

| आयकर अपीलीय अधिकरण न्यायपीठ, मुंबई |
IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH, MUMBAI

SHRI NARENDRA KUMAR BILLAIYA, HON'BLE ACCOUNTANT MEMBER
&
BEFORE SMT. BEENA PILLAI, HON'BLE JUDICIAL MEMBER

I.T.A. No. 5685/Mum/2024
Assessment Years: 2010-11

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| ACIT, CC-6(1), Mumbai | Vs | Prism Johnson Limited 2 nd Raheja S.V.P. Road Main Avenue Santacruz - 400054 [PAN: AAACP6224A] |
| अपीलार्थी/ (Appellant) | | प्रत्यर्थी/ (Respondent) |

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| Assessee by : | Shri Vijay Mehta, A/R |
| Revenue by : | Mr. R.A. Dhyani, CIT, D/R |

सुनवाई की तारीख/Date of Hearing : 12/12/2024
घोषणा की तारीख /Date of Pronouncement: 17/12/2024

आदेश/ORDER

PER NARENDRA KUMAR BILLAIYA, AM:

This appeal by the revenue is preferred against the order of the ld. CIT(A)-54, Mumbai, dated 19/08/2024, pertaining to AY 2010-11.

2. The grievance of the revenue reads as under:-

"Ground I) "Whether, on the facts and in the circumstances of the case and in law, the Ld. CIT(A) is justified in considering the Sales Tax/ VAT subsidy received by the assessee as a capital receipt without appreciating that the subsidy received by the assessee is purely linked to production of goods and not to capital expenditure undertaken by the assessee?"

Ground II) "Whether, on the facts and in the circumstances of the case and in law, the Ld. CIT(A) is justified in considering the Sales Tax/ VAT subsidy received by the assessee as a capital receipt without appreciating that if the subsidy does not fulfil the purpose of sharing the burden of the capital outlay but instead enables the assessee to recoup its profits in a recurring fashion, it must be treated as a revenue receipt."

Ground III) "Whether, on the facts and in the circumstances of the case and in law, the Id. CIT(A) is justified in considering the income received on account of sale of the Carbon Credit by the assessee as a capital receipt without appreciating that the income received by the assessee is purely linked to production of goods and not to capital expenditure undertaken by the assessee."

Ground IV) Whether, on the facts and in the circumstances of the case and in law, the Ld. CIT(A) is justified in considering the saving approach is appropriate basis for determination of market value of services for computation of 80-IA deduction without appreciating that the assessee has calculated its revenue from the rail system as the difference between the cost of transporting the same goods by road and by the India Railways, however, the assessee has actually not transported goods by road and this is an estimation basis."

Ground V) "The appellant craves to leave, to add, to amend and / or to alter any of the ground of appeal, if need be."

3. In the first round of litigation, the additional ground relating to sales tax subsidy, income from receipt of sale of carbon credit, were admitted and since the authorities below have not gone into the details and verification of the documents, this additional ground was set aside to the file of the AO for adjudication in terms of law.

4. Pursuant to the directions of the Tribunal, the AO examined the claim of sales tax subsidy of Rs.15.02 Crores, availed during the year under consideration and treated as a capital receipt. The assessee claimed the said subsidy as capital receipt applying the purpose test laid down in *Commissioner of Income-tax, Madras v. Ponni Sugars & Chemicals Ltd.* [2008] 306 ITR 392 (SC) and *Sahney Steel and Press Works Ltd and Others - vs.- CIT* (1997) 228 /TR 253 (SC), which did not find favour with the AO who was of the opinion that receipt of sales tax subsidy after the commencement of production, clearly provides a running support to the assessee to run the unit, therefore, has to be treated as a revenue receipt.

4.1. Insofar as, the issue of whether income from sale of carbon credit of Rs.1.14 Crores, should be treated as capital receipt as claimed by the assessee, the AO was of the opinion that carbon credits are earned by

the assessee as a result of adopting environment friendly production methods and hence it arises from the business activity of the assessee and is then traded for further revenue. The AO treated the same as a revenue receipt. Since the carbon credits are interlinked with the business and they are an offshoot of business activity and are a tradable commodity, hence income from sale of carbon credit of Rs.1.14 Crores was treated as a revenue receipt.

4.2. Both these additions were challenged before the Id. CIT(A) and it was strongly contented that the Tribunal in assessee's own case for AYs 2011-12 & 2012-13 has decided the issues in favour of the assessee and against the revenue. The Id. CIT(A) was convinced with the contention of the assessee and directed the AO to treat both the Sales Tax subsidy and the receipt from carbon credit as capital expenditure.

5. We find that the aforementioned quarrel has been decided by this Tribunal in *ITA Nos. 804 & 805/Mum/2018 for AYs 2012-13 & 2011-12* in favour of the assessee and against the revenue.

6. Insofar as the Sales Tax subsidy is concerned, the Co-ordinate Bench has considered the same vide Ground No. 3(a) & 3(b) in its order (*supra*) and held as follows:-

"50. Considered the rival submission of both Ld. Counsels on this issue and material placed on record, we notice that Coordinate Bench of ITAT in the case ACIT v. Mihir Packaging (ITA No.5629/Mum/2011) and in the case of John Deere India Pot. Ltd v. ITO (ITA No. 828/Pun/2014) has already decided this issue in detail. For the sake of clarity, relevant portion of the decision of Mihir Packaging case is reproduced below:-

14. We have carefully considered the rival contentions, perused the findings given by the authorities below and the material available on record. It is an undisputed fact that the assessee has established a small scale industries undertaking in a duly notified backward area in the District of Thane, which has been categorized as "D+" locality i.e., remote backward area for the purpose of new Package Scheme of Incentive, 1993. The preamble of the said scheme, reads as

under:-

“In order to achieve dispersal of industries outside the Bombay-ThanePune belt and to attract them to, the underdeveloped and developing areas of the State, Government has been giving a Package of Incentives to New/Expansion Units setup in the developing region of the State since 1964 under a Scheme popularly known as the Package Scheme of Incentives.

The Package Scheme of Incentives, introduced in 1964, was amended from time to time. The last amended Scheme, commonly known as the 1988 Scheme was operative from 1st October 1988 to 30th September, 1993.

The question of revising the 1988 Scheme to rationalise the scope of incentives, various scales and mode of release of incentives to intensify and accelerate the process of dispersal of industries from the developed areas and for development of the under- developed regions of the State, particularly those farther away from the Bombay- ThanePune belt, had been under consideration of the Government. In the light of the experience gained in implementation of the earlier Schemes,, particularly the 1988 Scheme, and in the changed circumstance of the liberalised industrial policy of the Government of India, and with a view to achieving the objectives outlined above, the Government has decided to revise the 1988 Scheme and bring into force a New Scheme, viz., the Package Scheme of Incentives, 1993 (hereinafter referred to as “the 1993 Scheme”).”

15. *Under the said scheme, one of the eligible unit in terms of clause 1.1 were the industries falling within the purview of small scale industries board and the implementing agency for the purpose of the scheme in case of small scale industries unit was “District Industries Centre” under which eligible certificate has to be procured after fulfilling certain conditions. Clause 5 provided various nature of incentive, which should be given and one of them included “Special Capital Incentive for SSI Unit”. The said scheme also provides the effective steps comprising of initial effective steps and final effective steps which were to be undertaken before being eligible for the grant of subsidy. Finally, in terms of clause 5.2, special capital incentive for SSI unit, was admissible as a grant after completion of all initial and final effective steps and will be computed on the basis of fixed capital investment actually made by the eligible SSI unit. The maximum ceiling for “D+” category has been put at ` 20,00,000.*

16. *The assessee had fulfilled the eligible criteria and also complied with the effective steps to be taken and thereafter, it has received the subsidy under special capital incentive for SSI unit based on its capital investment, which finally worked out to ` 20,00,000. Thus, from the preamble and also various other terms, it is seen that the purpose of the subsidy was to set-up a new unit in the notified backward areas particularly those between Bombay, Thane, Pune, belt for the development of the remote area. The said scheme provide special capital incentive for SSI unit and, therefore, the subsidy received under the scheme is clearly on account of capital only. This has been also mentioned in the eligible certificate dated 29th June 2000, issued by the District Industrial*

Centre, implementing agency for the SSI unit. The Hon'ble Supreme Court in *Ponni Sugars and Chemicals Ltd.* (supra), after relying upon the judgment in *Sahani Steels and Press Works Ltd.* (supra), held that character of the receipt in the hands of the assessee has to be determined with respect to the purpose for which subsidy is given. The "Propose Test" has to be applied while determining whether the subsidiary is in account of revenue account or capital subsidy. The relevant observation given in *Ponni Sugars and Chemicals Ltd.*, by Their Lordships are reproduced herein below:-

"14. In our view, the controversy in hand can be resolved if we apply the test laid down in the judgment of this Court in the case of *Sahney Steel & Press Works Ltd.* (supra). In that case, on behalf of the assessee, it was contended that the subsidy given was up to 10 per cent of the capital investment calculated on the basis of the quantum of investment in capital and, therefore, receipt of such subsidy was on capital account and not on revenue account. It was also urged in that case that subsidy granted on the basis of refund of sales tax on raw materials, machinery and finished goods were also of capital nature as the object of granting refund of sales tax was that the assessee could set up new business or expand his existing business. The contention of the assessee in that case was dismissed by the Tribunal and, therefore, the assessee had come to this Court by way of a special leave petition. It was held by this Court on the facts of that case and on the basis of the analyses of the Scheme therein that the subsidy given was on revenue account because it was given by way of assistance in carrying on of trade or business. On the facts of that case, it was held that the subsidy given was to meet recurring expenses. It was not for acquiring the capital asset. It was not to meet part of the cost. It was not granted for production of or bringing into existence any new asset. The subsidies in that case were granted year after year only after setting up of the new industry and only after commencement of production and, therefore, such a subsidy could only be treated as assistance given for the purpose of carrying on the business of the assessee. Consequently, the contentions raised on behalf of the assessee on the facts of that case stood rejected and it was held that the subsidy received by *Sahney Steel* could not be regarded as anything but a revenue receipt. Accordingly, the matter was decided against the assessee. The importance of the judgment of this Court in *Sahney Steel & Press Works Ltd.*, case (supra) lies in the fact that it has discussed and analysed the entire case law and it has laid down the basic test to be applied in judging the character of a subsidy. That test is that the character of the receipt in the hands of the assessee has to be determined with respect to the purpose for which the subsidy is given. In other words, in such cases, one has to apply the purpose test. The point of time which the subsidy is paid is not relevant. The source is immaterial. The form of subsidy is immaterial. The main eligibility condition in the scheme with which we are concerned in this case is that the incentive must be utilized for repayment of loans taken by the assessee to setup new units or for substantial expansion of existing units; On this aspect there is no dispute. If the object of the subsidy scheme was to enable the assessee to run the business more profitably then 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 then the receipt of the subsidy was on capital account. Therefore, 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."

17. *Applying the above ratio and the test laid down by the Hon'ble Supreme Court, we find that the subsidy received by the assessee under the new package scheme incentive of 1993, was solely for the purpose of setting up of SSI unit in the backward area for which it has received special capital incentive computed on the basis of fixed capital investment actually made by the assessee and, therefore, the same is capital in nature and hence, not taxable. Thus, the finding and conclusion given by the Commissioner (Appeals) is upheld and, accordingly, ground no.1, raised by the Revenue is dismissed.*

51. *Further we notice that Ld. DR submitted that this issue may be remitted back to the AO for factual verification and documents and AO may be given opportunity to verify the claim of the assessee. We notice that this issue was analyzed and adjudicated by Ld. CIT(A) after verifying the relevant documents submitted by the assessee before him and moreover, the proceedings before Ld. CIT(A) is only extension of assessment, it is otherwise known as extended assessment proceedings, therefore Ld. CIT(A) has applied his mind and came to the conclusion with his own reasoning and rejected the submission /contention of the assessee. Therefore, there is no necessity to remit this issue back to the AO for further verification.*

53. *Therefore, respectfully following the decision of Coordinate Bench of ITAT which is applicable mutatis mutandis in the present case, we are inclined to **allow** the ground nos. 3(a) and 3(b) raised by the assessee."*

7. Insofar as the taxability of carbon credit is concerned, the Coordinate Bench considered the issue issued vide Ground No. 5 in appeal by the assessee (*supra*) and held as under:-

*"67. After considering the submission of the assessee, we find that this carbon credit should be treated as capital in nature. We notice that Ld. CIT(A) by relying on the case DCIT vs Kalpataru Power Transmission Ltd (*supra*), decided this issue against the assessee. We further notice that this issue was already considered by Hon'ble AP High Court and Karnataka High Court in favour of the assessee. Our attention was also drawn by Ld. AR to the case of Dodson Lindblom Hydro Power Ltd. Bom HC and Dy. CIT v Dodson Lindblom Hydro Power Ltd, which are similar to the facts of the present case, wherein the Hon'ble Jurisdictional High Court held that the sale of carbon credit is to be considered as capital receipt, therefore not liable to tax. The same reasoning was followed by Hon'ble Allahabad and Rajasthan High Court. Therefore, considering the consistent view of the different High Courts in the country, we see no reason to take a different stand since the different High Courts has decided this issue in favour of the assessee. Respectfully following the aforesaid decisions of various High Courts which are applicable mutatis mutandis in the present case, we are inclined to **allow** the ground no. 5 raised by the assessee."*

8. Respectfully following the decision of the Co-ordinate Bench (*supra*), Ground Nos. 1, 2 & 3 are dismissed.

9. Coming to the grievance raised vide Ground No. 4, before proceeding any further, let us first understand the quarrel.

10. While scrutinising the return of income, the AO noticed that the assessee has claimed deduction u/s 80IA of the Act certified in Form 10B amounting to Rs. 32.01 Crores, in respect of rail system developed, operated and maintained by the assessee.

11. The assessee explained that the said rail system has been set up between its cement manufacturing plant and the nearest railway system of the Indian Railways for inward and outward movement of goods for efficient and cost-effective transportation to/from various destinations. It was claimed that the said infrastructure facility is eligible for deduction in terms of explanation to Section 80IA(4)(i) of the Act. In support, copy of the audit report in Form 10CCB and audited accounts of the rail system were submitted.

11.1. The assessee was asked to furnish details regarding how income derived from rail system was arrived at. The assessee furnished a chart showing how the income from services from its rail system was arrived at. After perusing the same the AO found that the assessee has calculated its profit as the difference between the cost of transporting material by road and by rail. It was explained by the assessee that it is computing income of the rail system by following the savings approach wherein, the revenue is computed as savings made on the basis of the freight and other costs that would have been payable if the rail system

were not present. Justifying its approach, the assessee explained that Railways are under the control of Government Authorities and has a monopoly in operation of Railways in India and accordingly determines the tariff with respect to the same. Indian Railways would never set up the rail infrastructure system for assessee's captive use and there is no other independent party which would install a rail infrastructure facility system, similar to that set up by the assessee nearby to its plant locations for captive handling of inward and outward materials . Rail system is captively used by the assessee for transportation of goods, loading and unloading etc., thereby reducing the cost of transportation. It was further explained that, if for any reason, the services of rail system are discontinued, the only option available to the cement manufacturing units would be to transport the goods to and/or from the nearest rail head through road. Accordingly, the income from services provided by the Rail System has been determined by computing the savings made on the basis of the freight and other costs that would have been incurred via road transport system had the Rail system not been setup by the assessee.

11.2. The submissions made by the assessee did not find any favour with the AO. The AO was of the opinion that savings approach adopted by the assessee is an estimate and is unacceptable as the assessee has in actuality not transported goods by road. Cost of transporting goods by road is seen to be approximately eight times the cost of transporting goods by Indian Railways and taking the difference between the two as the revenue of the Rail System for the purpose of deduction u/s 80IA of

the Act, results in artificial inflation of revenue of the rail system which in turn leads to a higher deduction being claimed by the assessee.

11.3. Allowing the deduction u/s 80IA of the Act, the AO recomputed the revenue from the rail system as follows:-

Profit from Rail system eligible for deduction u/s 80 IA = Income from Rail System - Expenditure of the Rail System

The expenditure is taken as per the assessee's own calculation in its Profit and Loss Account for the Rail System, which is Rs 4,90,43,749/-

11.3.1. The income was computed as under:-

Cost of transporting goods by Indian Railways, calculated using the statement of railway freight as per the Railway Rates Circular at Rs 6,11,22,022/- to which a markup of expenditure directly attributable to the loading and unloading expenses which are not to be incurred for the railway system at 5% and the total revenue to be charged for loading and unloading was taken at Rs. 4,68,50,208/-. Adding same to the total revenue to be charged for railway freight Rs.6,11,22,022/-. The AO computed the total revenue at Rs.10,79,72,230/- and the deduction u/s 80IA of the Act was computed thereof.

12. The assessee strongly contested this before the Id. CIT(A) and reiterated its claim of deduction on cost savings approach placing reliance on several judicial decisions. After considering the facts and the submissions, the Id. CIT(A) was convinced that the Explanation to Section 80IA of the Act and Section 80A(6) of the Act is clear that open market has to be presumed in existence for the purpose of computing a deduction u/s 80IA and market value has to be taken as if such open

market exists. The ld. CIT(A) was also convinced with the savings approach drawing support from various judicial decisions, namely, *CIT -vs.- Thiagarajar Mills Ltd (Tax Case(Appeal) Nos.68 to 70 of 2010 dated 7-6-2010)*, *Assam Carbon Products Ltd. -vs.- ACIT (2006) 100 TTJ 224 (Kol)*, *M/s. Hindustan Petroleum Corporation Ltd. -vs.- DCIT (2010) 328 ITR 534 (Bom)* and *Ambuja Cement Limited vs ACIT [ITA 3475/Mum/2019]*.

12.1. Drawing full support from the decision of the Co-ordinate Bench in the case of *Ambuja Cement Limited (supra)*, the ld. CIT(A) observed that savings in cost is a proper basis for determining the market value of services for computing deduction u/s 80IA of the Act.

13. Before us, the ld. D/R strongly supported the findings of the AO but could not bring any factual error or infirmity in the findings of the ld. CIT(A).

Per contra, the ld. Counsel for the assessee reiterated what has been stated before the lower authorities for justifying the approach adopted by the assessee.

14. We have given a thoughtful consideration to the orders of the authorities below. The undisputed fact is that, if the assessee had not transported its goods through Railways then, it had to transport the same by road thereby incurring higher cost. The calculation of eligible profit u/s 80IA of the Act can be understood from the following chart:-

| | |
|---|------------|
| 1. Cost of road freight | Rs. 48 Cr. |
| 2. Cost of rail freight (as per Indian railway fares) | Rs. 6 Cr. |
| 3. Actual expenses incurred by 'railway undertaking' | Rs. 5 Cr. |

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| <u>Calculation of eligible profit as per the A.O.:</u> | |
| (i) <u>Revenue</u> | |
| Freight as per railway fares | Rs. 6 Cr. |
| Loading and unloading charges (with 5% markup) | Rs. 5 Cr. |
| Total | Rs. 11 Cr. |
| (ii) <u>Less: Expenses incurred</u> | Rs. 5 Cr. |
| (iii) <u>Eligible profit</u> | Rs. 6 Cr. |

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| <u>Calculation of eligible profit as per assessee:</u> | |
| Freight charged to cement undertaking | Rs. 37 Cr. |
| Less: Expenses incurred | Rs. 5 Cr. |
| Eligible profit | Rs. 32 Cr. |

15. The cost of road freight shown at Rs. 48 Crores is based on the actual expenditure incurred in earlier year when the goods were transported by road.

15.1. It is also an admitted fact that in order to curtail transport and logistics cost incurred for transportation of raw materials as well as furnished goods being cement, the assessee has developed an integrated rail system for Unit-I at Satna, M.P. The deduction u/s 80IA of the Act has been computed by following the savings approach wherein the revenue of the Rail System was computed by taking excess of the road freight & handling charges payable for transportation of goods by road to the nearest rail head, over the tariff payable for transportation of goods from the railway siding to the rail head, determined as per the tariff notified by the Indian Railways, proportionate to the actual distance upto the nearest rail head. A

perusal of the chart exhibited elsewhere shows that the assessee has computed the revenue calculating the difference between the cost of transporting the goods by road and by India Railways.

16. We find that the Co-ordinate bench in *ITA No. 11/Gau/2004* in the case of *Assam Carbon Products vs. ACIT (2006) 100 TTJ (Kol) 224*, had occasion to consider a similar situation and held as under:-

*"7.7 The export of impugned goods viz., NH coke at a price of Rs. 137.45 per kg. to MCCP, UK, took place in the aforesaid backdrop. The said price was not determined by the law of demand and supply but was imposed and dictated by MCCP. As stated above, for the purpose of computing the deduction allowable under section 80-IB in case of captive consumption of goods, section 80-IA(8) provides that the market value of such goods as on the date of transfer has to be determined. The Explanation appended to section 80-IA(8) defines 'market value' as under :
" 'market value', in relation to any goods, means the price that such goods would ordinarily fetch on sale in the open market."*

7.8 The term 'open market' has been defined in the Advanced Law Lexicon by P. Ramanatha Aiyar, 3rd Edition, 2005 (Book 3) at page No. 3349 as under :

"Open market – Market in which goods are available to be brought and sold by any one who cares to Prices on an open market are determined by the laws of supply and demand (Investment : International Accounting, Banking).

If the transactions of sale and purchases are effected under conditions enabling every person desirous of purchasing the goods of place orders with such manufacturing unit and obtain supplies, they will constitute purchases from the open market. – Ahura Chemicals Products (P.) Ltd. v. Union of India AIR 1981 SC 1782, 1785."

7.9 In the instant case, the price at which the assessee-company exported goods (NH coke) to MCCP cannot be termed as the open market value. As stated above, the assessee-company was earning marginal profits and even incurring losses prior to entering into collaboration with MCCP for in-house production of NH coke. MCCP agreed to impart the necessary technical know-how to the assessee-company, but only after acquiring at least 51 per cent of the equity share capital of the assessee-company. The said arrangement would however, result in outflow of foreign exchange on account of payment of dividend of MCCP. As such in order to save the foreign exchange reserves of the country, the Government of India and the RBI stipulated that the foreign collaborator would have to necessarily buy-back 55 per cent of the annual production of the impugned goods over a period of 5 years and that the

outflow of foreign exchange on account of dividend should be covered by export earnings of the assessee-company during a period of 7 years from the date of commencement of commercial production.

7.10 *Taking into consideration the fact that MCCP was itself producing NH coke at substantially low cost of production, the said company could not be compelled to buy-back NH coke from the assessee-company at the prevailing market price which was inevitably high due to forces of demand and supply. Even the assessee-company agreed to export NH coke to MCCP at the price dictated by the latter out of compulsion and in order to fulfil the conditions laid down by the Government of India, which was the only available option for acquiring impugned technical know-how for production of NH coke. The said price was undisputedly much lower than the prevailing market value. Nevertheless, since the said substantial part of the fixed cost, the assessee-company agreed to export NH coke to MCCP below the prevailing market prices. However, it should be kept in mind that the assessee-company would never sell Morgan grade NH coke outside the group to any other concern at the said price.*

7.11 *As such taking into consideration the totality of the facts and circumstances of the assessee's case, the price at which it actually exported goods to MCCP could in no way be termed as indicative 'market value' in terms of the Explanation to section 80-IA(8). The price at which the goods were actually exported to MCCP was dictated/imposed by the latter it is not the price which the impugned product would ordinarily fetch on sale in the 'open market' between a willing buyer and a willing seller. The impugned export transactions were not effected under conditions enabling every person desirous of purchasing the goods to place orders with the manufacturing unit and obtain supplies. As such, the impugned export did not constitute open market transaction. If the said price is taken to be the 'market value' in terms of Explanation to section 80-IA(8), the whole purpose of enacting the said section i.e., to value goods in case of captive consumption at the 'open market value', will be rendered nugatory. Reliance in this connection is placed on the ratio of judgment of the Hon'ble Calcutta High Court in the case of Commissioner of Agricultural Income-tax v. Manmatha Nath Mukherjee [1958] 34 ITR 567 (Cal), wherein it was held as under :*

"that a market connoted freedom of bargain and when the agents of the State seized paddy under the authority of some law and paid for it at some rate fixed by themselves they did not create a regulated market; they created no market at all; therefore, the Tribunal erred in taking into account the procurement rate."

7.12 *Now, looking at the case from the other angle, if for any reason, the assessee stopped producing NH coke, the only available option would be to meet its requirement through imports. In fact, since the Morgan grade NH coke was not produced by any other unit in India any person willing to procure the same would*

have to import it from the Morgan group. Prior to setting up of Unit-I, even the assessee had been importing the said intermediary product from Morgan Electrical Carbon Ltd. As such, taking into consideration the fact that the impugned product was an import substitute, the only way to arrive at the representative market value was to take the notional landed cost of import. The term 'open market value' has been defined in the Advanced Law Lexicon (supra) at p. 3349 as under:

"Open market value (OMV). The price which would be paid by a willing buyer to a willing seller at the port of landing, it the open market value of the goods. Byrne v. Low [1972] 3 ALL ER 526, 529 (OBD)."

7.13 *In view of the above, the assessee was completely justified in valuing the internal transfer for captive consumption of NH coke (i.e., transfer of NH coke to Unit-II) at the landed cost. For arriving at such price, the sole way out was to obtain the quotation from the company's erstwhile foreign supplier viz., Morgan Electrical Carbon Ltd. As regards the Assessing Officer's allegation that the proforma invoice from Morganite Electrical Carbonite Ltd. carried the name of the assessee as the consignee but no such sale had taken place, it is submitted that the assessee had followed the established system of obtaining quotation from the foreign supplier in the form of a proforma and calculated the landed cost therefrom. It was submitted before the learned CIT(A) that no commercial establishment would import an item only for the sake of ascertaining the landed cost. Further, as regards the objection of the Assessing Officer that the invoice was not signed, it was submitted that computerized quotations and enquiries are generally not signed. The appellant, however, produced before the learned CIT(A) an authenticated copy of the preforms invoice in original. The learned CIT(A) refused to take the same into consideration on the pretext that the said document was not produced before the Assessing Officer. In this regard, it is submitted that the Assessing Officer never required the assessee to produce authenticated and signed copy of preforms invoice at the time of assessment proceedings. As such, the assessment order was passed without allowing sufficient opportunity to the assessee to adduce the impugned evidence. Thus, the learned CIT(A) should have admitted the additional evidence under rule 46A(1)(d). Copy of the authenticated and signed copy of proforma invoice date 17th Jan., 2000 is enclosed at p. 140 of the paper book.*

7.14 *Furthermore, regarding the objection of the Assessing Officer as to how the assessee relied on the proforma invoice of one date while speaking of the value of transfer of goods to its finishing unit on various dates, it was submitted before the learned CIT(A) that for all bulk purchases, the assessee contracted a price for the entire year and the delivery was obtained in phases. This was done to avoid any price fluctuation with concomitant effect on profit projections. The learned CIT(A) failed to dislodge the said explanation of the assessee. He erred in blindly following the order of the Assessing Officer without giving his own independent findings on the matter."*

17. The Hon'ble Supreme Court in the case of *CIT vs. Jindal Steel and Power Ltd.* [2024] 460 ITR 162 (SC), in somewhat similar situation had considered the following facts:-

"7.2 It was further noticed by the assessing officer that the assessee had supplied power (electricity) to its industrial units for captive consumption at the rate of Rs. 3.72 per unit. Assessing officer took the view that the assessee had declared inflated profits by showing supply of power at the rate of Rs. 3.72 per unit to its sister units i.e., for captive consumption. According to the assessing officer, there was no justification to claim electricity charge at the rate of Rs.3.72 per unit for supply to its own industrial units when the assessee was supplying power to the State Electricity Board at the rate of Rs. 2.32 per unit. Assessing officer observed that the profit calculated by the assessee (power generating units) at the rate of Rs. 3.72 per unit was not the real profit; the price per unit was inflated so that profit attributable to the power generating units could qualify for deduction from the taxable income under the Act. Thus, it was held to be a colourable device to reduce taxable income. On such an assumption, the assessee was asked to explain its claim of deduction under section 80-IA of the Act which the assessee complied with."

17.1. And after considering Section 80IA(8) of the Act read with Explanation thereon, the Hon'ble Supreme Court held as under:-

"26. Under the electricity regime in force, an industrial consumer could purchase electricity from the State Electricity Board or avail electricity produced by its own captive power generating unit. No other entity could supply electricity to any consumer. A private person could set up a power generating unit having restrictions on the use of power generated and at the same time, the tariff at which the said power plant could supply surplus power to the State Electricity Board was also liable to be determined in accordance with the statutory requirements. In the present case, as the electricity from the State Electricity Board was inadequate to meet power requirements of the industrial units of the assessee, it set up captive power plants to supply electricity to its industrial units. However, the captive power plants of the assessee could sell or supply the surplus electricity (after supplying electricity to its industrial units) to the State Electricity Board only and not to any other authority or person. Therefore, the surplus electricity had to be compulsorily supplied by the assessee to the State Electricity Board and in terms of Sections 43 and 43A of the 1948 Act, a contract was entered into between the assessee and the State Electricity Board for supply of the surplus electricity by the former to the latter. The price for supply of such electricity by the assessee to the State Electricity Board was fixed at Rs. 2.32 per unit as per the contract. This price is, therefore, a contracted price. Further, there was no room or any elbow space for negotiation on the part of the assessee. Under the statutory regime in place, the assessee had no other alternative

but to sell or supply the surplus electricity to the State Electricity Board. Being in a dominant position, the State Electricity Board could fix the price to which the assessee really had little or no scope to either oppose or negotiate. Therefore, it is evident that determination of tariff between the assessee and the State Electricity Board cannot be said to be an exercise between a buyer and a seller in a competitive environment or in the ordinary course of trade and business i.e., in the open market. Such a price cannot be said to be the price which is determined in the normal course of trade and competition.

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

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

18. Considering the facts of the case in totality, in light of the judicial decision discussed hereinabove, we could not find any fault in the savings approach adopted by the assessee as explained hereinabove. Therefore, we do not find any reason to interfere with the findings of the Id. CIT(A). This Ground is also dismissed.

19. In the result, appeal of the revenue is dismissed.

Order pronounced in the Court on 17th December, 2024 at Mumbai.

Sd/-

(BEENA PILLAI)
JUDICIAL MEMBER

Sd/-

(NARENDRA KUMAR BILLAIYA)
ACCOUNTANT MEMBER

Mumbai, Dated 17/12/2024

**S.P.*

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. संबंधित आयकर आयुक्त / Concerned Pr. CIT
4. आयकर आयुक्त (अपील)/ The CIT(A)-
5. विभागीय प्रतिनिधि ,आयकर अपीलीय अधिकरण, मुंबई /DR,ITAT, Mumbai,
6. गार्ड फाई/ Guard file.

आदेशानुसार/ BY ORDER,
TRUE COPY

Assistant Registrar
आयकर अपीलीय अधिकरण
ITAT, Mumbai