

**IN THE INCOME TAX APPELLATE TRIBUNAL,  
'C' BENCH, KOLKATA**

**Before Shri Rajesh Kumar, Accountant Member  
&  
Shri Pradip Kumar Choubey, Judicial Member**

**I.T.A. No. 1488/KOL/2024  
Assessment Year: 2020-2021**

***Orient Paper & Industries Limited,.....Appellant  
13<sup>th</sup> Floor, Birla Building,  
9/1, R.N. Mukherjee Road, BBD Bag,  
Kolkata-700001  
[PAN:AAACO3279J]***

**-Vs.-**

***Deputy Commissioner of Income Tax,.....Respondent  
Circle-5(1), Kolkata,  
Aayakar Bhawan,  
P-7, Chowringhee Square,  
Kolkata-700069***

**Appearances by:**

*Shri Rakesh Jhunjunwala, FCA, Shri Akkal Dudhwewala,  
FCA and Ms. Vidhi Lexlia, AR, appeared on behalf of the  
assessee*

*Shri Praveen Kishore, CIT (D.R.), appeared on behalf of  
the Revenue*

**Date of concluding the hearing: September 25, 2024  
Date of pronouncing the order: December, 17, 2024**

**O R D E R**

**Per Rajesh Kumar, Accountant Member:-**

The present appeal is directed at the instance of assessee against the final order of Id. Assessing Officer, Assessment Unit , National Faceless Assessment Centre dated 27<sup>th</sup>June, 2024

passed for Assessment Year 2020-21 passed in pursuance to Dispute Resolution Panel( hereinafter referred to as the DRP).

2. The first issue raised by the assessee in ground no. 1 to 5 is against the final order passed by the Assessing Officer u/s 143(3) r.w.s. 144(13) of the Act in pursuance to Dispute Resolution Panel(DRP)-2Delhi making a downward adjustment of Rs.37,36,51,214/- in respect of transfer value of power by the Captive Power Plant at Amlai, Madhya Pradesh to manufacturing unit of the assessee.

3. The facts in brief are that the assessee is engaged in the business of manufacture and sale of paper, electronic consumer durables, chemicals, industrial blowers and air pollution control equipment etc. The assessee had set up a 55 MW Captive Power Plant (CPP) at Amlai, District Shahdol, Madhya Pradesh during the Financial Year 2012-13 to meet the power requirements of its paper and chemicals manufacturing unit at the same location. The electricity generated by Captive Power Plant was transferred to and wholly consumed by the assessee's Manufacturing Unit located at Amlai, Madhya Pradesh. The profits of the said CPP qualified for deduction under section 80IA (4)(iv) of the Act and assessee accordingly prepared the standalone accounts for the eligible unit in terms of section 80IA(5)/(7) of the Act the copy whereof is available at page no. 87 to 92 of the paper book. The transfer to power by the CPP to the manufacturing was reported as specified domestic transactions in terms of section 80IA(8) r.w.s. 92 BA of the Act and was duly reported by the Tax Auditor

in form no. 3CEB. The specified domestic transactions were bench marked following comparable uncontrolled pricing method (hereinafter referred to CUP). The transfer of power was bench marked at the rate fixed as per MPERC retail orders i.e. the price at which the manufacturing unit would have otherwise bought power from unrelated third which worked out to weighted average of Rs. 7.756 per unit. The AO referred the issue to TPO for examining the ALP of the specified domestic transactions. The TPO in his order passed u/s 92CA(3) of the Act dated 18.01.2023 accepted all cost adjustments to the transfer price of power except the value of energy charges bench marked by the assessee Rs. 5.25 to 6.50 per unit. The eligible profits of the Captive Power Plant after adjusting for the depreciation under section 80IA stood at Rs.34,22,32,964/-. The TPO by following the decision of Hon'ble Calcutta High Court in the case of CIT Vs ITC Ltd (236 taxman 612) benchmarked the energy charge for power transferred by the CPP to the manufacturing unit at a price fixed by MPERC for power generation station i.e. Bina Power Project for selling power to power distribution companies at Rs. 3.404 per unit and accordingly made the ALP adjustment of Rs.37,36,51,214/- in respect of specified domestic transactions i.e. transfer of power by CPP to the manufacturing Unit of the assessee during the year. On appeal the DRP confirmed the order of TPO and hence the assessee in appeal before the tribunal.

4. We have heard the rival contentions and perused the records placed before us carefully. At the outset, we note that the

issue is settled once and for all by the decision of the Hon'ble Apex Court in the case of CIT -vs.- Jindal Steel & Power Limited reported in 157 taxmann.com 207 (SC) and the order of the Calcutta High Court in the case of CIT Vs ITC Ltd (supra) which has been relied by the TPO for benchmarking methodology has been reversed. The Hon'ble Apex Court has held that the market value or rate at which the power is supplied by the State Electricity Board to the industrial consumers has to be taken to be the market value /price for computing the deduction u/s 80IA of the Act and accordingly that should be construed to be the market value of electricity. The relevant finding of the Court is extracted below:-

*“There is no dispute that respondent-assessee is entitled to deduction under Section 80-IA of the Act for the relevant assessment year. The only issue is with regard to the quantum of profits and gains of the eligible business of the assessee and the resultant deduction under Section 80 IA of the Act. The higher the profits and gains, the higher would be the quantum of deduction. Conversely, if the profits and gains of the eligible business of the assessee is determined at a lower figure, the deduction under Section 80-IA would be on the lower side. Assessee had computed the profits and gains by taking Rs. 3.72 as the price of electricity per unit supplied by its captive power plants to its industrial units. The basis for taking this figure was that it was the rate at which the State Electricity Board was supplying electricity to its industrial consumers. Assessing officer repudiated such claim. According to him, the rate at which the assessee had supplied the surplus electricity to the State Electricity Board i.e., Rs. 2.32 per unit, should be the market value of electricity. Assessee cannot claim two rates for the same good i.e., electricity. When it supplies electricity to the State Electricity Board at the rate of Rs. 2.32 per unit, it cannot claim Rs. 3.72 per unit for supplying the same electricity to its sister concern i.e., the industrial units. This view of the assessing officer was confirmed by the CIT (A).*

*21. We have noticed that the Tribunal had rejected such contention of the revenue which has been affirmed by the High Court. In this proceeding, we are called upon to decide as to which of the two views is the correct one.*

22. Reverting back to sub-section (8) of Section 80-IA, it is seen that if the assessing officer disputes the consideration for supply of any goods by the assessee as recorded in the accounts of the eligible business on the ground that it does not correspond to the market value of such goods as on the date of the transfer, then for the purpose of deduction under Section 80-IA, the profits and gains of such eligible business shall be computed by adopting arm's length pricing. In other words, if the assessing officer rejects the price as not corresponding to the market value of such good, then he has to compute the sale price of the good at the market value as per his determination. The explanation below the proviso defines market value in relation to any goods to mean the price that such goods would ordinarily fetch on sale in the open market. Thus, as per this definition, the market value of any goods would mean the price that such goods would ordinarily fetch on sale in the open market.

23. This brings to the fore as to what do we mean by the expression "open market" which is not a defined expression.

24. Black's Law Dictionary, 10th Edition, defines the expression "open market" to mean a market in which any buyer or seller may trade and in which prices and product availability are determined by free competition. P. Ramanatha Aiyer's Advanced Law Lexicon has also defined the expression "open market" to mean a market in which goods are available to be bought and sold by anyone who cares to. Prices in an open market are determined by the laws of supply and demand.

25. Therefore, the expression "market value" in relation to any goods as defined by the explanation below the proviso to sub-section (8) of Section 80 IA would mean the price of such goods determined in an environment of free trade or competition. "Market value" is an expression which denotes the price of a good arrived at between a buyer and a seller in the open market i.e., where the transaction takes place in the normal course of trading. Such pricing is unfettered by any control or regulation; rather, it is determined by the economics of demand and supply.

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.*

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.

Conclusion:-

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”.*

5. We further note that ld DRP did not follow the said decision of the Hon'ble Apex Court in the case of CIT -vs.- Jindal Steel & Power Limited(supra) by holding that the provisions of section 80IA(6) of the Act were subsequently inserted by the Legislature wherein the above decision was not considered. The reasoning of the DRP appears to be incorrect in view of the fact that the same argument was raised before Bombay high court by the revenue in the case of CIT Vs Reliance Industries Ltd. (161 taxmann.com 423) wherein it has been held that insertion of section 80IA(6) of the Act had not made any change in law and the decision of the Hon'ble Apex Court in the case of CIT -vs.- Jindal Steel & Power Limited(supra) continued to hold good. So far as the DRP observations on the point that Hon'ble Apex Court did not have the occasion to examine this issue in the light of the concept of arm's length value brought in by way of transfer pricing provisions in section 92BA of the Act, we note that this aspect has been considered by the Coordinate bench in the case of DCIT Vs Rungta Mines Ltd. ITA No. 286/Kol/2023 and rejected the revenue's arguments.

6. Therefore considering the above facts and circumstances and respectfully following the decision of the Hon'ble Apex Court in the case of Jindal Steel & Power Limited (supra), we set aside the order of ld. Assessing Officer and direct the ld. Assessing Officer to apply the rate at which the electricity was supplied by

the State Electricity Board to the consumers. Accordingly, Grounds No. 1 to 5 are allowed.

7. The second issue raised by the assessee in ground no. 6 is against the restricting the deduction claimed u/s 80IA of the Act to the extent of business income as against the gross total income which was confirmed by DRP. We note that even this issue is squarely covered by the decision of Hon'ble Apex Court in the case of CIT Vs Reliance Energy Ltd. (127 taxmann.com 69). In the said decision the Hon'ble Court held that deduction u/s 80IA has to be allowed with reference to gross total income and not business income alone while deciding an issue raised whether the quantum of deduction u/s 80IA has to be restricted by treating the eligible business as the only source of income or whether it can be allowed against any source even other than the business income. Accordingly, we direct the AO to allow deduction u/s 80IA of the Act with reference to gross total income as assessed finally. Accordingly the ground raised by the assessee is allowed.

6. The issue raised in Ground No. 7 is against the order of ld. Assessing Officer in not allowing the assessee's claim of Rs.45,000/- on the ground that TDS was not deducted at source and the same is not allowable in terms of the provisions of section 40(a)(ia) of the Act by ignoring the fact that the TDS was paid within the due date of filing the return of income.

7. After hearing the rival contentions and perusing the relevant material placed before us, we find that the issue requires fresh adjudication at the level of ld. Assessing Officer whether the tax has been deducted at source and paid before the due date of filing of the return. Though the assessee has furnished the necessary documents substantiating the claim of the assessee we are of the opinion that let it be examined at AO's level. In the present case the assessee itself disallowed the amount *suo motto* in the return of income but that is not a bar for making claim before the appellate body for allowing/deleting the said disallowance as it was wrongly disallowed. The case of the assessee finds support from the decision of the jurisdiction High /Court in the case of CIT Vs Britannia Industries Ltd (83 taxmann.com 365 and Hon'ble Bombay High /court in the case of CIT Vs Pruthvi Brokers & others(349 ITR 336). In our considered opinion the fresh claim made by the assessee is allowable provided it satisfied the conditions for admissibility. Accordingly, we restore the issue to the file of ld. Assessing Officer with a direction to allow the claim if TDS is found to be deposited before the due date of filing of the return. This ground no. 7 of appeal is allowed for statistical purposes.

8. The issue raised in Ground No. 8 is *qua-non* book profit taken under section 115JB in the ITNS computation sheet at Rs.74,64,00,256/- as against the correct figure of Rs.15,43,27,305/-.

9. The ld. Authorized Representative for the assessee while referring to page no. 179 of the paper book, which is an intimation under section 143(1) passed by the Centralized Processing Centre in assessment year 2020-21, submitted the deemed total income under section 115JB was taken at Rs.15,43,27,305/- as per the assessee as well as per the Department. However, in the ITNS computation sheet, the figure was wrongly taken at Rs.74,64,00,256/-. There appears to be an apparent mistake by the ld. Assessing Officer as the amount was wrongly taken in the ITNS computation sheet. Accordingly, we restore the issue to the file of ld. Assessing Officer to examine the issue afresh and correct the mistake. This ground no. 8 is allowed for statistical purposes.

10. Similarly in Ground No. 9, the assessee has challenged the mistake in ITNS computation sheet annexed to the order, wherein the income under the head "other sources" was stated at Rs.3,34,56,807/- instead of correct figure of Rs.40,50,884/-.

11. After examining the facts before us, we feel that there is an error at the end of the ld. Assessing Officer in taking the figure under the head "other income" in the ITNS computation sheet. Accordingly, we restore the issue to the file of ld. Assessing Officer to examine afresh and correct the mistake. This ground no. 9 is also allowed for statistical purposes.

12. The issue raised in Ground No. 10 & 11 is related to the issue as decided in Ground No. 8, wherein we have restored the

matter to the file of ld. Assessing Officer for examination and taking the correct figure of book profit under section 115JB of the Act. Therefore, the Ground No. 11 is also restored to the file of ld. Assessing Officer for making the correct computation of book profit. This ground no. 10 & 11 of appeal are allowed for statistical purposes.

13. The other grounds raised by the assessee are general in nature and need no adjudication.

**14. In the result, the appeal of the assessee is partly allowed for statistical purposes.**

Order pronounced in the open Court on 17/12/2024.

Sd/-

**(Pradip Kumar Choubey)**  
**Judicial Member**

Sd/-

**(Rajesh Kumar)**  
**Accountant Member**

**Kolkata, the 17<sup>th</sup> day of December, 2024**

*Copies to :(1) Orient Paper & Industries Limited,  
13<sup>th</sup> Floor, Birla Building,  
9/1, R.N. Mukherjee Road, BBD Bag,  
Kolkata-700001*

*(2) Deputy Commissioner of Income Tax,  
Circle-5(1), Kolkata,  
Aayakar Bhawan,  
P-7, Chowringhee Square, Kolkata-700069*

*(3) DC/ACIT TP-2, Kolkata;*

*(4) Dispute Resolution Panel-2, New Delhi;*

*(5) The Departmental Representative;*

(6) *Guard File*  
*TRUE COPY*

*By order*

*Assistant Registrar,  
Income Tax Appellate Tribunal,  
Kolkata Benches, Kolkata*

***Laha/Sr. P.S.***