

आयकर अपीलिय अधिकरण, 'डी' न्यायपीठ, चेन्नई
IN THE INCOME TAX APPELLATE TRIBUNAL
'D' BENCH, CHENNAI

श्री महावीर सिंह, उपाध्यक्ष एवं श्री एस. आर. रघुनाथा, लेखा सदस्य के समक्ष
BEFORE SHRI MAHAVIR SINGH, HON'BLE VICE PRESIDENT AND
SHRI S. R. RAGHUNATHA, HON'BLE ACCOUNTANT MEMBER

आयकर अपील सं./ITA No.: **1718/Chny/2024**

निर्धारण वर्ष / Assessment Year: 2020-21

K G Denim Limited,
1, Thenthirumalai,
Jadayampalayam B.O.,
Dhoddabavi,
Coimbatore – 641 302.

[PAN: AAACK-7940-C]

(अपीलार्थी/Assessee)

DCIT,
v. TP-2(1),
Chennai.

(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/Assessee by
प्रत्यर्थी की ओर से/Respondent by

: Shri. Arjun Raj, Advocate
: Shri. A. Sasikumar, CIT

सुनवाई की तारीख/Date of Hearing

: 11.09.2024

घोषणा की तारीख/Date of Pronouncement

: 05.12.2024

आदेश / O R D E R

PER S. R. RAGHUNATHA, ACCOUNTANT MEMBER:

This appeal filed by the assessee is directed against the order passed by the learned Commissioner of Income Tax (Transfer Pricing), Chennai, dated 26.04.2024 and pertains to assessment year 2020-21.

2. The assessee has raised the following grounds of appeal:

"1. The revisional order of the CIT,(Transfer Pricing), Chennai dated 26.04.2024 vide DIN & Order No. ITBA/COM/F/17/2024-

25/1064398354(1) for the above mentioned Assessment Year is contrary to law, fact and in circumstances of the case.

2. The PCIT erred in assuming jurisdiction u/s 263 of the Act and consequently erred in setting aside the Transfer Pricing Order dated 19.01.2023 without assigning proper reasons and justification.

3. The PCIT failed to appreciate that revision order was passed out of time, invalid, passed without jurisdiction and not sustainable both on facts and in law.

4. The PCIT failed to appreciate that the twin conditions prescribed for assuming jurisdiction under Section 263 of the Act were not satisfied concurrently on the facts and in the circumstances of the case and hence ought to have appreciated that the order of revision under consideration was passed out of time, invalid, passed without jurisdiction and not sustainable both on facts and in law.

5. The PCIT failed to appreciate that the findings in the impugned order were wrong, erroneous, incorrect, invalid, unjustified and not sustainable both on facts and in law and ought to have appreciated that the distinction between the concept of review and the concept of revision under the Act was completely over looked and brushed aside inasmuch as in this regard, ought to have appreciated that the review of the assessment order completed would be prohibited within the scope of the powers of revision under Section 263 of the Act.

6. The PCIT failed to appreciate that the distinction between lack of enquiry and inadequate enquiry was also over looked before passing the revision order and ought to have appreciated that there could not be any presumption of lack of enquiry on the part of the Assessing Officer much less inadequate enquiry on the facts and in the circumstances of the case there by vitiating the revision order.

7. The PCIT erred in directing the Assessing Officer to make a downward adjustment to the extent of difference between the price determined in Transfer Pricing Order / order sought to be set aside and the price arrived after comparing competitive market price of electricity available in the market under long-term contracts as the Arm's Length Price for the purpose of computing the deduction under Section 801A of the Act without assigning proper reasons and justification.

8. *The PCIT failed to appreciate that the provisions in Section 263 of the Act were erroneously invoked to revise a particular subject matter of addition forming part of the assessment order which is appealed against before the First Appellate Authority and ought to have appreciated that the explanation to Section 263(1)(c) of the Act in this regard was lost sight off, in the process, there by vitiating the impugned order in its entirety.*

9. *The PCIT failed to appreciate that the action in rejecting the rate(s) adopted by the assessee by reckoning TANGEDCO's selling rate(s) was wholly unjustified and ought to have appreciated that the finding of contravention of basic principles in the adoption of the selling rate(s) of TANGEDCO Ltd. so as to justify the ALP of the electricity generated and captively consumed by the other division was wrong, erroneous, unjustified, incorrect, invalid and not sustainable both on facts and in law.*

10. *The PCIT failed to appreciate that that the consistent acceptance of the adoption of selling rate(s) of the TANGEDCO Ltd for determining ALP under similar circumstances in other cases was completely ignored and brushed aside, there by vitiating the decision in directing the Assessing Officer to make the downward adjustment which enhanced the taxable total income erroneously."*

The issue in the present appeal pertains to the correctness of the assumption of jurisdiction under Section 263 of the Act by the CIT(TP), Chennai in setting aside the transfer pricing order passed under Section 92CA(3) of the Act dated 19.01.2023 for the assessment year under consideration for fresh consideration in line with the directions issued forming part of the impugned order.

3. The brief facts of the case are that the assessee is a company engaged in production and manufacture of denim and apparel fabric. The KG Denim group concerns are Sri Kannapiran Mills Limited (SKML), KG Denim Limited (KGDL) and Trigger apparels Limited (TAL). The assessee has a thermal power unit which produces electricity for the consumption of its own fabric unit and excess of electricity produced based on its capacity is further sold to AE, Sri Kannapiran Mills Limited. The assessee filed its return of income for the A.Y. 2020-21 on 16.12.2020 declaring a total income of Rs.NIL. The return was processed u/s.143(1) of the Act. Further the case was selected for scrutiny under CASS. The reference was made by AO in terms of Section 92CA(1) of the Act to the Transfer Pricing Officer to examine the domestic transfer pricing transactions reported for the assessment year under consideration. During the TP proceedings, the Transfer Pricing Officer after considering the contentions of the assessee, vide order dated 19.01.2023 proposed adjustment of Rs.12,47,350/- in respect of sale of steam. Subsequently, the AO passed a draft assessment order u/s.144C(1) of the Act on 29.08.2023. Since, the assessee did not file any objection / reply, the AO passed an order u/s.143(3) r.w.s.144C(3) r.w.s.144B of the Act on

30.09.2023 by making an addition of Rs.12,47,350/- as per TP order and Rs.87,07,950/- in respect of undisclosed investment u/s.69B of the Act. During the course of the TP proceedings, the TPO had noticed the fact of transfer of power by the assessee to other related party, i.e. M/s.Sri Kannapiran Mills Limited and captive consumption was adopted at Rs.6.35 per unit, being the rate at which the said related party purchases the electricity from TNEB. In fact, the TPO had issued the Show Cause Notice dated 21.12.2022 in proposing to determine Arm's Length Price of the above mentioned Specified Domestic Transactions (SDT) at Rs.4.66 per unit by reckoning the rate at which the thermal power is sold to TNEB as the "market value" as envisaged in terms of clause (ii) to the Explanation under Section 801A(8) of the Act.

4. The assessee in consequence to the Show Cause Notice had contended that the power purchase cost of TANGEDCO should not be the basis for comparison inasmuch the power purchase cost of the recipient which has to be seen and compared for the purpose of determining. Further, the assessee rebutted that it is erroneous to compare the price at which TANGEDCO buys power from market with that of the price at

which the assessee company sells its power by relying upon certain judicial precedents in support of the submissions placed before. Furthermore, the assessee had also placed reliance upon the directions issued by the DRP- 2, Bangalore in the assessee's own case for the A.Y. 2017-18 on the similar issue of determination of ALP on such SDT. The TPO in the Transfer Pricing order passed under Section 92CA(3) of the Act dated 19.01.2023 had accepted the submissions of the assessee in this regard as well as the directions issued by the DRP- 2, Bangalore for the A.Y. 2017-18 in dropping the proposed adjustment of determination of ALP on such SDT. Subsequently, the CIT(TP), Chennai had invoked the revisionary powers in terms of Section 263 of the Act in setting aside the said order of Transfer Pricing dated 19.01.2023 by holding the same to be erroneous and prejudicial to the interest of Revenue within the scope of the provisions in Section 263 of the Act.

5. The CIT(TP), Chennai vide their revision order dated 26.04.2024 had held that the action of the TPO in accepting the assessee's submissions with regard to the ALP of the SDT reported as erroneous and prejudicial to the interest of Revenue in as much for the purpose of determining the ALP in terms of

the provisions under the explanation to section 80IA(8) of the Act, the rates charged by the power generating company while selling the power to power distribution company has to be the market value for the purpose of determining ALP of inter-unit transfer of power is to be reckoned as Arm's Length Price. Further, the CIT(TP), Chennai rejected the stand of the assessee that electricity purchased from State Electricity Board by any manufacturing unit can be the market rate at which power plant of the assessee could have sold its production in open market. The assessee in their reply to the above Show Cause Notice objected to the assumption of jurisdiction under Section 263 of the Act both on jurisdiction as well as on merits. However, the impugned order came to be passed under Section 263 of the Act by the CIT(TP), Chennai in setting aside the TPO dated 19.01.2023 in directing the Transfer Pricing Officer to recompute the ALP of the revenue of the eligible unit from sale of power to its associated enterprises being the power consuming unit of the Assessee and its sister concern Sri Kannapiran Mills Limited.

6. The Id.AR for the assessee objected to the assumption of jurisdiction under Section 263 of the Act on three facets. The

first facet is with regard to the absence of concurrent satisfaction of the twin conditions envisaged under Section 263 of the Act on the facts of the present case. In this regard, the Id.AR submitted that the order sought to be set aside and revised in terms of Section 263 of the Act should be both erroneous and prejudicial to the interest of Revenue inasmuch both the conditions ought to be satisfied on the case of case concurrently. In the case of the assessee, the Transfer Pricing Officer had issued a specific Show Cause Notice on the issue which the CIT(TP), Chennai seeks to set aside for passing the fresh Transfer Pricing order. The Transfer Pricing Officer after taking into consideration the submissions of the assessee placed on record in relation thereto had dropped the proposed to recompute the ALP. The Id.AR stated that in such circumstances, the entire facts of the present case was considered by the TPO while passing the original TP Order and moreover the TPO had decided the issue in favour of the Assessee after considering the decision rendered by DRP for the earlier year by following the rule of consistency theory. The Transfer Pricing Officer had accepted the assessee's reliance placed on directions issued by the DRP- 2, Bangalore for the A.Y. 2017-18 in assessee's own case by observing the principles

of rule of consistency. The assessee submits that an order passed by the quasi-judicial authority by following the rules of judicial consistency and as well as judicial discipline cannot be construed as an erroneous order inasmuch the failure to adhere would in fact render the same as erroneous. Hence, the Ld.AR submitted that on facts of the present case at no stretch of imagination can be said that the Transfer Pricing Order passed without inadequate inquiry so as to reckon the same as an error or prejudice caused to the Revenue.

7. The Id.AR stated that the second facet of submission is regard to the fact that the Transfer Pricing Order sought to be set aside cannot also be reckoned as erroneous for the purpose of validly invoking the provisions in Section 263 of the Act in as much as the issue on merits is already settled by virtue of the law declared by the Apex Court in the case of CIT Vs.Jindal Iron and Steel Co. Ltd. (SC) 460 ITR 162, dated 06.12.2023 (Paper Book Page No.142 to 166) wherein it was held that market price of power generated for the purpose of determining the Arm's Length Price of power generating unit in terms of Section 80IA of the Act shall be the price at which the power is supplied by Government generation and distribution Unit to general

consumers. The Supreme Court had held that the market price would be the price at which the Government electricity generation and distribution unit sells it to a regular customer. The said ratio laid down by the Apex Court was also followed by the jurisdictional bench of the ITAT in multiple cases, thereby negating the action of the Transfer Pricing Officer in accepting the submissions of the assessee in this regard as erroneous for the purpose of invoking the provisions in Section 263 of the Act.

8. The next facet of submissions by the Id.AR is that in any event, the Transfer Pricing Officer having taken one permissible view that is sustainable in law, the said view cannot be faulted with by the CIT(TP), Chennai by invoking the powers in Section 263 of the Act in directing the TPO to adopt the another view permissible in law. In this regard, the Ld.AR placed a reliance upon the decision of the jurisdictional Hon'ble Madras High Court in the case of M/s.Agasthiya Granite P Ltd, in T.C.(Appeal) No.450 of 2007 dated 16.04.2018, wherein the Hon'ble Madras High Court in the context of interplay between the provisions in Section 80HHC(AB) and Section 80IB of the Act had held that the action of the Assessing Officer in following the ratio of the Hon'ble Madras High Court in the case of (SCM

Creations vs. Assistant Commissioner of Income-Tax) reported in [2008] 304 ITR 319 cannot be interfered with by the PCIT by holding that the failure to observe the ratio of the Madras High Court in the case of (General Optics (Asia) Ltd., vs. Deputy Commissioner of Income-tax) reported [2009] 315 ITR 400 would constitute the same as erroneous and prejudice to the interest of the revenue. The Madras High Court in the above mentioned order had held that the very fact that two divergent views being taken by the Hon'ble Madras High Court, resulting in constitution of a Larger Bench would demonstrate the fact that two different views are permissible under the eyes of the law and the action of the Assessing Officer in following one cannot be interfered with by the PCIT in terms of Section 263 of the Act. The Ld.AR summarised that the Id.CIT(TP) has erred in invoking the powers of the revision u/s.263 of the Act on all the three facets of the above arguments and deserved to be quashed and prayed for allowing the appeal of the assessee.

9. Per contra the Id.DR relied on the order of the Id.CIT(TP) and prayed for dismissing the appeal of the assessee.

10. We have heard the rival contentions, perused the materials available on record and gone through the orders of the lower authorities. In the circumstances before adjudicating the issues arising from the impugned order, we have to first examine the scope of revisional jurisdiction u/s. 263 of the Act. For that, let us take the guidance of judicial precedence laid down by the Hon'ble Apex Court in *Malabar Industries Ltd. vs. CIT* [2000] 243 ITR 83(SC) wherein their Lordship have held that twin conditions should be satisfied before jurisdiction u/s 263 of the Act is exercised by the Ld.CIT. The twin conditions which need to be satisfied are that (i) the order of the Assessing Officer must be erroneous and (ii) as a consequence of passing an erroneous order, prejudice is caused to the interest of the Revenue. In the following circumstances, the order of the AO can be held to be erroneous i.e. (i) if the Assessing Officer's order was passed on assumption of incorrect facts; or assumption of incorrect law; (ii) Assessing Officer's order is in violation of the principles of natural justice; (iii) if the AO's order is passed without application of mind; or (iv) if the AO has not investigated the issue before him. In the circumstances enumerated above only the order passed by the Assessing Officer can be termed as erroneous for the purpose of Section

263 of the Act. Coming next to the second limb, the AO's erroneous order can be revised by the Ld. CIT only when it is shown that the said order is prejudicial to the interest of Revenue. When this aspect is examined, one has to understand what is prejudicial to the interest of the revenue. The Hon'ble Supreme Court in the case of Malabar Industries (supra) held that this phrase i.e. "prejudicial to the interest of the revenue" has to be read in conjunction with an "erroneous" order passed by the Assessing Officer. The Hon'ble Supreme Court held that for invoking powers conferred by Section 263; the CIT should not only show that the AO's order is erroneous as a result of any of the situations enumerated above but CIT must also further show that as a result of an erroneous order, some loss is caused to the interest of the revenue. Their Lordship in the said judgment held that every loss of revenue as a consequence of an order of Assessing Officer cannot be treated as prejudicial to the interest of the revenue. It was further observed that when the Assessing Officer adopts one of the course permissible in law and it has resulted in loss to the revenue, or where two views are possible and the Assessing Officer has taken one view with which the Ld. CIT does not agree, it cannot be treated as

an order prejudicial to the interest of the revenue unless the view taken by the Assessing Officer is unsustainable in law.

11. Keeping the aforesaid legal principles in mind when we apply the same to the facts of the present case, we note that the sole issue that has been raked up by the Ld.CIT(TP) in the present case, emanated from perusal of TPO order dated 19.01.2023 which showed that the TPO has accepted the price comparative to that of the price of electricity generated and sold under such long term contracts, without arriving the correct market price. Accordingly, the CIT(TP) was of the view that the action of the AO was erroneous and prejudicial to the interest of Revenue order and directed the AO holding as under:

*"28. In view of the above facts, I am satisfied that the order of the Transfer Pricing Officer is erroneous in law as far as it is prejudicial to the interest of the revenue. Hence, the order of the Transfer Pricing Officer is here by set aside for fresh order to be passed by ascertaining the competitive market price of electricity available in the market under long-term contracts and adopting the same for computing the revenue of the eligible unit from sale of power to its associated enterprises being the power consuming unit **of the Assessee and its sister concern Sri Kannapiran Mills**. The downward adjustment to the extent of difference between the price determined" in TPOs order and the price arrived as per the above directed computation of the ALP, shall be suggested to the Assessment Unit."*

12. The aforesaid assertion of the PCIT that the AO while scrutinizing the assessment has failed to verify the issue stated

(supra) is contrary to the facts revealed from the records and found to be incorrect assertion of the Ld.PCIT. This fact is revealed from perusal of the Paper Book filed before us that the TPO had issued notice u/s.92CA of the Act dated 21.12.2022 reflecting DIN: ITBA/TPO/F/17/2022-23/1048151375(1), (Page No.236 to 238 of paper book) wherein, inter alia, the TPO specifically asked the query relevant to the issue in dispute is as under:

*"5. The market value will be the price at which thermal power is sold to TNEB or in any energy exchanges. The details of power purchase rate/unit for thermal power has been obtained from TANGEDCO. TANGEDCO gives a rate of **Rs.4.66 per unit** for procurement of power from power generating companies for FY 2019-20.*

6. You are hereby requested to show cause as to why the Arm's Length Price of the Specified Domestic Transactions not be determined as per above mentioned proposal for transfer of power by the assessee.

7. For the transfer of steam, assessee has adopted Cos! Plus Method. The cost of steam is arrived at Rs.1040/unit. It is sold at Rs.1050/unit. When there is no market for steam, the assessee is requested to show cause as to why the Arm's Length Price of steam not be determined at cost of Rs.1040/unit at cost" on or before 27/12/2022 at 03:15 P.M."

13. And the assessee replied the same vide letter dated 21.12.2022 (Page No.239 to 244 of paper book) as under:

"New power cost by TPO at Rs. 4.66 / unit based on certain information from TANGEDCO:

For the relevant financial year we have been provided with a communication from TANGEDCO which has responded to Sec 133 (6) has given Thermal Power purchase price of TANGEDCO for the

relevant financial year has been mentioned as Rs. 4.66. Based on the above information called under section 133(6) we have been required to show cause why the said rate of Rs. 4.66 should not be adopted as ALP for sales made by the power unit of the assessee to its AE both its own manufacturing unit and to M/s Sri Kannapiran Mills Ltd.

The issue has been discussed at length in the previous order of the assessee which was subsequently ordered in favour of the assessee by DRP and this was not contested by either the AO or TPO based on the submissions made for the relevant assessment year.

Currently even though the year is different the basis and arguments put forth by the assessee both to the TPO and DRP for the earlier year stands for the reason that the price at which the power was transferred in that year was at Rs.6.35 being the purchase rate of the said consumers from the same TANGEDCO.

It is highly inconsistent to compare the price at which TANGEDCO buys power from market with that of the price at which the assessee company sells its power. The comparison of power purchase by TANGEDCO cannot be compared for the reason that the volume of power purchase by TANGEDCO is nowhere near to the sales made by the assessee company. Mostly the power purchased by TANGEDCO will be from exclusive power generating units unlike that of the assessee which is a co generation unit.

The power generation is not primary but secondary since during the generation of thermal power the unit produces steam as well which is again used in the manufacturing unit for its processing of fabrics process. The cost effective method adopted by investing in thermal power which again supports uninterrupted power supply to the manufacturing unit.

The submission is that the power purchase cost of TANGEDCO should not be the yardstick for comparison instead the power purchase cost of the recipient has to be compared for the purpose of ALP.

The above stand has been accepted by various courts as listed below:

- a. High Court of Bombay in the case of CIT L TU Vs Reliance Industries 102 taxmann-com 372 Bombay
- b. The Hon'ble ITAT in the case of Gujarat Fluorochemicals Ltd Vs DCIT cir 1(1) (1) Vadodara 97 Taxmann.com 10 (Ahmedabad Trib)
- c. The Hon'ble ITAT in the case of DCIT Vs Hera Ferro Alloys Ltd 90 Tax Taxmann.com430 (Raipur -Trib)
- d. The Hon'ble High Court of Gujarat in the case of Gujarat Alkalis & Chemicals Ltd 88 Taxmann.com 722 (Gujarat)

- e. *The Hon'ble High Court of Chhattisgarh in the case of CIT Raipur Vs Godawari Power & Ispat Ltd 42 Taxmann.com 551 (Chhattisgarh)*
- f. *The Hon'ble High Court of Calcutta in the case of CIT Kolkata III Vs ITC Ltd 64 Taxmann.com 214 (Calcutta)*
- g. *The Hon'ble ITAT in the case of Star Paper Mills Ltd Vs DCIT Circle 4(2) Kolkata ITA No 127/Kol/2021 dt 26th Oct 2021 . This judgement was pronounced after considering the Reliance Industries Case which was much after the admission of SLP by the Supreme Court which was admitted as early as 2019*

Without prejudice to the claim as above it is submitted that the assessee company though transferred power and steam to its AE, the income computation statement is evident to show that the company has not claimed any deduction under section 80IA for, the reason that the GTI is negative and not eligible to claim deduction as per the provisions of section 80A of the Act."

14. Thus, we note that the AO had asked the specific question regarding the price comparative to that of the price of electricity generated and sold. After taking note of the assessee's explanation (supra), and following the various judicial precedents relied on by the assessee, the TPO has accepted the ALP of the power price. Therefore, the action of the TPO allowing the claim of assessee cannot be held to be erroneous as well as prejudicial to the Revenue.

15. Further, we note that the issue on merits is already settled by virtue of the law declared by the Apex Court in the case of CIT Vs. Jindal Iron and Steel Co. Ltd. (SC) 460 ITR 162 (Paper Book Page No.142 to 166) wherein it was held that

market price of power generated for the purpose of determining the Arm's Length Price of power generating unit in terms of Section 80IA of the Act shall be the price at which the power is supplied by Government generation and distribution Unit to general consumers. The Supreme Court had held that the market price would be the price at which the Government electricity generation and distribution unit sells it to a regular customer. The said ratio laid down by the Apex Court was also followed by the jurisdictional bench of the ITAT in multiple cases. Therefore, the action of the Transfer Pricing Officer in accepting the submissions of the assessee cannot be regarded as erroneous for the purpose of invoking the provisions in Section 263 of the Act.

16. We also note that the decision of the jurisdictional Hon'ble Madras High Court in the case of M/s.Agasthiya Granite P Ltd, in T.C.(Appeal) No.450 of 2007 dated 16.04.2018, wherein the Hon'ble Madras High Court had held that the very fact that two divergent views being taken by the Hon'ble Madras High Court, resulting in constitution of a Larger Bench would demonstrate the fact that two different views are permissible under the eyes of the law and the action of the

Assessing Officer in following one cannot be interfered with by the PCIT in terms of Section 263 of the Act. Therefore, in the present case on hand, the TPO has taken one of the views which is permissible under the law, cannot be found faulted with by the Id.CIT(TP) in respect of the power price adopted to the transactions with AE.

17. In the light of the aforesaid facts, we are of the view that the assessee succeeds and the Id.CIT(TP) erred in invoking his jurisdiction u/s.263 of the Act and hence the same is quashed.

18. In the result, appeal filed by the assessee is allowed.

Order pronounced in the court on 5th December, 2024 at Chennai.

Sd/-
(महावीर सिंह)
(MAHAVIR SINGH)
उपाध्यक्ष /**Vice President**

Sd/-
(एस. आर. रघुनाथा)
(S. R. RAGHUNATHA)
लेखासदस्य/**Accountant Member**

चेन्नई/Chennai,

दिनांक/Dated, the 5th December, 2024

JPV

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. अपीलार्थी/Assessee
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त/CIT
4. विभागीय प्रतिनिधि/DR
5. गार्ड फाईल/GF