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

BEFORE SHRI ANIKESH BANERJEE, JM &
MS PADMAVATHY S, AM

I.T.A. No. 3093/Mum/2023
(Assessment Year: 2019-20)

Tata Chemicals Ltd. 24, Homi Mody Street, Bombay House, Fort, Mumbai-400001. **PAN : AAACT4059M**	Vs.	**DCIT-2(3)(1),** Room No. 562, Aayakar Bhavan, M.K. Road, Mumbai-400020.
Appellant)	:	**Respondent)**

Appellant/Assessee by	:	Shri Nitesh Joshi a/w Samkit Chauradiya, CA
Revenue/Respondent by	:	Shri K.C. Selvamani, CIT-DR
Date of Hearing	:	15.05.2024
Date of Pronouncement	:	28.05.2024

O R D E R

Per Padmavathy S, AM:

This appeal is against the final order of assessment passed by the Assessing Officer, Assessment Unit [for short 'the AO'] under section 143(3) r.w.s. 144C(13) of the Income Tax Act (the Act) dated 12.07.2023 for the AY 2019-20. The assessee raised the following grounds of appeal:

*"**Addition on account of Transfer Pricing adjustment (Rs. 12.99 Cr.)***

1 The Ld. Assessing Officer ('AO')/ Ld. Transfer Pricing Officer ('TPO') [following the directions of Dispute Resolution Panel-2, Mumbai ('DRP') under section

144C(5) of the Income-tax Act, 1961 ('Act')] grossly erred, on fact and in law, in making upward transfer pricing addition of Rs. 12,99,46,410/- u/s. 92 of the Act in respect of specified domestic transaction of inter-unit transfer of power from the eligible undertaking u/s 80-IA of the Act namely, Power Plant TT-12 to Other Manufacturing undertaking of the Appellant. In doing so, on the facts and in law, the Ld. AO/Ld. TPO grossly erred:

1.1. in considering the Gujarat Electricity Regulatory Commission's order in case No.1696 of 2018 dated 31.03.2018 in case of M/s Torrent Power Ltd. - Generation, Ahmedabad as a lone suitable comparable instance for the purpose of application of the "Comparable Uncontrolled Price Method" ('CUP method") as prescribed in the Income-tax Rules, 1962.

1.2. in not appreciating that the level of market of the comparable transaction adopted by the Ld. AD/Ld. TPO (following the directions of DRP under section 144C (5) of the Act) is different as compared with the level of market in which the Appellant operates being transaction of power supply between power producer and end consumer.

1.3. in rejecting the economic/benchmarking analysis of the Appellant whereby the rate of Rs.6.58 p.u. being the rate applicable for purchase of power by Appellant from Gujarat Electricity Board that was adopted as arm's length price for such inter-unit transfer of power.

2. The Ld. AO/Ld. TPO [following the directions of DRP under section 144C(5) of the Act) grossly erred, on fact and in law, in rejecting the price at which the State Electricity Board supplied power to its consumers as 'market value' under section 80-IA(8) of the Act and thereby alleging that the eligible undertaking of the Appellant has earned more than ordinary profits,

3. The Ld. AO/Ld. TPO [following the directions of DRP under section 144C(5) of the Act) grossly erred, on fact and in law, in disregarding the fact that the Appellant also undertakes distribution function and its operations are integrated operations right from generation of electricity to distribution of electricity to end-consumer (i.e. manufacturing unit) in a B2C model.

4. The Ld. AO/Ld. TPO [following the directions of DRP under section 144C(5) of the Act) grossly erred, on fact and in law, in not taking cognizance of various judicial precedents relied upon by the Appellant which are of the cases where

transfer pricing was applicable to specified domestic transaction as defined under the provisions of section 92BA of the Act."

2. The assessee is a company engaged in the business of manufacturing and sale of inorganic chemicals, fertilizers and bio-fuels. The assessee is operating inorganic chemical complex at Mithapur in Gujarat, its fertilizer complex at Babrala in Uttar Pradesh and phosphatic fertilizers complex at Haldia in West Bengal. The assessee filed the return of income for AY 2019-20 on 29.11.2019 declaring a total income of Rs. 1040,85,22,356/-. The return was subsequently revised on 17.08.2020 in which the assessee declared total income of Rs. 1004,02,49,100/-. The case was selected for scrutiny under CASS and the statutory notices were duly served on the assessee. During the year under consideration the assessee has reported specific domestic transactions (SDT) to the tune of Rs.115,22,57,650/- with respect to sale of electricity from unit Power Plant – TT–12 which is eligible for deduction under section 80IA(8) of the Act (eligible unit) to the manufacturing unit in Mithapur (non-eligible unit). Accordingly the case was referred to the Transfer Pricing Officer (TPO) to determine the Arm's Length Price (ALP) of the impugned transactions. The assessee, in the Transfer Pricing Report has bench marked the transaction using Comparable Uncontrolled Method (CUP) in which the rate at which Gujarat Electricity Board supplies electricity to the assessee is compared with the rate of Rs.6.58/Kwh at which the eligible unit supplies electricity to non-eligible unit to conclude that the same is at arm's length. However the TPO did not accept the bench marking done by the assessee and passed an order making an adjustment of Rs. 15,10,08,540/- by adopting the power purchase cost charged by Gujarat Urja Vikas Nigam Ltd. (GUVNL) while purchasing power from coal based thermal power generating units in Gujarat i.e. Rs.4.09 / Kwh. Aggrieved assessee filed its objection before the DRP. The DRP

directed the TPO to adopt the rate at which electricity is supplied by Torrent Power Ltd (TPL) and accordingly the TP Adjustment was revised to Rs.14,37,31,020. The AO in the final assessment order restricted the disallowance to Rs.12,99,46,410/- being the amount claimed by the assessee under section 80IA of the Act. The assessee is in appeal before the Tribunal against the final order of assessment passed by the AO pursuant to the directions of the DRP.

3. Brief facts pertaining to the issue under consideration. During the Financial Year relevant to AY 2019-20 the assessee has transferred 6,06,46,000 kwh units of electricity from Power Plant –TT-12 which is eligible for deduction under section 80IA to the manufacturing unit at Mithapur at a cost of Rs. 39,88,16,944/-. In the TP report the assessee has followed CUP as the most appropriate method whereby the assessee has stated that the price charged by the eligible unit are compared with the prices charged by Gujarat Electricity Board (GEB) to the Mithapur Unit for supply of electricity under similar comparable circumstances. The assessee has further stated that GEB charges an average rate of Rs. 6.90 per unit and the eligible unit has also transferred to the Mithapur Unit at the same rate and therefore the price charged by the eligible unit is at ALP.

4. The TPO did not accept the TP report by holding that the comparison to sale price charged by eligible unit of the assessee with that of GEB is not correct considering the fact that functions performed, asset employed and the risk assumed by GEB is completely different from the eligible unit. The TPO further held that in the case of GEB huge distribution cost are involved whereas in assessee's case no such cost are involved as the transfer is an inter-unit transfer of power. The TPO also held that the assessee has not made any adjustment towards the distribution cost to make the prices comparable and thus the CUP data used by the assessee is

defective. The TPO proceeded to adopt the power purchase cost charged by Gujarat Urja Vikas Nigam Ltd. (GUVNL) while purchasing power from coal based thermal power generating units in Gujarat and the power charged by power generating units in Gujarat which are functionally similar to the assessee. The TPO adopted the rate of Rs. 4.09 per kwh i.e. the cost at which the power from the coal based thermal power generating units are purchase by GUVNL and accordingly made a TP Adjustment of Rs. 15,10,08,540/-. On further appeal before the DRP, the DRP followed its own decision for AY 2017-18 and directed the TPO to adopt the rate at which electricity is supplied by TPL. Accordingly the TP Adjustment was revised to reduced to Rs.14,37,31,020 which got restricted to Rs. 12,99,46,410/- being the amount claimed as deduction under section 80IA(8) of the Act.

5. Before us the ld. AR submitted that the identical issue for AY 2017-18 has been considered by the co-ordinate bench in assessee's own case wherein the Tribunal has held in favour of the assessee. The ld AR drew our attention to the decision of the Hon'ble Supreme Court in the case of CIT vs Jindal Steel & Power Limited ([2023] 157 taxmann.com 207 (SC)) where it has been held that the market value of power supplied by assessee to its industrial units should be computed by considering rate at which State Electricity Board supplied power to consumers in open market for the purpose of deduction under section 80IA(8) of the Act. The ld AR also submitted that the rate at which TPL as held by the DRP is not the correct comparable since many factors which the revenue raised while comparing rate charged by GEB are applicable to TPL also.

6. The ld. DR on the other hand argued that if the comparison with rate charged by TPL is to be rejected then the rate charged by GEB also needs to be rejected

since both are not charging purely un-controlled pricing. The ld DR further argued that in that case rate charged in independent platforms like rates of Indian energy exchange needs to be considered for the purpose of ALP. Accordingly the ld DR supported the order of the TPO and the finding of the DRP.

7. We have heard the parties and perused the material available on record. We notice that the co-ordinate bench has considered the similar issue in assessee's own case for AY 2017-18 ([2023] 155 taxmann.com 461) where it has been held that

> *"9. We have heard both the parties at length and also perused the relevant finding given in the impugned orders. Before us, the ld. DR referred to various observations made by the ld. TPO in its TP order and submitted that the captive power generating unit which is eligible for deduction u/s.80IA, not only is to be taken as a tested party but also the FAR analysis has to be done from power generating entities and not the distribution entities because distribution companies incurred various other costs of transmission loss and distribution cost apart from other administrative costs for such distribution. The price at which Distribution Company sells the power to the customers cannot be the price at which power generating units sells the electricity. In this case, the ld. DRP has taken M/s. Torrent Power Ltd. (TPL) ITA No.468/Mum/2022 M/s. Tata Chemicals Ltd. 11 which is an electricity generation unit in whose case per unit has been determined at Rs.3.99/- which is in accordance with Safe Harbour Rules and also specific external CUP in the case of electricity generation unit. Secondly, he submitted that wherever transfer of goods and services falls under SDT, then market price has to be determined as per principles of ALP under transfer pricing mechanism as provide in clause (ii) of Explanation to section 80IA(8).*
>
> *10. The case of the ld. Counsel for the assessee is that, what is required to be seen as to how much a non-eligible unit will have to pay the price for buying electricity. If it has bought electricity from GEB which has supplied the electricity @6.90 per unit, then if at the same price the eligible unit has supplied, then there is direct CUP. The purpose of Section 80IA(8) is to see whether the goods and services has been transferred at market value. The market value here in this case is at Rs.6.90 per unit. In support of his contention, he has filed 34 judgments of various Tribunals as well as the High Courts, and particularly the judgement of (i) Hon"ble Chhattisgarh High Court in CIT vs. Godawari Power & Ispat Ltd (2014) 42 taxmann.com 551; (ii) PCIT vs. Gujarat*

Alkalies & Chemicals Ltd. reported in 395 ITR 247 (Guj), wherein the Hon"ble Gujarat High Court specifically said that generation of power for captive consumption has to be computed considering the rate of power at each electricity board supplied power to its customers. He further referred to the decision of another Jurisdictional High Court in the case of CIT vs. ITA No.468/Mum/2022 M/s. Tata Chemicals Ltd. 12 Reliance Industries Ltd., reported in 421 ITR 686 (Bom), wherein the Hon"ble High Court held that, if assessee had set up a captive power generating unit and provided electricity to its another unit and claimed deduction under section 80-IA in respect of profits arising out of such activity then the valuation of electricity provided to another unit should be at rate at which electricity distribution companies were allowed to supply electricity to consumers. Besides this, catena of decisions of the Co-ordinate Bench has also been filed wherein similar view has been taken.

11. The entire controversy germinates from the fact, as to whether the sale of electricity by eligible unit entitled for deduction u/s.80IA which has supplied 5,23,42,000 KWH units of electricity to the manufacturing unit of TCL at Mithapur at transaction price of Rs. 36,09,44,480/- at the rate of Rs. 6.90/- per unit is at market value or not. In so far as determining market value in terms of Section 80 IA (8), the premise of the ld. TPO is that, firstly, it is a specific domestic transaction u/s.92BA and therefore, the market value of the electricity supply has to be determined in terms of transfer pricing provisions so as to determine the correct market value and the profits of eligible unit as per ALP within the scope and ambit of Section 80IA (8). Secondly, the ld. TPO has held that since the eligible unit is captive power generation unit and therefore, the price at which it has sold the electricity should be benchmarked with the comparables who are generating electricity and supplying it to the State Electricity Board which here in this case is GEB. ITA No.468/Mum/2022 M/s. Tata Chemicals Ltd. 13 Another point which has been raised by the ld. TPO is that, what is to be benchmarked is the profits of the eligible unit and therefore, eligible unit alone should be taken as a tested party and the FAR analysis has to be done of the eligible unit vis-à-vis the other units which are generating electricity. Lastly, he has given the detailed analysis as to why the price charged by the distribution companies cannot be compared with the assessee because it undertakes various functions, deploys various assets and assumes various risks and therefore, the price charged by the distribution company from the end customers cannot be the market value of the price on which assessee sold the price as power generation unit to another unit of the same assessee. Finally, the ld. DRP has given one comparable instance, of M/s. Torrent Power Ltd. (TPL) which was into generation of electricity in whose case, Gujarat Electricity Regulatory Commission (GERC) has determined the tariff for supply of electricity to State Electricity Board at Rs.3.99 per unit.

12. Whereas the case of the assessee is that the manufacturing unit has bought the electricity from the eligible unit at Rs.6.90 per unit which is the price from which it has procured electricity from GEB and therefore, the price charged by GEB is the market value of the transaction of sale of electricity. Section 80 IA provides that gross total income of an assessee includes any profits and gains derived by an undertaking or an enterprise from any business referred to in sub-section (4), then while computing the total income of the assessee, a deduction of an amount equal to 100% of the profits and gains derived from such ITA No.468/Mum/2022 M/s. Tata Chemicals Ltd. 14 business for ten consecutive assessment years. However, subsection (8) provides that where any goods or services held for the purposes of the eligible business are transferred to any other business carried on by the assessee, the consideration, if any, for such transfer of the eligible business does not correspond to the market value of such goods or services as on the date of the transfer, then, for the purposes of the deduction, the profits and gains of such eligible business shall be computed as if the transfer had been made at the market value of such goods or services. The relevant specimen reads as under:-

> *8) Where any goods for services held for the purposes of the eligible business are transferred to any other business carried on by the assessee, or where any goods or services]held for the purposes of any other business carried on by the assessee are transferred to the eligible business and, in either case, the consideration, if any, for such transfer as recorded in the accounts of the eligible business does not correspond to the "market value of such goods "or services as on the date of the transfer, then, for the purposes of the deduction under this section, the profits and gains of such eligible business shall be computed as if the transfer, in either case, had been made at the "market value of such goods "or services" as on that date:*
>
> *Provided that where, in the opinion of the Assessing Officer, the computation of the profits and gains of the eligible business in the manner hereinbefore specified presents exceptional difficulties, the Assessing Officer may compute such profits and gains on such reasonable basis as he may deem fit.*
>
> *Explanation- For the purposes of this sub-section, "market value", in relation to any goods or services, means-*
>
> *(i) the price that such goods or services would ordinarily fetch in the open market;*
> *(ii) the arm's length price as defined in clause (ii) of section 92F, where the transfer of such goods or services is a specified domestic transaction referred to in section 92BA.*

13. Thus, the aforesaid provision provides that goods and services provided by the eligible business which is being transferred to other business carried on by the assessee has to correspond to the market value of such goods as on the date of the transfer. The Explanation provides the scope and the meaning of the „market value" in relation to any goods and services which has provided two manners to determine. The first is the price that such goods or services would ordinarily fetch in the open market and then the phrase "or" has been used. Secondly, the arm's length price as defined in clause (ii) of section 92F, where the transfer of such goods or services is a specified domestic transaction referred to section 92BA. Section 92BA incorporates the determination of ALP under transfer pricing provision of sections 92,92C, 92D and 92E. It provides that any transfer of goods or services referred to in sub-section (8) of Section 80IA is also covered under the specified domestic transaction. 92F sub-clause (ii) defines the arm"s length price, which means the price which is applied or proposed to be applied in a transaction between the persons other than associated enterprises in uncontrolled conditions. Thus, the second option for determining the market value is the mechanism of transfer pricing provision for determining the arm"s length price. ITA No.468/Mum/2022 M/s. Tata Chemicals Ltd. 16

14. The entire case of the department is that, since it is SDT in term of Section 80I (8), therefore, the market value has to be in accordance with the determination of arm"s length price u/s.92C r.w.r. 10BA. In other words, once any transaction is hit by 80IA (8), then compulsorily, the market value has to be determined in accordance with the arm"s length principle and not otherwise. If the TPO"s contention and the opinion is accepted, then under all the transactions which are covered u/s.80IA(8) would compulsorily be determined as per transfer pricing provision as all the transactions falling u/s.80IA(8) will be specified domestic transactions only. If that is the only opinion which is to be upheld, then, ostensibly the entire exercise of ld. TPO is justified, that is, the whole process of determining, who is the tested party, what should be the FAR analysis of the tested party vis-à-vis the comparables under uncontrolled transactions and whether particularly in this case the price charged by the distribution entity can be said to be arm"s length price or the comparable has to be from the entities which are generating power, which here in this case one comparable has been chosen i.e. M/s. Torrent Power Ltd. (TPL). In our opinion it will be too myopic view to give an interpretation that all the transaction covered u/s. 80IA(8) has to be compulsorily determined under transfer pricing provision, cannot be accepted. Because, the statute has clearly provided two options or two manner in which market value of the goods and services can be determined. The phrase "or" does not give mean that the second mechanism provided in clause (ii) of Explanation alone can be applied after introduction of SDT from 01.04.2013. The use of the word "or" can be interpreted as, firstly,

both manner are available with the assessee to demonstrate that market value of the goods and services has to be either by showing that the price of such goods and services is in consonance with the price available in the open market; or if assessee is not able to establish the price available in the open market, then the price of goods and services has to be established through arm"s length principle. Secondly, if the price of the transfer of goods and services is in consonance with the price available in the open market then the profits of the eligible business shown as per this price is eligible for deduction and in that case the second option may not be necessary.

15. Both the authorities, i.e., ld. TPO and ld. DRP have held that in case of 80IA (8), the market value has to be compulsory governed by Explanation (ii) to Section 80IA (8), because in 92BA provides that such transfer of goods and services referred in this sub-section falls within SDT and therefore, arm"s length price has to be determined as per Section 92F(ii). Further according to them Explanation (i) & (ii) have separate application because it is separated by word "or", but how they are separately applicable and under which circumstances has not been elaborated. If such an interpretation is to be accepted, then clause-(i) of the Explanation will become otios and redundant, because then the transfer of the goods and services falling u/s.80IA(8) has to be compulsorily be determined under arm"s length principle. Had it been so, then post introduction of SDT in Section 92BA w.e.f. 01/04/2013, then statute would have provided that for the purpose of Sub-section (8) to Section 80IA, "market value" in relation to goods or services means the arm"s length price as defined in clause (ii) of Section 92F. If both the clauses exist then one has to see if the market value is discernable from the price for such goods would ordinarily fetch in the open market unless such price is not available, then there is an option for determining the market value as per the arm"s length price.

16. Here in this case what is required to be seen is, whether the market value in the price charged by the eligible unit for the sale of electricity to another unit can be benchmarked with the price on which GEB is supplying to the customers. From the records, it is seen that the manufacturing unit of the assessee also buys electricity from GEB at the same price of Rs.6.90/- per unit and the same price is being paid to the eligible unit also. The case of the department is that since assessee is generating electricity and supplying it to the manufacturing unit, therefore, functionally it is similar to entities which are generating electricity and not which are into distribution of electricity. What is required to be seen u/s. 80IA (8) is that, where any goods or services provided by the eligible business or transfer to any other business carried on by the assessee, the same should correspond to market value of such goods and services. The market value has to be seen qua the price in which such goods or services would ordinarily be fetched in the open market, i.e., whether in the open market the price of such

goods and services are available or not? Here assessee is a captive service provider for generating electricity and to supply and distribute to the manufacturing unit which otherwise would have bought from the open market. The price has to be seen what the manufacturing unit is paying in the open market. This precisely has been dealt by the Hon"ble Gujarat High Court in the case of PCIT vs. Gujarat Fluorochemicals Ltd., and also by the Hon"ble Jurisdictional High Court in the case of CIT vs. Reliance Industries Ltd., wherein the Courts had held that if the assessee had set up a captive power generating unit and provided electricity to its another unit and claimed deduction under section 80-IA in respect of profits arising out of such activity, then violation of electricity provided to another unit should be at the rate at which electricity distribution companies were allowed to supply electricity to the consumers. This judgment has been distinguished by ld. TPO / ld. DRP holding that these judgments relate to assessment years where SDT provisions were not applicable. We are not inclined to agree to such a view that these judgments have become redundant and Explanation (i) is no more applicable after the introduction of Clause (ii) w.e.f. 01/04/2013, because, the statute has not omitted clause (i). Thus, in our opinion these judgments still holds the field and once the market value of such price on which electricity is sold to another unit of the assessee, the same can be compared with the electricity distribution entities for supplying to the customers in the open market. Accordingly, there is no infirmity in the contention of the assessee that per unit electricity sold to the non-eligible unit at Rs.6.90 per unit is the market value.

17. The ld. DRP has taken M/s. Torrent Power Ltd. (TPL) which is the electricity generation entity supplying electricity to GEB. In that case Gujarat Electricity Regulatory Commission (GERC) has fixed tariff of Rs.3.99 per unit for supplying it to the GEB for F.Y.2016-17. First of all nothing has been brought on record whether, M/s. Torrent Power Ltd. (TPL) was supplying to other entities or industry or it was purely supplying to GEB. What is culled out is that, these power generating entities were manufacturing and supplying 100% to the GEB and the price is influenced by GEB, although fixed by GERC, but if there is only one party to whom sale is made and the prices and other conditions are purely influenced by that entity, then it becomes a tainted transaction. The reason being, Section 92A dealing with the meaning of the associated enterprises stipulates that two enterprises shall be deemed to be associated enterprises if any time during the previous year, the goods or articles manufactured or processed of one enterprise are sold to other enterprise which is specified by the other enterprises and the prices and the conditions are influenced by the other enterprise. This has been specifically provided in 92A (2)(i) which reads as under:-

(i) The goods or articles manufactured or processed by one enterprise are sold to the other enterprise or to the persons specified by the other enterprise, and the prices and other conditions relating thereto are influenced by such other enterprise.

18. If M/s. Torrent Power Ltd. (TPL) is purely supplying to GEB and GEB is controlling the prices and other conditions, although determined by regulatory authority, then it falls in the category of aforesaid clause and any such price under the condition, where one entity, i.e. GEB is influencing the price, then it becomes an controlled transaction between two associated enterprises. In that scenario, the prices on which GEB purchased the electricity from M/s. Torrent Power Ltd. (TPL) cannot be considered as comparative price. Thus, the price fixed for purchasing the electricity by GEB from M/s. Torrent Power Ltd. (TPL) cannot be compared with the prices on which eligible unit of the assessee is selling it to the other. Thus, once only comparable as chosen by the ld. DRP fails, then same loses the comparability for determining the ALP. In view of aforesaid discussion, we hold that the price on which eligible unit is selling the power, i.e., at Rs.6.90 per unit which is the price available in the open market and also the same manufacturing unit is purchasing it from GEB at the same price, then it can be said to be the market value of the price. Accordingly, addition / disallowance of deduction made by the ld. CIT (A) is deleted and the ground Nos. 1-4 raised by the assessee are allowed."

8. We notice that in the above decision, the coordinate bench has held the issue in favour of the assessee stating that the rate charged by GEB to the assessee i.e. the price at which the electricity is procured by the assessee in the open market is the right comparison as per explanation (i) to section 80IA(8) of the Act. The said view is strengthened by the decision of the Hon'ble Supreme Court in the case of JindalSteel & Power Ltd (supra) where it is held that

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.

The facts for year under consideration being similar respectfully following the above decision of the co-ordinate bench we hold that the TP Adjustment is not sustainable and the addition made in this regard hereby deleted.

9. We also notice that the coordination bench for AY 2017-18 has also held that TPL is not the correct comparison for CUP since the transaction of TPL which exclusively supplies to GEB is not an uncontrolled transaction. However the arguments of the ld DR is that if TPL is to be rejected then GEB also should be rejected since both are not un-controlled transactions and that the rate adopted in independent platform such as rates of Indian energy exchange needs to be considered. In this regard, we notice that Delhi Bench of the Tribunal while considering a similar issue in the case of DCM Shriram Ltd vs Addl.CIT (ITA No.7362/Del/2018 dated 28.10.2021) has held that –

29. Now the issue arises is that whether the learned that TPO has correctly adopted IEX rates for the purpose of benchmarking the transaction of sale of power by Kota eligible unit to non eligible unit. We look at the provisions of Section 92C (2) of the act which provides as per the first proviso to that Section that where more than one price is determined by the most appropriate method, the arm's-length price shall be taken to be the arithmetical mean of such prices. The claim of the revenue is that according to the cup method, two external comparable is our available (1) rates at which the assessee purchases power at Rajasthan and (2) IEX rates applicable to Rajasthan. Therefore both of them can be averaged to determine the arm's-length price. As we have already held that the rates at which the assessee purchases power at Rajasthan is a proper external cup upheld by the learned dispute resolution panel, which can be adopted by the learned TPO for benchmarking the arm'slength price of the transfer of power. However, the issue now arising is whether the Indian energy exchange rates are proper external cup or not.

30. Firstly if we look at the rate Indian energy exchange which is stated to be pertaining to Rajasthan region is Rs 2.55 per kilowatt whereas the rates at which

the power was purchased by the assessee in Rajasthan from SEBs ₹ 8.35 per kilowatt. This shows that the rates at which the power is sold by SEBs is 3.30 times higher than the rates which are quoted by Indian energy exchange. It is also undisputed fact that most of the power is supplied in Rajasthan region by Jaipur Vidhyout Vitran Nigam Limited and used by the consumers. Whereas there is no data available that how much power is being sold at the platform of Indian energy exchange in Rajasthan region.

31. It is also an undisputed fact that product comparability is a critical element while applying cup method and needs to be closely examined. In case if there are any differences identified between the controlled and uncontrolled transaction that would affect price, adjustment should be made to the price of the uncontrolled transaction is in order to make the same comparable to the controlled transaction is. No doubt the product similarity exist in the above transactions. However comparability Under the cup method depends on the similarity with respect to the following factors also which could materially affect the price in uncontrolled transaction
i. quality of the product
ii. contractual terms (i.e. scope and terms of warranties provided, sales are purchased volume, credit terms, transport terms)
iii. level of market (i.e. whole sale or retail etc)
iv. geographic market in which the transaction takes place v. date of the transaction
vi. intangible property associated with the sale, foreign currency risks and alternatives realistically available to the buyer and seller

the learned transfer pricing officer has used the average sale price for the financial year 2013 – 14 available at the Indian energy exchange. Therefore there cannot be much of the grievance when the assessee also charges the same rate for the whole year. However the claim made by the assessee before us which remains uncontroverted is that Indian energy exchange is not the main exchange where the power is traded. As per the Indian power market journey so far and way forward June 2014 report published by Indian energy exchange which is available in public domain has categorically stated that the size of power exchange-based market has grown to 3% approximately of the total electricity generated. Therefore the argument of the learned transfer pricing officer that Indian energy exchange is the main exchange where nearly 95 – 96% of power is traded is a negative by the report of Indian energy exchange itself. Therefore it is apparent that it is the very minuscule part of the total power traded. Further the Indian energy exchange is a spot exchange and cannot be compared with the continuous power supplied by SEBs to the assessee. Of course, in Indian energy exchange there would always be a doubt about the availability of continuous power. This shows that there are material differences existing between the transaction entered into by the assessee for transfer of power and the rates stated by Indian energy exchange. Undoubtedly the rates

quoted at Indian energy exchange are based on the bid price rather than the actual quantity consumed by the assessee. Even otherwise the data is not available in the public domain and learned transfer pricing officer has used the powers u/s 133 (6) of the act to obtain such rates i.e. data. Furthermore the Indian energy exchange rates are also required to be adjusted for the various levies and other variable charges of transmission et cetera as well as the transmission loss. Even otherwise the assessee has submitted the land rate at Indian energy exchange which shows the average price at ₹ 6.36 per kilowatt by taking base rate at Rs 2.55. Even if the average of the SEBI rates at ₹ 8.35 per kilowatt and the landed rate at Indian energy exchange at ₹ 6.36 per kilowatt is averaged out it comes to ₹ 7.355 per kilowatt which is more than the rates at which the power is transferred from eligible unit to non-eligible unit at Kota Rajasthan by the assessee i.e. at ₹ 6.30 kilowatt.

32. There is no doubt that the rates at which the SEBs supplies power to the assessee is an perfect external cup. Such rates are ₹ 8.35 per kilowatt. Rates of Indian energy exchange shown at Rs 2 .55 per kilowatt. If the rates of SEB compared with the rates of Indian energy exchange clearly shows that there is a wide disparity between the two rates. It is not in dispute that SEB in Rajasthan is supplying power to majority of the consumer using electricity. Therefore, much sanctity is attached to the rates adopted by SEBs. However, the learned transfer pricing officer has failed to show the reason of such a wide disparity between the rates of Indian energy exchange which is a spot exchange compared with the rates at which the energy is actually consumed in that geographical region. This does not mean that the quoted price cannot be used for the comparability analysis in cup method. But if the prices are so divergent and the difference between the two external cup becomes irreconcilable, the external cup price which is more reliable should be used. Therefore, in our view, IEX rates for these reasons cannot be said to be an external cup available for invoking the provisions of first proviso to Section 92C (2) of the act.

10. In assessee's case CUP method is applied where rate at which GEB supplies electricity to the non-eligible unit is compared with rate which the eligible unit supplies electricity. These facts being similar to the above decision of the Tribunal we are of the considered view that GEB is the right comparison for external CUP and that there is no reason to hold that rates of Indian energy exchange need to be considered in assessee's case even in case where explanation (ii) to section 8-0IA is applicable in assessee's case. Accordingly on that count also we hold that no

further adjustment is necessary and that the addition done in this regard is hereby deleted.

11. The assessee has filed an additional ground which reads as under:

> *"1. That the profits eligible for deduction under section 80-IA of the Income-tax Act, 1961 in respect of transfer of steam from the 80-IA eligible undertaking ought to have been computed by taking its market value instead of cost."*

12. With regard to the admission of additional ground the ld AR submitted that the assessee while the appeal is pending before the Tribunal came across Tribunal ruling in the case of Nectar Lifesciences Ltd. Vs DCIT in ITA NO. 1497/Chd/2019 pronounced on 17.02.2022 by Chandigarh Bench of Tribunal holding the view that even transfer of steam by an 80-IA eligible undertaking is to be valued at market value. The ld AR further submitted that the assessee's eligible unit has also produced Steam which has been presently transferred to its non-eligible undertaking at cost and therefore wishes to claim 80-IA deduction for transfer of steam at market value. The ld AR also submitted that additional claim through additional ground could not be raised earlier as the assessee was not aware that such claim is permissible and as soon as it came to know thereafter, it took professional advice and immediately raised this additional ground. It is submitted that claim of deduction under section 80IA towards transfer of steam is already part of the return of income and since the transfer is done at cost the amount claimed is nil. Therefore the ld AR argued that the revenue is not correct in contending that this is fresh claim by the assessee and that this is only an incremental claim made based on market rate. The ld AR further argued that the issue contended through additional ground is purely legal and that the relevant facts pertaining to the issue are already part of the record. The ld AR also argued

that since the assessee was not aware that the claim under section 80IA for transfer steam could be done at market rate and came to know of it only during the research done during the process of hearing before the Tribunal and therefore there is a reasonable cause as to why the same was not made before the lower authorities. The ld AR relied on the decisions of the Bombay High Court in the case of CIT vs Pruthvi Brokers & Shareholders ([2012] 23 Taxmann.com 23 (Bom)) and Ultratech Cements Ltd vs ACIT ([2017] 81 taxmann.com 74 (Bom)). The ld AR also submitted additional evidence of Report on determination of market value of Steam and prayed for the admission of the additional evidence also.

13. The ld DR on the other hand vehemently objected to the admission of additional ground. The ld DR submitted that the assessee is making a fresh claim of deduction before the Tribunal through additional ground and the same should not be entertained. The ld DR further submitted that the issue is not arising out of the order of the CIT(A) and that the assessee does not have any grievance arising out of the orders of lower authorities on this issue. The ld DR also brought on record the objections of the AO in admitting the additional ground vide letter dated 01.03.2024. The ld DR also submitted that in the case laws relied on by the assessee, the issue raised through additional ground was already before the AO/CIT(A) whereas in the present case this is a fresh claim made for the first time before the Tribunal. Therefore the ld DR submitted that the facts in the present case are distinguishable. The ld DR relied on the following decisions in this regard

(i) Jay Bharat Co-op. Housing Society Ltd. Vs. ITO [2011] 11 ITR(T) 717 (Mum)

(ii) CIT Vs. Smt Kamal C. Mahoboobbani [1995] 81 Taxman 311 (Bom.)

(iii) Velji Deoraj & Co. Vs. CIT [1968] 68 ITR 708 (Bom.)

(iv) Indian Steel and Wire Products Ltd. Vs. CIT [1994] 208 ITR 740 (Cal.)

(v) CIT Vs. Tollaram Hassomal [2006] 153 Taxman 532 (MP)

14. On merits, the ld DR submitted that steam cannot be considered as "goods" and that the assessee has not paid any excise duty on the sale of steam. Further the ld DR submitted that since there is no marketability and excisability for steam there is no question of claiming deduction under section 80IA of the Act towards transfer of steam. The ld DR relied on various judgments rendered in the context of Excise and Customs in this regard.

15. We heard the parties and perused the material on record. The assessee through additional ground is claiming that in respect of transfer of steam from the 80-IA eligible undertaking ought to have been computed by taking its market value instead of cost. From the perusal of the financial statements of the assessee (page 3 of paper book) it is clear that the assessee has accounted the steam consumed from eligible units at cost and has stated in the Notes forming part of Accounts (page 9 of paper book) that the steam consumed is booked at cost since steam is not a marketable product. The contention of the assessee is that the deduction claimed under section 80IA in the return of income includes steam also wherein the cost and the revenue are same resulting in zero claim. Therefore through additional ground it is contended that the sale value needs to be considered at market value and this claim is based on the decision of the Chandigarh Bench of the Tribunal in the case of Nectar Lifesciences Ltd (supra). Revenue's contention is that the assessee itself has admitted that steam is not a marketable product thereby the deduction under section 80IA could not have been made and accordingly it is a fresh claim not made neither in the return of income nor in the relevant form claiming 80IA. Therefore it is argued that the additional ground should not be accepted.

16. We notice from the perusal of record that the steam and power have been considered together while arriving at the profits eligible for deduction under section 80IA and the assessee in Form 3CEB has considered the transfer of steam at cost as being at arm's length by stating that the market value steam cannot be determined as there is no open market for steam. Accordingly we see merit in the contention that the claim made through additional ground is a not fresh one but is only an incremental claim towards transfer at market value instead of cost. Now coming to the issue of whether a claim which was not made before the lower authorities can be made for the first time before the Tribunal through additional ground we rely on the decision of the Hon'ble Supreme Court in the case of National Thermal Power Co. Ltd. vs CIT ([1998] 97 Taxman 358 (SC)) where it has been held that –

> ***4.*** *The Tribunal has framed as many as five questions while making a reference to us. Since the Tribunal has not examined the additional grounds raised by the assessee on the merits, we do not propose to answer the questions relating to the merits of those contentions. We reframe the question which arises for our consideration in order to bring out the point which requires determination more clearly. It is as follows :*
>
> > *"Where on the facts found by the authorities below a question of law arises (though not raised before the authorities) which bears on the tax liability of the assessee, whether the Tribunal has jurisdiction to examine the same ?"*
>
> ***5.*** *Under section 254 of the Income-tax Act, 1961, the Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit. The power of the Tribunal in dealing with appeals is, thus, expressed in the widest possible terms. The purpose of the assessment proceedings before the taxing authorities is to assess correctly the tax liability of an assessee in accordance with law. If, for example, as a result of a judicial decision given while the appeal is pending before the Tribunal, it is found that a non-taxable item is taxed or a permissible deduction is denied, we do not see any reason why the assessee should be prevented from raising that question before the Tribunal for the first time, so long as the relevant facts are on record in respect of that item. We do not see any reason to restrict the power of the Tribunal under section 254 only to decide the grounds which arise from the order of the Commissioner (Appeals). Both*

the assessee as well as the Department have a right to file an appeal/cross-objections before the Tribunal. We fail to see why the Tribunal should be prevented from considering questions of law arising in assessment proceedings although not raised earlier.

6. *In the case of Jute Corpn. of India Ltd. v. CIT [1991] 187 ITR 688, this Court, while dealing with the powers of the AAC, observed that an appellate authority has all the powers which the original authority may have in deciding the question before it subject to the restrictions or limitations, if any, prescribed by the statutory provisions. In the absence of any statutory provision, the appellate authority is vested with all the plenary powers which the subordinate authority may have in the matter. There is no good reason to justify curtailment of the power of the AAC in entertaining an additional ground raised by the assessee in seeking modification of the order of assessment passed by the ITO. This Court further observed that there may be several factors justifying the raising of a new plea in an appeal and each case has to be considered on its own facts. The AAC must be satisfied that the ground raised was bona fide and that the same could not have been raised earlier for good reasons. The AAC should exercise his discretion in permitting or not permitting the assessee to raise an additional ground in accordance with law and reason. The same observations would apply to appeals before the Tribunal also.*

7. *The view that the Tribunal is confined only to issues arising out of the appeal before the Commissioner (Appeals) takes too narrow a view of the powers of the Tribunal - vide, e.g., CIT v. Anand Prasad [1981] 128 ITR 388/ 5 Taxman 308 (Delhi), CIT v. Karamchand Premchand (P.) Ltd. [1969] 74 ITR 254 (Guj.) and CIT v. Cellulose Products of India Ltd. [1985] 151 ITR 499/[1984] 19 Taxman 278 (Guj.) (FB). Undoubtedly, the Tribunal will have the discretion to allow or not allow a new ground to be raised. But where the Tribunal is only required to consider a question of law arising from the facts which are on record in the assessment proceedings we fail to see why such a question should not be allowed to be raised when it is necessary to consider that question in order to correctly assess the tax liability of an assessee.*

8. *The reframed question, therefore, is answered in the affirmative, i.e., the Tribunal has jurisdiction to examine a question of law which arises from the facts as found by the authorities below and having a bearing on the tax liability of the assessee. We remand the proceedings to the Tribunal for consideration of the new grounds raised by the assessee on the merits.*

17. In the given case, the issue raised in additional ground i.e. the claim of deduction under section 80IA towards transfer of steam on the basis of market value is legal issue and that relevant facts pertaining to the same except how to

determine the market value of steam are already part of the records. The next question is whether there is any bona fide reason for raising this additional ground before the Tribunal. The assessee in the submissions has stated that the additional ground is raised based on the decision of the Tribunal which the assessee was not aware of at the time of assessment or at the time of appellate proceeding before DRP. We are of the considered view that the assessee has a reasonable cause for not raising the issue before the lower authorities and therefore we are inclined to admit the additional ground for adjudication by placing reliance on the decisions of the Apex Court in the case of National Thermal Power Co. Ltd (supra) and Jute Corpn. of India Ltd (supra)

18. With regard to the decisions relied on by the ld DR they are rendered prior to the decision of the Apex Court in the case of National Thermal Power Co. Ltd and are distinguishable. The decision of decision in the case of Jay Bharat Co-op Housing Society (surpa) relied on by the ld DR also the facts are distinguishable since the claim made before the lower authorities which was rejected by placing reliance on the decision in the case of Goetz India Ltd vs CIT (284 ITR 323).

19. On the merits of the issue under consideration, since the issue has not been examined by the lower authorities on merits, we deem it fit to remit the same to the AO for a denovo consideration. The additional evidence now submitted goes to the root of the issue of whether the market value of steam should be considered for the purpose of determining deduction under section 80IA of the Act. Therefore For a proper adjudication of the issue and for substantial cause, the additional evidence is admitted and taken on record. The AO is directed to call for any further details as may required in this regard. The AO is further directed to take into account the additional evidence, the case laws placed by the ld DR on merits while considering

the issue and decide in accordance with law. Needless to say that the assessee be given a proper opportunity of being heard. It is ordered accordingly

20. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on 28-05-2024.

Sd/-	***Sd/-***
(ANIKESH BANERJEE)	**(PADMAVATHY S)**
Judicial Member	**Accountant Member**

**SK, Sr. PS*

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. DR, ITAT, Mumbai
4. Guard File
5. CIT

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai