the price of electricity sold by it to its paper unit, the same could not be availed of by the assessee. The electricity generated was sold by the assessee entirely to its paper unit. There was no surplus electricity to be supplied to the State Electricity Board and consequently, there was no contract between the assessee and the State Electricity Board determining the rate of tariff for the electricity supplied by the assessee to the State Electricity Board. On the other hand, it was noticed that the Electricity Act, 2003 had come into force whereby and whereunder, the rate at which electricity could be supplied is determined, notably by Sections 21 and 22 thereof. That apart, there is the tariff regulatory commission which has the mandate for fixing the rates for sale and purchase of electricity by the distribution licensee. Thus it was noted that there is an inbuilt mechanism to ensure permissible profit both to the generating companies and to the distribution licensees. Therefore, it was held by the High Court that the assessee's generating unit could not claim any benefit under section 80-IA of the Act computing the profits and gains on the basis of the rate chargeable by the distribution licensee from the consumer and that the benefit could only be claimed on the basis of the rates fixed by the tariff regulatory commission for sale of electricity by the generating company. Facts being clearly distinguishable, this decision can be of no assistance to the revenue."

9. We heard the rival submissions and considered the documents available in the record. Issue related toacceptance of the rate per unit for selling electricity in CPP is squarely covered matter by the order of Hon'ble Apex Court and the order of Coordinate bench that the electricity unit would be charged as per the rate prevail by the WBSEB in case of selling to the consumer without any further conditions. The assessee has taken the calculation in CUP method the Ld. CIT(A) has taken the issue in external CUP method and accordingly deleted the addition. The ld. TPO has considered the comparable who are not generating thermal power which the assessee dealt in. Here, the supply power in between eligible unit to non-eligible unit. The assessee had adopted the power tariff which is said to be ALP and the WBSEB was maintain this rate by selling the consumer. The rate was adopted by the ld. TPO in CUP method cannot be accepted as the WBSEB is not tested party. The assessee has only transactions with AE, not any other party. The fair market value is clearly covered in order of **Jindal Steel and power Ltd**. (supra) and **Birla Corporation Ltd**. (supra). We respectfully relied on both the orders. We are not interfering in the appeal order in this issue. The assessment order is unjustified in this issue.

Accordingly, the grounds of the revenue for **ground nos. 1 and 3** are dismissed.

10. In case of addition u/s 14A the revenue has fully relied on the order of Ld. CIT(A) for addition u/s 14A amount of Rs. 1,48,085/-. The Ld. D.R invited our attention in appeal order page 22 which is reproduced as below:

> *" 9. Ground no. 2 taken by the appellant contends that the Ld. AO's has erred in law without establishing proximate cause between earning of exempt income and the expenses incurred. The impugned matter has been dealt with by the Ld. AO as under:*
>
> > *4.1 It is seen from the records that during the relevant previous year, the assessee has earned dividend of Rs 25,000/- on different shares and mutual funds. The assessee, in its computation was not disallowed any expenditure related to such exempted income as laid down u/s 14A of the IT Act, 1961.*
> >
> > *4.2. A company cannot earn dividend without its existence and management. Investment decisions are very complex in nature. They require substantial' market research, day to day analysis of market trends and decisions with regard to acquisition, retention, and sale of shares, units of mutual funds etc. at the most appropriate time. The investment requires availability of funds and consequential blocking of funds. It is well known that capital has cost and that element of cost is represented by interest. Besides, investment decisions are generally taken in the meetings of the Board of directors for which administrative expenses are incurred. In view of above, Rule 8D of the IT Rules have been applied for computation of disallowance.*
> >
> > *4.3. The calculation of disallowance u/s 14A :*
> >
> > *a) Rule 8D(2)(i) Direct expenses : Nil*
> >
> > *b) Rule 8D(2)(ii) : Nil*
> >
> > *c) Rule 8D(2)(iii): 0.5% of average investments of Rs 296.17 lakhs*
> >
> > *equals to Rs 1,48,085/-*
> >
> > *Avg Investments- Rs 296.171akhs+ Rs296.17 lakhs = Rs 296.17 lakhs*
>
> *Hence total disallowance u/s 14A is of Rs 1,48,085/- is added back to the total income of the assessee."*

11. The Ld. Sr. Advocate, Mr. Khaitan further argued and placed that 0.5% disallowance u/s 14A will be applicable only on the dividend yielding investment. As per calculation, the only the dividend yielding investment is

amount to Rs. 4.72 Lakh. The addition is 0.5% of the investment which works out to Rs. 3,131/-. So, the disallowance of dividend of Rs. 25,000/- is liable to be deleted and the Ld. A.R has accepted the disallowance u/s 14A of Rs. 3,131/-.

12. We heard the rival submissions and considered the documents available in the record. We find that both Ld. AO and the Ld. CIT(A) had added back under Rule 8D(2)(iii) of the Rules 0.5% on average investment of Rs. 296.17 Lakh which works out amount to Rs. 1,48,085/-. But all the investments are not dividend yielding as a result only amount to Rs. 25,000/- was earned dividend by the assessee during the impugned assessment year. We relied on the argument of Mr. Khaitan and accordingly the addition should be restricted to Rs. 3,131/-.

Accordingly, ground **no. 2** of the revenue is partly allowed.

13. In case of **ground no. 4** is not pressed by any of the parties.

14. **Ground no. 5** is general in nature and does not need any adjudication.

15. Now we shall adjudicate in ITA No. 491/Kol/2019 for AY 2014-15 and find that the issue raised in ground no. 1,2 &3 are similar to one as decided by us in ITA No. 490/Kol/2019 for AY 2013-14.Since we have decided the similar issue in ITA No. 490/Kol/2019 for AY 2013-14, therefore our

findings/decisions in the above ITA No. 490/Kol/2019 for AY 2013-14would, *mutatis mutandis*, apply to this appeal as well.

16. In the result, both the appeals filed by the revenue in **ITA No. 490/Kol/2019** is partly allowed **& 491/Kol/2019** is dismissed.

Order is pronounced in the open court on 8th February, 2024

Sd/-	Sd/-
(Dr. Manish Borad/ डॉ मनीष बोरड)	(Anikesh Banerjee /अनिकेश बनर्जी)
Accountant Member/लेख सदस्य	Judicial Member/न्यिक सदस्य

Dated: 8th February, 2024

SM, Sr. PS

Copy of the order forwarded to:

1. Appellant- DCIT, Circle-(1), Kolkata
2. Respondent – M/s IFB Agro Industries Ltd., Plot-INd-5/Sector-1, East Kolkata Township, Kolkata-700107.
3. Ld. CIT(A)- 22, Kolkata
4. Pr. CIT- , Kolkata
5. DR, Kolkata Benches, Kolkata (sent through e-mail)

True Copy By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata