

**आयकर अपीलीय अधिकरण 'डी' न्यायपीठ चेन्नई में।**  
**IN THE INCOME TAX APPELLATE TRIBUNAL**  
**'D' BENCH, CHENNAI**

मजनीय श्री मनोज कुमार अग्रवाल, लेखक सदस्य एवं  
मजनीय श्री मनु कुमार गिरि, न्यायिक सदस्य के समक्ष।  
**BEFORE HON'BLE SHRI MANOJ KUMAR AGGARWAL, AM**  
**AND HON'BLE SHRI MANU KUMAR GIRI, JM**

1. आयकरअपील सं. ITA No.957/Chny/2016  
(निर्धारण वर्ष / Assessment Year: 2010-11)

&

2. आयकरअपील सं. ITA No.958/Chny/2016  
(निर्धारण वर्ष / Assessment Year: 2012-13)

&

3. आयकरअपील सं. ITA No.2196/Chny/2019  
(निर्धारण वर्ष / Assessment Year: 2014-15)

<b>The Ramco Cements Limited</b> (Formerly known as Madras Cements Ltd) Ramamandiram, Rajapalayam-626 117.	<b>बनम</b> / Vs.	<b>DCIT</b> Corporate Circle -2, Madurai.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No. <b>AABCM-8375-L</b>		
(पीलार्थी/ <b>Appellant</b> )	:	(प्रत्यर्थी / <b>Respondent</b> )

&

4. आयकरअपील सं./ ITA No.1274/Chny/2016  
(निर्धारण वर्ष / Assessment Year: 2010-11)

&

5. आयकरअपील सं./ ITA No.1363/Chny/2016  
(निर्धारण वर्ष / Assessment Year: 2012-13)

&

6. आयकरअपील सं./ ITA No.1897/Chny/2017  
(निर्धारणवर्ष / Assessment Year: 2013-14)

<b>DCIT</b> Corporate Circle -2, Madurai.	<b>बनम</b> Vs.	<b>The Ramco Cements Limited</b> (Formerly known as Madras Cements Ltd) Ramamandiram, Rajapalayam-626 117.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No. <b>AABCM-8375-L</b>		
(पीलार्थी/ <b>Appellant</b> )	:	(प्रत्यर्थी / <b>Respondent</b> )

&  
**7. Cross Objection No.142/Chny/2017**  
**(In ITA No.1897/Chny/2017)**  
**(निर्धारण वर्ष / Assessment Year: 2013-14)**

<b>The Ramco Cements Limited</b> (Formerly known as Madras Cements Ltd) Ramamandiram, Rajapalayam-626 117.	बनाम/ Vs.	<b>DCIT</b> Corporate Circle -2, Madurai.
स्थायी लेखासं./जीआइआरसं./PAN/GIR No.		<b>AABCM-8375-L</b>
(अपीलार्थी/ <b>Cross Objector</b> )	:	(प्रत्यर्थी / <b>Respondent</b> )

अपीलार्थीकीओरसे/ <b>Assessee by</b>	:	Shri J.Prabhakar (CA) & Shri S.Muralidhar(FCA) -Ld. ARs
प्रत्यर्थीकीओरसे/ <b>Revenue by</b>	:	Mrs. Jothi Lakshmi Nayak (CIT)-Ld.DR

सुनवाई की तारीख/ <b>Date of Hearing</b>	:	05-06-2024
घोषणा की तारीख / <b>Date of Pronouncement</b>	:	03-07-2024

**आदेश / ORDER**

**Manoj Kumar Aggarwal (Accountant Member)**

1. The assessee as well as revenue is in further appeal before us for various assessment years as captioned above. The facts as well as issues are stated to be substantially the same. First, we take up assessee's appeal ITA No.2196/Chny/2019 for AY 2014-15 wherein the grounds raised by the assessee read as under:-

1. The order of the Hon'ble Commissioner of Income Tax (Appeals) is contrary to law and facts.

**Industrial Promotion Assistance (Incentive) received under the West Bengal Incentive Scheme- Rs. 51,39,36,062/-**

The learned CIT(A) erred in upholding the taxing of subsidy (Industrial Promotion Assistance IPA") of Rs.51,39,36,062/- received under the West Bengal Incentive Scheme and in not following the decisions of the Hon'ble Tribunal in ITA No 2148 and 2163/MDS/2015 and the decision of the Calcutta High Court in Rasoi Ltd. (2011) 335 ITR 438, wherein it was held that the incentive received under the WB Incentive Scheme is capital in nature.

2. The learned Commissioner of Income Tax (Appeals) erred in incorrectly applying the decision of the Supreme Court in Sahney Steel and Press Works Limited Vs. CIT

(1997)228 ITR 253 (SC), though the said decision has been specifically held to be inapplicable to the West Bengal IPA subsidy by the Calcutta High Court in Rasoi Ltd. (2011) 335 ITR 438, cited supra.

3. The learned CIT(A) committed factual errors in failing to note that the West Bengal Govt. abolished all sales tax related incentives with effect from 1<sup>st</sup> Jan 2000 and in holding that the subsidy was given "without any specified purpose", while in fact it was given to the Appellant for the sole purpose of establishment of the new industrial unit in Kolaghat in the State of West Bengal.

4. The Appellant submits that the decision of the learned CIT(A) is contrary to the settled legal principle that if the purpose/object of the subsidy is to enable the assessee to set up a new unit then the receipt of the subsidy is on capital account.

**Disallowance of Railway sidings expenses - Rs10,94,98,610/-**

5. The learned CIT(A) erred in disallowing railway siding expenses of Rs.10,94,98,610/- as the issue is already covered in favour of your Appellant by order of the Hon'ble ITAT in Appellant's own case for AY 2003-04 and for AY 1996-97 wherein the cost of railway sidings was allowed as revenue expenditure.

6. The learned CIT(A) erred in his understanding that the Tribunal in Appellant's own case for AY 2011-12 had held the expenses to be capital in nature, while in fact the ITAT, without overruling its earlier decisions in favour of the Appellant has remitted back to the AO only for the reason that the railway siding agreement was not available with the Hon'ble ITAT while deciding the Appeal for the AY 2011-12.

7. The learned Commission of Income Tax (Appeals) failed to note that in terms of the Railway Sidings Agreement your Appellant was not entitled to transfer or assign or sublet or permit to be used by any other persons the railway sidings and that the railway sidings were not for the exclusive use of the Appellant and therefore, the Appellant could neither be regarded as the owner of the property nor was he entitled for exclusive right of use.

8. The learned CIT(A) failed to consider the provisions of the relevant Accounting Standards that prescribe that expenses incurred on construction of enabling assets such as the roads, culverts, bridges, railway sidings, electricity transmission lines etc., of which the assessee is not the owner are not in the nature of tangible or intangible assets and are to be regarded as revenue in nature.

9. The order of the CIT(A) is contrary to the settled legal principle that where the expenditure incurred by the assessee results in creation of asset for a third party and of which the assessee is not the owner, the said expenditure shall be regarded as revenue expenditure.

**Disallowance of Power Transmission expenses-Rs.6,51,55,269/-**

10. The learned CIT(A) erred in holding that the power transmission charges paid to TANGEDCO amounting to Rs.6,51,55,269/- is capital in nature on an incorrect reasoning that the power transmission system is for the exclusive use of the Appellant company which is contrary to facts and documents on record. The Appellant submits that since the facts on record expressly prohibit any rights of ownership or exclusive right of use to the Appellant, the conclusion of the CIT(A) is contrary to facts and law.

11. The learned CIT(A) failed to note that the aforesaid expenditure were incurred by your Appellant to strengthen TANGEDCO's Singapuram and Thullukapatti sub-stations, both of which are property belonging to TANGEDCO, located in TANGEDCO's premises, and not meant for the exclusive use of your Appellant.

12. The learned CIT(A) failed to consider the provisions of the relevant Accounting Standards that prescribe that expenses incurred on construction of enabling assets (such as the roads, culverts, bridges, railway sidings, electricity transmission lines etc.), of which

the assessee is not the owner, are not in the nature of assets and are to be regarded as revenue in nature.

13. The order of the CIT(A) is contrary to the settled legal principle that where the expenditure incurred by the assessee results in creation of asset for a third party of which the assessee is not the owner shall be regarded as revenue expenditure.

**Disallowance u/s 14A r.w Rule 8D-Rs 91,54,895**

14. The Hon'ble Commissioner of Income Tax (Appeals) erred in sustaining the addition of Rs.91,54,895/- under section 14A since all the investments held by the appellant were funded entirely by company's own funds and no borrowed funds were used for making , investments, as is evident from the facts already submitted to the Commissioner of Income Tax (Appeals)with respect to source and deployment of funds,

15. The Commissioner of Income Tax (Appeals) erred in applying the decisions in cases where the facts are fully different from those that apply in appellant's case.

16. The Hon'ble Commissioner of Income Tax (Appeals) erred in sustaining the disallowance on an erroneous interpretation that the disallowance under Section 14A is to be made automatically regardless of whether or not any expenses were incurred, as this is contrary to judicial precedents in this regard.

**Enhancement in book profits u/s 115JB without giving opportunity to the Appellant**

17. The Hon'ble CIT(A) erred, in facts and law, in adjudicating on the issue of applying the disallowance u/s 14A for re-computation of Book Profits since no such re-computation of Book profits was made by the AO and consequently no such ground was raised by the Appellant. The Appellant submits that such adjudication by the Hon'ble CIT(A) resulting in enhancement of assessment without giving opportunity to the Appellant is contrary to law, rendering the Order of the CIT(A) a nullity. It is also submitted that, in any case and without prejudice to the above, the CIT(A) erred in not following the specific decision of the Hon'ble ITAT that Section 14A has no application for computing the book profits, since Section 115JB is a complete code in itself.

**Failure to give credit for claim of additional TDS- Rs 14,76,039/-**

18. The learned CIT(A) is not justified in omitting to give credit for additional TDS amounting to Rs 14,76,039 validly claimed by your Appellant vide revised return dated 29/03/2016.

As is evident, the issues that fall for our consideration are - (i) Taxability of Industrial Promotion Assistance (incentive) received under West Bengal Incentive Scheme; (ii) Disallowance of railway sidings expenses; (iii) Disallowance of power transmission expenses; (iv) Disallowance u/s 14A in normal profits as well as u/s 115JB; (v) Short credit of TDS.

2. The Ld. AR advanced arguments along with case laws to support the case of the assessee. The Ld. CIT-DR also made arguments and supported the stand of lower authorities. The written submissions have also been filed by both the sides which have duly been considered while

adjudicating the appeals. Having heard rival submissions and upon perusal of case records, our adjudication would be as under. The assessee being resident corporate assessee is stated to be engaged in manufacturing and sale of cement.

### **3. Industrial Promotion Assistance (incentive) received under West Bengal Incentive Scheme**

3.1 The assessee received captioned incentive with respect to clinker grinding unit at Kolaghat in West Bengal. A sum of Rs.51.39 Crores accrued to the assessee being 90% of Sales Tax Paid. The same was credited as operating income but claimed as deduction in the computation of income. The Ld. AO, relying on the decision of Hon'ble Supreme Court in the case of **Sahney Steel & Press Works Ltd. (94 Taxman 368)**, held that refund of sales tax would be revenue receipts and accordingly, chargeable to tax. The assessee submitted that the same was capital receipts in terms of various judicial decisions including the decision of Hon'ble Supreme Court in the case of **Ponni Sugars & Chemicals (306 ITR 392)**. The Ld. AO also noted that assessee's first appeal for AYs 2011-12, 2012-13 and 2013-14 was allowed by applying the ratio of Hon'ble Calcutta High Court in the case of **M/s Rasoi Ltd. (335 ITR 438)**. However, Tribunal in assessee's own case for AY 2011-12, remitted that matter back to the file of Ld. AO to reconsider the same in the light of various other decision of Hon'ble Supreme Court as well the decision in Andhra Pradesh High Court since the same was not considered by learned first appellate authority. Therefore, Ld. AO brought to tax the incentives so received by the assessee.

3.2 The Ld. CIT(A) noted that the incentive was received after commencement of commercial production. The facts of assessee's case

were akin to the case law of **Sahney Steel & Press Works Ltd. (supra)** and accordingly, the stand of Ld. AO was confirmed against which the assessee is in further appeal before us.

3.3 From the facts, it emerges that the assessee has established a new cement unit at Kolaghat in West Bengal during FY 2009-10. It commenced commercial production on 05-02-2010 with capital investments of Rs.192.59 Crores. As per West Bengal Incentive Scheme of 2004, the assessee was eligible for Industrial Promotional assistance (IPA) of 90% of CST and VAT paid in each year over a period of 15 years or till 125% of fixed capital investment is reached, whichever is earlier. The assessee received first subsidy in AY 2011-12. The assessee claimed the same to be exempt on the ground that it was capital receipts. In AYs 2012-13 & 2013-14, Ld. CIT(A) allowed the claim of the assessee against which the department is in further appeal before Tribunal by way of present appeals. In AY 2011-12, in the first round, Ld. CIT(A) allowed the claim of the assessee. However in departmental appeal, Tribunal in its order dated 27-07-2017 remitted the matter back to Ld. AO to consider the claim in the light of the decision of Hon'ble Supreme Court in **Sahney Steel & Press Works Ltd. (supra)**. In set aside proceedings, Ld. AO held the same to be taxable and the assessee's appeal, in this regard, is pending before Ld. CIT(A).

3.4 The Ld. AR submitted that Tribunal in its subsequent order dated 27-04-2018, in the case of assessee's sister concern viz. Ramco Industries Ltd. held that same very subsidy to be non-taxable. The copy of decision has been placed on record.

3.5 The Ld. AR has further submitted that reliance on the decision of **Sahney Steel & Press Works Ltd. (supra)** is incorrect since the

applicability of said decision to IPA subsidy received under WB incentive Scheme was specifically examined by Calcutta High Court in the case of **Rasoil Limited (supra)**. This decision has become final since Special Leave Petition (SLP) of the department has been dismissed by Hon'ble Supreme Court. Following the decision on **Rasoil Limited (supra)**, similar view has been taken by Hon'ble Calcutta High Court in subsequent decisions. The Ld. AR further submitted that Hon'ble Supreme Court has laid down purpose test. In the present case, the purpose of the subsidy was to promote industries in the state and therefore, the incentive was capital in nature. The Ld. AR also submitted that the decision in **Rasoil Limited (supra)** has considered the decision in **Sahney Steel & Press Works (supra)**. Another argument raised by Ld. AR is that all sales tax related incentives have been withdrawn in the State of West Bengal with effect from 01-01-2000 pursuant to National Policy Decision. Therefore, the understanding of the department that the IPA subsidy is refund of sales tax is incorrect. The subsidy was quantified at 90% of sales tax paid but it does not represent refund of sales tax as held in the decision of **Rasoil Limited (supra)**.

3.6 We find that the impugned issue of taxability of IPA incentive has been adjudicated in assessee's favor by Hon'ble Calcutta High Court in the cited case of **M/s Rasoil Ltd. (supra)**. This decision has considered the decision of Hon'ble Supreme Court in the case of **Sahney Steel & Press Works Ltd. (supra)** as well as the decision rendered in **Ponni Sugars & Chemicals Ltd. (supra)**. In Ponni Sugars case, it was held by Hon'ble Court that if the object of the Subsidy Scheme was to enable the assessee to run the business more profitably, the receipt is on revenue account. On the other hand, if the object of the assistance under the

Subsidy Scheme was to enable the assessee to set up a new unit or to expand the existing unit, the receipt of the subsidy was on capital account. Therefore, the Court held that it is the object for which the subsidy / assistance is given, which determines the nature of the incentive subsidy. The form of the mechanism through which the subsidy is given is irrelevant. Considering the same, Hon'ble Calcutta High Court held that in the instant case, the object of the subsidy was for expansion of capacities, modernization and improving marketing capabilities and therefore, those were for the assistance on capital account. Merely because the amount of subsidy was equivalent to 90 per cent of the sales tax paid by the beneficiary, it did not imply that the same was in the form of refund of sale tax paid. It is the quality of the payment that is decisive of the character of the payment and not the method of the payment or its measure that makes it fall within capital or revenue. Thus, in the instant case, the amount paid as subsidy was really capital in nature. This decision has been rendered after considering the decision of **Sahney Steel & Press Works Ltd. (supra)**. In the absence of any contrary decision shown to us, we would hold that the impugned incentive as received by the assessee was capital in nature. We order so. The corresponding grounds stands allowed.

#### **4. Disallowance of railway sidings expenses**

4.1 The assessee incurred expenditure of Rs.129.09 Lacs for extension of railway tracks, Rs.169.43 Lacs for replacement of railway sleepers at Jayanthipuram and Rs.796.45 Lacs for construction of track for clinker wagon loading at Ariyalur. The expenditure aggregated to Rs.1094.98 Lacs. Such expenditure, though capitalized in the books, was claimed in the computation of income as revenue expenditure. In

support, the assessee submitted that the aforesaid asset does not belong to the assessee but it was the property of railways which is clear from clause-21 of Railway siding agreement which provide that the assessee has no right to assign or transfer or sublet or permit to be used or enjoyed by any other person in any manner whatsoever any of the rights of benefits conferred upon the assessee. Such assignment, transfer or subletting or permission shall be void and of no effect. The assessee relied on the decision of Tribunal in own case for AYs 2003-04 and 2011-12. The assessee also referred to the decision of Hon'ble Supreme Court in the case of **L.H. Sugar factory and Oil Mills P. Ltd. (125 ITR 293)** as well as the decision of Hon'ble Gauhati High Court in the case of **Bongaigaon Ref. & Petrochemicals Ltd. (222 ITR 208)** to support the claim. However, Ld. AO held that enduring benefit would accrue to the assessee and therefore, the expenditure was capital in nature. Further, this matter was restored by Tribunal in AY 2011-12 holding that the assessee was enjoying intangible asset. The assessee disclosed the same as an asset in the Balance Sheet. It was essential to comply with matching concept in order to arrive at correct profit earned by the assessee. Accordingly, Ld. AO disallowed the claim. The Ld. CIT(A) upheld the stand of Ld. AO against which the assessee is in further appeal before us.

4.2 The Ld. AR has submitted that this issue has been decided by Tribunal in assessee's favor for AYs 1994-95, 1996-97 and 2003-04. However, the issue has been restored back by Tribunal for AY 2011-12. In AY 2003-04, Tribunal approved reliance placed by Ld. CIT(A) on the decision of Hon'ble Supreme Court in the case of **Madras Auto Service (233 ITR 468)**. The Ld. AR also submitted that though expenditure was

capitalized in the books of account and depreciation was charged in the books, however, for Income Tax purpose, no depreciation was claimed on the same. The Ld. AR also placed on record relevant railway siding agreements and submitted that the terms of the agreements remain the same as they were in AY 2003-04. As per relevant clauses, the assessee is not the owner of railway siding. There being no change in the same, Tribunal order for AY 2003-04 would apply. The Ld. AR also submitted that the matter in AY 2011-12 was restored back only for the reason that railway siding agreement was not available before Tribunal while deciding the appeal for AY 2011-12. The Ld. AR also submitted that similar treatment was given to such expenditure during AYs 1994-95, 1996-97 and 2003-04.

4.3 After considering the submissions of the assessee as well as upon perusal of relevant documents, in this regard, we concur with the aforesaid plea raised by the assessee. The issue in earlier years stand covered in assessee's favor. The issue in AY 2011-12 was restored back since relevant agreements were not available on record. Therefore, concurring with aforesaid submissions, we direct Ld. AO to allow the expenditure as revenue expenditure after verifying the fact that the assessee has not claimed depreciation on the same in Income Tax Computations in any of the years. The assessee is directed to demonstrate the same. The corresponding ground stand allowed accordingly.

## **5. Disallowance of Power Transmission expenses**

5.1 The assessee spent an amount of Rs.651.55 Lacs as power transmission expenses. Though the same was capitalized in the books, it was claimed as revenue item in the computation of income. The amount

of Rs.307.82 Lacs was spent for upgrading cement grinding unit at Vazhapadi wherein existing 22KV feeder was converted into 110KV feeder between Singapuram sub-station and Vazhapadi Plant. The amount of Rs.343.72 Lacs was incurred due to the fact that the assessee proposed to export 10MW power from Thermal Plant to TANGEDCO Grid. For the said purpose, it proposed to convert existing Thulukapatti sub-station from non-grid sub-station to grid sub-station enabling Tangedco to receive exported power from assessee's thermal plant. The assessee incurred the amount for erection and commissioning charges. The assessee also submitted that it did not have any ownership on the same. However, Ld. AO disallowed the claim of the assessee. The Ld. CIT(A) upheld the stand of Ld. AO against which the assessee is in further appeal before us.

5.2 The Ld. AR has submitted that the assessee made payment of Rs.308.55 Lacs to TANGEDCO for conversion of 22KV feeder line into 110KV between Singapuram sub-station and Vazhapadi Plant in view of increase in power requirement in Vazhapadi Plant from 4500KV to 9000KV. The impugned amount of Rs.307.82 Lacs was paid towards development charges, extension charges etc. and there was no creation of any capital asset.

Similarly, at RR Nagar, the amount of Rs.343.72 Lacs was incurred due to the fact that the assessee proposed to export 10MW power from Thermal Plant to TANGEDCO Grid. For the said purpose, it proposed to convert existing Thulukapatti sub-station from non-grid sub-station to grid sub-station enabling TANGEDCO to receive exported power from assessee's thermal plant. The assessee incurred the amount for erection and commissioning charges. The Ld. AR has submitted that the

assessee do not have any ownership right over the same. The Ld. AR has submitted that the cost includes cost of laying supply line, bay extension work, construction of control room, cable duct, meter arrangements at the power plant. Though the expenses resulted in creation of capital asset, however, the same do not belong to the assessee. Most of the work is stated to be done at the premises of TANGEDCO.

It has further been submitted that aforesaid expenditure has been capitalized in the books under intangible assets and depreciation has been charged on the same in the books of accounts. However, no depreciation has been claimed for Income Tax purposes and the expenditure has been claimed in full as revenue expenditure.

5.3 Upon perusal of material facts, so far as the expenditure of Rs.307.82 Lacs is concerned, we are convinced with the argument of Ld. AR that the said expenditure has not resulted into creation of any capital asset. The impugned amount has been paid to TANGEDCO for enhancement of feeder line in view of increase in power requirement at the plant. The expenditure is in the nature of development charges, extension charges etc. and there was no creation of any capital asset. Therefore, this expenditure would be allowable as revenue expenditure subject to verification by Ld. AO that no depreciation has been claimed under Income Tax Act in any of the years. The assessee is directed to demonstrate the same.

5.4 So far as the expenditure of Rs.343.72 Lacs is concerned, it is primarily incurred so as to facilitate the assessee to export power to TANGEDCO grid. For the said purpose, it has converted non-grid sub-station to grid sub-station enabling TANGEDCO to receive exported

power from assessee's thermal plant. The expenditure is on account of erection and commissioning charges which is clearly capital in nature so as to enlarge the profit making apparatus of the assessee. The fact that the assessee does not have ownership right over the same would be immaterial. This cost is in the nature of cost of laying supply line, bay extension work, construction of control room, cable duct, meter arrangements at the power plant which would bring enduring benefit to the assessee. Therefore, this expenditure, in our considered opinion, is capital expenditure. The assessee would be entitled for depreciation on the same. The corresponding grounds raised by the assessee stand partly allowed.

## **6. Disallowance u/s 14A**

6.1 The assessee earned exempt income of Rs.76.20 Lacs and offered suo-moto disallowance of Rs.1250/- in the computation of income. The assessee did not maintain any separate account for the same. Therefore, rejecting the submissions of the assessee and by applying Rule 8D, Ld. AO computed disallowance of Rs.91.54 Lacs which was interest disallowance u/r 8D(2)(ii) for Rs.58.35 Lacs and indirect expense disallowance u/r 8D(2)(iii) for Rs.33.19 Lacs. The Ld. CIT(A) not only upheld the stand of Ld. AO but also directed Ld. AO to enhance book profits u/s 115JB to that extent. Aggrieved, the assessee is in further appeal before us.

6.2 The Ld. AR, from financial statements, demonstrated that its own funds far exceed the investment made by the assessee. After going through the financial statements of the assessee as placed on record, this fact is clearly brought out at Page 365 of the paper book. In such a

case, the disallowance of interest expenditure could not be sustained in law. We order so.

6.3 So far as disallowance of indirect expenditure is concerned, it is the plea of Ld. AR that only those investments are to be considered which have yielded exempt income during the year as held in various judicial decisions. We concur with the same and direct Ld. AO to re-compute the disallowance only by considering those investments which have yielded any exempt income during the year. This disallowance could not be made u/s 115JB as per the decision of Special bench of Tribunal in the case of **Vireet Investments Pvt. Ltd. (165 ITD 27)** which held that disallowance u/s 14A r.w.r. 8D has no application while computing the book profit u/s 115JB. Respectfully following the same, we direct Ld. AO not to make this adjustment u/s 115JB. The corresponding grounds raised by the assessee stand partly allowed.

### **7. Short credit of TDS**

In this ground, the assessee seeks credit of correct TDS. It would suffice on our part to direct Ld. AO to allow correct TDS credit to the assessee in accordance with law.

8. In the result, the assessee's appeal for AY 2014-15 stands partly allowed.

### **Assessee's Appeal for AY 2010-11**

9. The only grievance of the assessee is confirmation of disallowance u/s 14A as made by Ld. AO in an order passed u/s 143(3) r.w.s. 263 on 25-09-2015. The assessee earned exempt dividend income of Rs.105.68 Lacs. The Ld. AO applied Rule 8D and computed interest disallowance of Rs.26.83 Lacs u/r 8D(2)(ii) and indirect expense disallowance of Rs.33.39 Lacs u/r 8D(2)(iii). The same aggregated to Rs.60.22 Lacs.

During appellate proceedings, the assessee submitted that no fresh investments were made during the year. In the alternative, the assessee offered disallowance of 2% of exempt income. The Ld. CIT(A) concurred that there was no fresh investments, however, application of Rule 8D was mandatory. Facts being pari-materia the same as in AY 2014-15, we direct Ld. AO to delete interest disallowance. The indirect expense disallowance would be restricted on investments which have actually yielded any exempt income during the year. This disallowance would not be made u/s 115JB. The appeal stand partly allowed.

**Assessee's Appeal for AY 2012-13**

10. The only grievance of the assessee is confirmation of disallowance u/s 14A as made by Ld. AO in an order passed u/s 143(3) on 31-03-2015. The assessee earned exempt dividend income of Rs.234.24 Lacs. The Ld. AO applied Rule 8D and computed disallowance of Rs.90.38 Lacs. The Ld. CIT(A) confirmed the same. Facts being pari-materia the same as in AY 2014-15, we direct Ld. AO to delete interest disallowance. The indirect expense disallowance would be restricted on investments which have actually yielded any exempt income during the year. The appeal stand partly allowed.

**Disallowance u/s 14A in Assessee's CO for AY 2013-14**

11. In this year, the assessee earned exempt income of Rs.195.64 Lacs. The Ld. AO, in an order passed u/s 143(3) r.w.s. 92CA (1) & 144C, on 31-01-2017, applied Rule 8D and computed disallowance of Rs.93.28 Lacs which was interest disallowance of Rs.59.97 Lacs u/r 8D(2)(ii) and indirect expense disallowance of Rs.33.30 Lacs u/r 8D(2)(iii). The Ld. CIT(A) confirmed the same. Facts being pari-materia the same as in AY 2014-15, we direct Ld. AO to delete interest disallowance. The indirect

expense disallowance would be restricted on investments which have actually yielded any exempt income during the year. The cross-objection of the assessee stand partly allowed.

### **Department's Appeal for AY 2010-11**

12. The sole grievance of the revenue is depreciation on windmill components. The Ld. AO noted that the assessee was eligible for higher depreciation on windmill. However, the assessee clubbed various items like transformers, breakers, CTPT, and approach road under this head and claimed higher depreciation on the same. The assessee submitted that above items have to be considered as a single unit. However, Ld. AO restricted depreciation on these items at 15% and at 10% on approach road. The disallowance aggregated to Rs.96.37 Lacs. The Ld. CIT(A) relying on Tribunal order for AYs 2006-07 to 2008-09 decided the issue in assessee's favor. Aggrieved, the department is in further appeal before us. As is evident, the issue stand decided in assessee's favor by the earlier decision of the Tribunal. Facts are similar in this year. Therefore, we see no reason to interfere in the impugned order. The appeal stand dismissed.

### **Department's Appeal for AY 2012-13**

13. The first issue that fall for our consideration is treatment of IPA incentives. The Ld. CIT(A) decided this issue in assessee's favor, inter-alia, by following the decision of Hon'ble Calcutta High Court in Rasoi Ltd. (supra). Aggrieved, the revenue is in further appeal before us. This issue has been decided by us in assessee's favor in AY 2014-15. Facts being identical, taking the same, view, we dismiss the corresponding grounds urged by the revenue. This issue arises in revenue's appeal for AY 2013-14 also which stand dismissed on similar lines.

14. The last issue that arises for our consideration is claim of excessive electricity expenditure. The facts are that the assessee made equity investments in Andhra Pradesh Gas Power Corporation Ltd. (APGPCL) which entitled the assessee to source 6MW of power from APGPCL at economical rates. The proportionate shares equivalent to 4.15 MW Power was held jointly by the assessee with related party. Accordingly, APGPCL would supply the power to these related parties also for which the charges would be paid by related parties directly. The assessee was entitled to receive 10 paise per unit of power consumed by them by virtue of the joint ownership of shares.

15. However, Ld. AO, upon perusal of relevant data, held that the assessee did not fully utilize the benefit of economical rates for its own business. The assessee transferred 14152679 units to related parties for consideration of Rs.14.15 Lacs from related parties for transfer of the right to draw power at concessional rate from APGPCL. The consideration was reported as income by the assessee. However, as against this, the assessee incurred additional cost of Rs.321.26 Lacs. The Ld. AO alleged that transfer of right in respect of benefit of economical rates compared to the rates charged by Andhra Pradesh State Electricity rates in respect of investment was having the characteristics of shifting of profit and inflation of expenditure. Accordingly, the expenditure of Rs.321.26 Lacs was added to the income of the assessee.

16. The Ld. CIT(A) observed that Ld. AO could not sit on the armchair of the businessmen and direct the assessee to earn more profit by not transferring the power to its group companies. The provisions of Sec.40A(2) would have application only when the payment was to

related concerns. However, in the present case, electricity charges were not paid to group companies but paid directly to electricity board. Therefore, the stand of Ld. AO was not correct. Even in merits, it was observed that the assessee had to pay fix charges of Rs.250 per KVA in respect of 14700 KVA. The Ld. AO committed the mistake of including contractual fixed charges. The actual electricity consumed by the assessee was charged at Rs.2.87 per unit. Therefore, Ld. AO was not correct in stating that the assessee did not consider the maximum demand charges levied by the electricity board. Therefore, there was no excess claim of expenditure. Finally, the disallowance was deleted against which the revenue is in further appeal before us.

17. We are of the considered opinion that Ld. CIT(A) has clinched the issue in correct perspective. The provisions of Sec.40A(2) would have no application to the fact of the case since the payment have been made to electricity board and not to related parties. Even the factual findings, on merits, remain uncontroverted before us. Therefore, we see no reason to interfere in the impugned order, on this issue. The revenue's appeal for AY 2012-13 stand dismissed.

18. This issue arises in revenue's appeal for AY 2013-14 also. In this year, Ld. AO held that the assessee has made investment for related parties since the assessee derived benefit only partially. Applying notional interest rate of 12%, Ld. AO made disallowance of Rs.223.10 Lacs. The Ld. CIT(A) deleted the same on the ground that the investment was made during FY 1999-2000. Further, in the current year, the assessee had surplus fund in the form of equity capital and reserves. It could not be said that the borrowed funds were diverted for non-business purposes. Aggrieved, the revenue is in further appeal before

us. Since Ld. CIT(A) has rendered factual finding which is uncontroverted, we confirm the same. The corresponding grounds stand disposed-off on the same lines as in AY 2012-13.

**Department's Appeal for AY 2013-14**

19.1 The remaining ground in revenue's appeal is Transfer Pricing (TP) Adjustment of Rs.3334.85 Lacs as proposed by Ld. TPO in its order dated 27-10-2016. The assessee carried out certain specified domestic transactions with its associated enterprises which were subjected to determination of Arm's Length Price (ALP) before Ld. TPO. One of the transactions was transfer of electricity by Alathiyur Thermal Plant of the assessee for captive consumption. This unit was enjoying exemption u/s 80-IA. The assessee benchmarked the same using CUP method. The electricity generated by the unit was transferred at Rs.6.52 per unit on the basis of which deduction u/s 80IA was claimed by the assessee. The Ld. TPO proposed the determine ALP of the same at Rs.4.43 per unit. The Ld. TPO while accepting the transfer price in respect of sale of electricity to AEs for 24023422 units of electricity @ Rs.6.15 per unit reworked the captive consumption of electricity at Alathiyur by bifurcating the 80.15 % of electricity captively consumed into two categories namely saleable power @ 51 % and non-saleable power @49% on the basis of a letter dated 29-06-2012 issued by TANGEDGO according approval for open access under Electricity Rules. Accordingly, TPO reworked the ALP of 99956976 units being 51% (out of 80.15%) of electricity consumed at Rs.4.43 per unit instead of Rs.6.43 per unit as taken by the assessee and proposed a downward adjustment of Rs.2092.84 Lacs. For the balance 29.15% i.e., (80.15% minus 51%) of captive consumption being 57148782 units, Ld. TPO adopted the same rate of

Rs.4.43 per unit on the ground that the ALP of power sold to third parties @7.15 per unit has not factored distribution and wheeling costs which would render the ALP unreliable. Accordingly, Ld. TPO proposed a downward adjustment of Rs.1196.55 Lacs by reducing the ALP by Rs.2.09 per unit as against the claim made by assessee u/s 80IA at Rs.6.52 per unit.

19.2 Similar adjustment was proposed by Ld. TPO for power produced by windmills located at Karnataka which was consumed by Cement Plant located in that state. The ALP of such power was determined at Rs.3.70 per unit for the entire power produced on the ground that no part of power produced was capable of sale to outsiders by assuming conditions laid out in power purchase agreements (PPA) and accordingly, proposed downward adjustment of Rs.45.45 Lacs.

19.3 During appellate proceedings, the assessee submitted that the power sold by Alathiyur plant as well as windmills was not capable of categorization into saleable and non-saleable power as done by Ld. TPO since the power consumed captively did not have an economic value lesser than the electricity produced and sold to third parties. It was further submitted that in the absence of price controls under Electricity Act, 2003 and Rules there-under, there was no basis for valuing power consumed internally at rates which were far less than the Arm's length price determined for sale to outside entities. It was further submitted that Ld. TPO refused to value even the saleable portion being 29.15% of his categorization at ALP offered for assessment at Rs.6.52 per unit for the reason that the price did not exclude transmission and wheeling charges. It was also submitted that average price realization from outsiders at Rs.7.15 per unit excludes transmission and wheeling charges. The

assessee further stated that the price fixed by the regulatory commission for purchase of power of TANGEDCO was not comparable uncontrolled price (CUP) in view of the state undertaking being a persistent Loss making unit. It was further submitted that reducing the claim u/s 80IA to a loss by downward adjustment would not arise when the profit of final product viz., cement was not achieved without substantial contribution from captive units producing electricity. The consumption of electricity, a key input for cement production, result in the cost savings made by not purchasing electricity from electricity Board or from outside parties, which profits (saving) contributes to the ultimate profits of the cement unit. It was also submitted that provisions of Sec.80IA was a self-contained code by itself where principles of valuation are defined as market value, being the price sold or fetched in open market. A grievance was raised that downward adjustment in respect of power produced in the two units for which a claim u/s 80IA was made at Rs.3171.65 Lacs was reduced to NIL and instead an addition of Rs.163.20 Lacs was made towards the taxable income of the assessee.

19.4 The Ld. CIT(A) concurred with assessee's submissions and held that bifurcation of power produced by two units claiming Sec.80IA benefits into saleable and non-saleable portions was incorrect. There was no justification for treating the electricity produced and used for captive consumption differently from the power sold to outsiders when the quality and nature of the goods (Electricity) remains the same in both cases. The incentive u/s 80IA was with reference to power generated irrespective of the fact that whether it was sold or consumed captive. All that was required was that in respect of captive consumption, the power should be valued at Market price.

19.5 The Hon'ble High Court of Madras in the case of **Tamil Nadu Petro Products (338 ITR 643)** held that sale was not a criteria for grant of relief u/s 80IA. Therefore, classification of saleable and non-saleable unit was not relevant for determining ALP and both categories would stand on equal footing which is the intent of Sec. 80IA. Accordingly, Sec.80IA relief for captive power could not be different from the relief for power sold in the open market.

19.6 The Ld. CIT(A) further held that the assessee arrived at ALP by taking average of rates realized on sale of electricity to 48 unrelated parties at Rs.8.24 per unit. After reduction of transmission and wheeling charges, the ALP was determined at Rs.7.15 per unit. The price differential on account of transmission and distribution function that is wheeling and transmission charges was already reduced from ALP of Rs.8.24 per unit to Rs.7.15 per unit and hence, functions, assets employed and risk associated in the transaction that is FAR or comparability analysis of the power generated was factored in to make it a comparable transaction with assessee's specified domestic transactions. The bifurcation by Ld. TPO into saleable and non-saleable unit was not warranted since the very purpose of Sec. 80IA(8) was to grant relief for captive consumption in equal measure with sale to outsiders so long as the claim u/s 80IA was not inflated when compared with market value. The relief could not be worked out differently for captive consumption of electricity. Further, Ld. TPO's reliance on Electricity Board purchase rate of 4.43 per unit for valuation was not appropriate since the assessee's transaction of captive consumption was not subjected to any price controls as in the case in Sugar Industry. The relevant Section 62 of the Electricity Act 2003 does not seek to regulate

the price of captive units and hence not subjected to price controls as in the case of sugar industry. The TPO comparison of tariff rates by regulatory commission was not derived from actual transaction which was a primary requirement under CUP method and hence it was not a valid comparison. The Ld. TPO did not question the CUP method adopted by the assessee. The Hon'ble Bombay High Court in the case of Thyssen Krupp Industries (P) Ltd (388 ITR 612) held that the transaction of a public sector unit could not be held to be a comparable transaction as PSUs were not driven by profit-motive alone but also by other considerations such as discharge of social obligations etc. TANGEDCO being a PSU was a persistent lost making company by virtue of its social obligation and therefore, not an appropriate comparable unit under the CUP method. Moreover, there was no reason to reject the price arrived at under CUP method in respect of 48 unrelated comparable transactions whose ALP was more than the price adopted by the company for transfer price of its captive usage of electricity. The rate of Rs.4.43 fixed by the regulatory commission for purchase of power by TANGEDCO would not appear to be its only rate when assessee himself has sold electricity to TANGEDCO at 5.50 per unit from the Thermal Power Plant. This would show that the rate of 4.43 per unit was recommendatory price and not a fixed price to be compulsory for all power purchased from power producers by Electricity Board. Similarly, the rate of 3.70 per unit determined for Mathodu windmills would be irrelevant since it relates to specific cases of power purchase agreements (PPA) and factually there was no such agreement in the assessee's case on record, when entire power produced was captively consumed by cement unit. To support the conclusions, Ld.

CIT(A) referred to the decision of Hon'ble High Court of Madras in Tamil Nadu Petro Products Ltd. (supra). Finally, the impugned adjustments were deleted. Aggrieved, the revenue is in further appeal before us.

**Our findings on the issue**

20. The Ld. CIT-DR has supported the working of Ld. TPO and has filed written submissions. It has been submitted that the assessee runs a Thermal Captive Power Plant (CPP) which is integrated with cement plant. The CPP is eligible for benefit u/s 80-IA. During this year, CPP generated power of 19.59 Crores units of power out of which 15.71 crores units (80.19%) were captively consumed by cement unit. The remaining 3.88 crores units were sold by CPP to third parties as well as to related parties. The assessee adopted transfer price of Rs.6.52 per unit for power consumed by cement plant which was nothing but rate charged by Electricity Board for High Tension consumers. However, tariff order of Tamil Nadu Electricity Regulatory Commission determine selling rate of Rs.4.43 per unit for power generated from CPPs. It has further been submitted that the assessee has been permitted to set-up its own CPP on the condition that it consume at least 51% of generated power for own production process. In other words, 51% of power would be for captive consumption whereas 49% of power could be sold to others. The assessee has charged unit rate of Rs.6.52 for power transferred to cement plant. It has charged rate of Rs.6.15 per unit for power sold to related parties whereas it has charged rate of Rs.6.84 per unit for power sold to third parties. The Ld. CIT(A) has further submitted that the power transferred for captive consumption has been bifurcated into two parts i.e., 51% of units (9.99 Crores) which are not permitted to be sold by the assessee and remaining units (5.71 Crores) of power which is permitted

to be sold by the assessee but used for captive consumption by the assessee. The Ld. CIT-DR submitted that the power sold to related parties @6.15 per unit has been accepted to be at arm's length since it is less than average rate of 6.84 per unit as realized by the assessee from third-parties. Accordingly units which are for captive consumption (51%) is subjected to determination of ALP. The same has to be valued at the rate at which it could have been sold to TNEB since it is the only independent entity which could have purchased the power, Therefore, the tariff rate of Rs.4.43 per unit has to be accepted as ALP. It has further been submitted that the remaining units, though captively consumed, had no restriction on its saleability. The ALP of the same has also been determined at purchase price of TNEB. Similar ALP has been determined for power generated out of windmill.

21. Upon perusal of relevant material on record, we concur with the findings of Ld. CIT(A) that the only requirement for the assessee that it should use generated electricity for captive consumption at least to the extent of 51%. The assessee has fulfilled this condition and in fact, it has consumed more than 80% for captive consumption. The working of Ld. TPO would assume that the assessee would consume exactly 51% of power generated by CPP which is clearly erroneous. Accordingly, action of Ld. TPO in artificial bifurcation into saleable units and non-saleable units could not be sustained. All that was required was that in respect of captive consumption, the power should be valued at Market price and nothing more. Considering the ratio of decision of Hon'ble High Court of Madras in the case of **Tamil Nadu Petro Products (supra)**, we would concur with the finding that Sec.80IA relief for captive power could not be different from the relief for power sold in the open market.

22. We further find that the impugned issue stand covered in assessee's favor by the decision of Hon'ble Supreme Court in the case of **Jindal Steel & Power Ltd. (157 Taxmann.com 207)** as under: -

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 a 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.

It has been held by Hon'ble Court that the 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 would be 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. Respectfully

following the same, we confirm the adjudication of Ld. CIT(A), on this issue. The corresponding grounds raised by the revenue stand dismissed.

### **Conclusion**

23. The assessee's three appeals ITA No.2196/Chny/2019, ITA Nos.957 & 958/Chny/2016 as well as CO. No.142/Chny/2017 stands partly allowed. All the appeals of the revenue stand dismissed.

*Order pronounced on 3<sup>rd</sup> July, 2024*

<b>Sd/-</b> <b>(MANU KUMAR GIRI)</b> न्यायिक सदस्य / JUDICIAL MEMBER	<b>Sd/-</b> <b>(MANOJ KUMAR AGGARWAL)</b> लेखक सदस्य / ACCOUNTANT MEMBER
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चेन्नई Chennai; दिनांक Dated : 03-07-2024  
DS

### **आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी/Assessee
2. प्रत्यर्थी/Revenue
3. आयकरआयुक्त/CIT, Madurai
4. विभागीयप्रतिनिधि/DR
5. गार्डफाईल/GF