

आयकर अपीलीय अधिकरण, कोलकाता पीठ "सी", कोलकाता
IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH: KOLKATA
श्री प्रदीप कुमार चौबे, न्यायिक सदस्य एवं श्री संजय अवस्थी, लेखा सदस्य के समक्ष
[Before Shri Pradip Kumar Choubey, Judicial Member & Shri Sanjay Awasthi, Accountant Member]

I.T.A. No. 968/Kol/2024
Assessment Year: 2016-17

DCIT, Circle-5(1), Kolkata	Vs.	Dhunseri Ventures Ltd. (PAN: AABCD 1597 K)
Appellant / (अपीलार्थी)		Respondent / प्रत्यर्थी

Date of Hearing / सुनवाई की तिथि	30.04.2025
Date of Pronouncement/ आदेश उद्घोषणा की तिथि	15.05.2025
For the assessee / निर्धारिती की ओर से	Shri Akkal Dudhwewala, A.R
For the revenue / राजस्व की ओर से	Shri Praveen Kishore, CIT DR

ORDER / आदेश

Per Pradip Kumar Choubey, JM:

This is the appeal preferred by the revenue against the order of Commissioner of Income Tax (Appeal)-22, Kolkata (hereinafter referred to as the Ld. CIT(A)] dated 31.01.2024 for AY 2016-17.

2. It appears from the report of the registry that the appeal has been filed after a delay of 31 days. At the time of hearing the counsel of the assessee explained the reason for delay in filing the appeal. The Ld. A.R did not raise any objection in condoning the delay. Keeping in view, the submission made by the A.R. and the judicial pronouncement that a case should be decided on merit not on technical issue, the delay is hereby condoned.

3. Brief facts of the case of the assessee are that the assessee is engaged in the business of manufacture of PET regimes having its factory at Haldia & West Bengal. For AY 2016-17 the assessee filed return of income disclosing total income under normal computational provisions at Rs. 33,26,97,040/- and book profit of Rs. 53,43,86,898/-. The AO assessed total income under normal computational provisions at Rs. 46,03,79,472/- and books profit at Rs. 53,43,86,898/- u/s 115JB after making certain addition and disallowances. The case of the assessee was referred to Transfer Pricing scrutiny in respect of international transaction and specified domestic transaction. The TPO in the order u/s 92CA proposed downward adjustment of Rs. 12,69,60,600/- in respect of deduction claimed u/s 80IA of the Act. During the relevant year, the assessee had incurred expenditure of Rs. 7,21,832/- towards club fees are inter alia included Rs. 5,56,410/- being interest free and monthly subscription for clubs at Rs. 1,65,422/- being cost of service and facility provided at the club. The AO disallowed the expenditure on the ground of being personal in nature and not related to the business of the assessee.

4. Aggrieved by the same, the assessee preferred an appeal before the Ld. CIT(A) wherein the appeal of the assessee has been partly allowed as the Ld. CIT(A) has allowed the appeal of the assessee on all the grounds except the grounds relates to the non-granting of credit of DDT tax paid by the company.

Being aggrieved and dissatisfied the revenue has preferred an appeal before us.

5. The Ld. D.R challenges the very impugned order of Ld. CIT(A) thereby submitting that the Ld. CIT(A) has erred in not appreciating that TPO has applied

external CUP as most appropriate method (MAM) which is one of methods or determining ALP and further not discussed in the body of the order as to why the same is not the MAM. The Ld. D.R has further submitted that the Ld. CIT(A) has erred in not appreciating the fact that the assessee is generating units account as such claimed any amount of benefit u/s 80IA of the Act computed on the basis of rate change charged by the distributors licensee from the consumers. The benefit can only be claimed on the basis of rates fixed by the Tariff Regulation Commission for sale of electricity by generating companies to the distributors companies. It has further been argued by the Ld. D.R that the Ld. CIT(A) has erred in not appreciating that the manufacturers cannot be compensated based on the rates impugned for distributor and thereby ignoring the clear provision of Rule 10B(2)(b) of the Rules, 1962 with specified funding assets, risk to the essential comparability factories for reference. The further argument of Ld. D.R is that the facts and circumstances of the case , the Ld. CIT(A) has assumed an external CUP as an internal CUP and also considered the same to be most appropriate method the price at which a distributor has sold to a third party considered as price at which the assessee has been sold the same by the distributor wholly arrived at the decision by relying on the incorrect factual premises to decide the most appropriate method.

6. Contrary to that the Ld. A.R supports the impugned order thereby submitting that for relevant year the assessee has claimed deduction u/s 80IA in respect of power plant set up in West Bengal. The electricity generated by the power plant was transferred to the PET regimes manufacturing units. Having regard to the provision of section 80IA (8) the electricity transferred from the power plant to the PET regimes manufacturing unit was valued by the assessee with reference to the amount charged by the concerned State Electricity Board in this appeal raised opined the assessee. The Ld. AR further submits that the assessee worked out the transfer price of power of both CPPs aggregating to Rs. 53.29 crores after deducting expenses incurred by these two thermal plants and thereafter claimed as deduction u/s 80IA of the Act. He has submitted Form 10CB for PU1 and PU 3 at Haldia for AY 2016-17. The Ld. Counsel further drew the attention of the Court that the TPO had rejected the methodology applied by the assessee

by relying on the decision of Hon'ble Calcutta High Court has since been reversed by the Hon'ble Supreme Court in their lead order in the case of CIT vs. Jindal Steel and Power Ltd. reported in 157 taxmann.com 207 (Sc). The Ld. Counsel further submits that the Ld. CIT(A) has allowed the appeal of the assessee by placing his reliance passed by the Hon'ble ITAT, Kolkata in the assessee's own case for AY 2015-16 in ITA No. 1989/Kol/2019. The Ld. A.R has also placed following judicial pronouncements:

- i) CIT-LTU vs. Reliance Industries Ltd. (161 taxmann.com 423) (Bom-HC)*
- ii) PCIT vs. Nalwa Steel and Power Ltd. (ITA NO. 725/2019)(Delhi-HC)*
- iii) DCIT vs. Rungta Mines Ltd. (ITA No. 286/Kol/2023) (ITAT-Kol)*
- iv) DCIT vs. IFB Agro Industries Ltd. (ITA Nos. 490 & 491/Kol/2019)(ITAT-Kol)*
- v) DCIT vs. Shyam Sel and Power Ltd. (IT(S.S)A No. 129/Kol/2023)(ITAT-Kol)*
- vi) DCIT vs. IVL Dhunseri Petrochem Industries Pvt. Ltd. (ITA No. 1712/Kol/2024)(ITAT_Kol)*
- vii) DCIT vs. Birla Corporation Ltd. (ITA NO. 1024/Kol/2023)(ITAT-Kol)*
- viii) Tata Chemicals vs. DCIT (ITA No. 3093/Mum/2023) (ITAT, Kol)*
- ix) The Ramco Cements Ltd. vs. DCIT (ITA NO. 1897/Chny/2017)(ITAT-Chennai)*
- x) Bhagwati Power and Steels Ltd. vs. ACIT (163 taxmann.com 253)(ITAT Raipur)*

7. Upon hearing the submission of the counsel of the respective parties and on perusal of the order passed by the Ld. CIT(A), the sole grievance of the revenue in the several grounds raised in the appeal related to the action of Ld. CIT(A) deleting the disallowance the deduction of Rs. 12,69,60,600/- claimed u/s 80IA of the Act on account of downward transfer pricing adjustment of Rs. 35,67,10,110/- made by the TPO in respect of transfer price of the eligible captive power plat (In short CPP) at Haldia and West Bengal. On perusal of the order passed by the TPO, it appears to us that TPO has rejected the submission put forth by the assessee, keeping in view the judgment rendered by the Hon'ble Calcutta High Court in the case of CIT vs. ITC Ltd.. It is pertinent to mention here that the reliance placed by the TPO on the decision of Hon'ble Calcutta High Court in the case of ITC Ltd. has since been reversed by the Hon'ble

Supreme Court in the case of CIT vs. Jindal Steel and Power Ltd. in which the Hon'ble Apex Court has held thus:

“The Hon'ble Supreme Court has held that the assessee who are engaged in industrial activities and have set up captive power plants, then the market value of power supplied by assessee' CPP to its industrial units should be computed by considering the rate of transfer power at which the State Electricity Board supplied power to consumers in the open market and not comparing it with the rate of transfer of power when sold by the assessee or power generation station to the State Electricity Board. The Hon'ble Apex Court note that the price at which surplus power was supplied by the assessee to the State Electricity Board was determined entirely by State Electricity Board in terms of statutory regulations and contractual terms and that such a price could not be equated with market value as was understood for purpose of Section 80-IA(8) of the Income Tax Act, 1961. Instead, the Hon'ble Apex Court held that the rate at which the State Electricity Board supplied electricity to industrial consumers would have to be taken as market value for computing deduction u/s 80-IA. Thus, in totality, the Hon'ble Apex Court has concluded that the market value of the power supplied by CPP to an industrial unit should be computed by considering the rate at which the State Electricity Board supplied power the industrial consumers in the open market and not by comparing it with the rate power when sold by the Assessee to the State Electricity Board. The Hon'ble Supreme Court emphasized that the rate contended by the Revenue was not the rate at which industrial consumer could have purchased power in the open market.”

8. It is further important to mention here that in a later judgment of Hon'ble Calcutta High Court passed in the case of CIT vs. Star Paper Mills Ltd. has followed the decision of Hon'ble Apex Court passed in CIT vs. Jindal Steel And Power Ltd. upheld the decision of Hon'ble ITAT passed in ITA NO. 214/Kol/2024 and the relevant portion of the judgment is as under:

"The learned Tribunal had followed the assessee's own case for the assessment year 2016-17 in ITA No. 127/Kol/2020-21 dated 26.10.2021. On the date when the learned Tribunal followed the assessee's own case for the assessment year 2016-17, the order passed by the learned Tribunal was not put to challenge by filing an appeal before this Court under Section 260A of the Act. In fact, this has been noted by the learned Tribunal in paragraph 8 of the impugned order. We are informed by the learned senior standing counsel for the appellant that the revenue has challenged the order passed by the learned Tribunal for the assessment year 2016-17 and ITAT/20/2025 is pending before this Court. Admittedly, there would be gross delay in filing the appeal since the order impugned in the said appeal passed by the learned Tribunal is dated 26.10.2021. Be that as it may, the legal issue involved in the instant case has since been settled by the Hon'ble Supreme Court in the case of Commissioner of Income Tax Vs. Jindal Steel and Power Limited reported at [2024] 460 ITR 162 (SC). The facts dealt with by the Hon'ble Court in the said case are more or less identical to the facts of the case on hand. As in the case before the Hon'ble Supreme Court, the assessee before us having found that the electricity supplied by the State Electricity Board was inadequate to meet the requirement of its industrial unit, they set up captive power generating unit to supply electricity to its industrial unit which was done at a particular rate. The surplus power, if any, generated was to be wheeled out to the Electricity Board grade pursuant to an agreement between the State Electricity Board and the assessee at a rate fixed by the State Electricity Board. The question which arose for consideration is that

as to the quantum of deduction which the assessee would be entitled to claim under Section 80IA of the Act. The assessing officer did not accept the case of the assessee that the market value of the electricity should be computed based on the rates fixed by the State Electricity Board for the electricity which is purchased by the assessee and held that there was excessive claim of deduction on captive consumption and restricted the deduction claimed by the appellant under Section 80IA of the Act.

The assessee went before the Disputes Resolution Plan (DRP) who affirmed the view taken by the assessing officer which was put to challenge before the learned Tribunal. As noted above, the learned Tribunal had followed the decision in the assessee's own case for the assessment year 2016-17. Since no appeal was filed by the Department at the relevant time, namely, at the time when the learned Tribunal decided the matter and passed the impugned order, the learned Tribunal cannot be faulted for having followed the assessee's own case for the said assessment year. Therefore, it will be a good ground to dismiss the revenue's appeal. Nonetheless, since Ms. Smita Das De, learned senior standing counsel assisted by Mr. Prithu Dudheria, learned senior standing counsel for the appellant/revenue have elaborately made submissions on the legal aspects, the Court is constrained to take a decision on merits. For the purpose of taking a decision on merits, we need not labour much as we are guided by the decision of the Hon'ble Supreme Court in Jindal Steel and Power Limited. In fact, one of the appeals which was dealt with by the Hon'ble Supreme Court was an appeal arising out of an order passed by the Hon'ble Division Bench of this Court in the case of CIT Vs. ITC reported at [2015] 64 taxmann.com 214 (Cal.). In fact, the appeals were heard along with the bunch of appeals and the appeal against the decision in ITC Ltd. by the Hon'ble Division Bench of this Court was CA No. 992012016 which was filed by the assessee and which was allowed by the Hon'ble Supreme Court and this aspect was clarified by the Hon'ble Supreme Court upon mentioning by order dated 7.12.2023. At this juncture, it will be beneficial to note the law laid down by the Hon'ble Supreme Court as regards computation of the market value of the power supplied by the assessee to its industrial units from the captive power generating plant, should it be at the rate as suggested by the assessee or it should be computed at the market value. The answer to this query is contained in the following paragraphs of the judgment of the Hon'ble Supreme Court.

9. It is further important to mention here that the ITAT, Kolkata has passed an order in favour of the assessee for AY 2015-16 in ITA NO. 1989/Kol/2019, the relevant findings are as follows:

“9.5. We have heard rival submissions and perused the material as placed before us carefully including the impugned order and case laws relied upon by the assessee and the revenue. The undisputed facts in brief are that the assessee has two CPPs or eligible units generating electricity which was consumed captively by other non-eligible units i.e PET Resin Manufacturing Units(hereinafter referred to as Non Eligible Units). for carrying out the manufacturing. Noteworthy that non eligible units have also consumed power by purchasing the same from SEB. We observe that the assessee determined the ALP of specified domestic transactions at rate ranging from Rs. 7.66 per unit to Rs. 7.87 per unit which was the Average Annual Landed Cost (AALC) at which the non-eligible unit procured power from SEB. Thus, the assessee followed internal CUP for bench marking the specified domestic transactions of transfer of power from CPPs to non eligible unit at average landed cost at which the non eligible units procured electricity from the SEB by taking non eligible units as the tested party in the TP Study Report and accordingly ALP of the power captively consumed has been benchmarked at ALC of power purchased by the tested party from SEB. The assessee also duly reported these transactions in the audited report in Form 3CEB. Accordingly to the TPO the

average rate of Rs. 3.47 per unit calculated on the basis of sale data of power by independent CPPs/PPs as determined by various tariff orders would be the ALP of the domestic specified transactions. Accordingly the TPO recommended adjustment to the tune of Rs. 6,75,22,00,000/- and the AO passed the draft assessment accordingly. According to the assessee the internal CUP has to be used for the determination of ALP at which the non-eligible units/manufacturing units procured the power from unrelated party i.e. SEB. Now the issue before us whether the CUP method can be applied to bench mark specified domestic transactions of transferring power by CPPs to non eligible units. We have also perused the provisions as contained in Rule 10B of the Income Tax Rules which provide as to where the CUP can be and has to be applied. We observe from the said rule 10B that we have to see the price at which the property, goods or service has been acquired under similar market conditions. It is also settled that choice of tested party is of lesser significance for the purpose of application of CUP method but instead key factor in application of CUP is product comparability and similar market conditions. Further the CUP method can be classified into two categories i.e. internal CUP method and external CUP method. Under internal CUP method the transactions between the AE's involving buying or selling of goods and services are comparable to the transactions entered into by the AE's with the unrelated parties for buying and selling similar goods and service under similar circumstances. However when such internal data was not available then one may apply external CUP which involves comparison of price paid/charged between the two unrelated parties in uncontrolled condition for transactions entered into between the AE's. In the instant case as noted elsewhere hereinabove that the CPPs bench marked the transactions with non eligible units at a rate at which power is supplied by the SEB to the non eligible units and therefore is the prevailing rate at which the power has been supplied by the SEB to other parties/factories located in the same geographical areas/location. It is also undisputed that both CPPs as well as SEB supplied/sold power during the year and thus there is no timing difference as well. Thus we are in agreement with the conclusion of Ld. CIT(A) that transactions of purchase of power by the non eligible units from SEB fulfil the internal CUP parameters vis product comparability and similar market conditions and thus the ALC paid by the non eligible units to the SEB represented the internal comparable ALP.

9.6. According to Ld. CIT(A), the excess surplus power sold in the open market at a price which was lower than the price at which the manufacturing units procured electricity from the SEB cannot be the arm's length price of the power. Thus, the Ld. CIT(A) reversed the order of TPO/AO by directing that the price at which the SEB sold power in the open market under uncontrolled conditions is reliable internal CUP and accordingly came to the conclusion that ALC notified by the SEB is a fair, reliable and reasonable basis to bench mark the power procured by non-eligible unit from the eligible unit. The Ld. CIT(A) while allowing the appeal of the assessee has relied on the series of decisions namely PCIT vs. Gujarat Alkalies & Chemicals Ltd. (supra), CIT vs. Godawari Power & Ispat Ltd. (supra) and Reliance Infrastructure Ltd. in ITA No. 2180 of 2011 (Bombay-High Court) and the decision of Coordinate Bench of Kolkata in the case of DCIT vs. Birla Corporation Ltd. in ITA No. 971/Kol/2012 for AY 2008-09. We note that in all the above decisions, the AALC at which the power is purchased by the non-eligible unit of the assessee was considered to be the fair market value / transfer price of power supplied by the eligible unit to the non-eligible unit. Before us, the Ld. A.R also argued that non-eligible units has to be held as a tested party and AALC at which the power was purchased by the tested party from SEB/ third party is the most appropriate ALP to bench mark the transfer of power supplied by eligible unit to noneligible unit. The said view of the assessee is squarely covered by the two decisions of Hon'ble Benches namely Star Paper Mills Ltd. vs. DCIT (supra) and DCIT vs. Balrampur Chini Mills Ltd. (supra). Having considered the ratio laid down, we are of the view that there is no infirmity in the order of Ld. CIT(A) which is a very reasoned and speaking order passed after following the decision of various Hon'ble High Courts and decision of Co-ordinate Benches of the Tribunal. We have also noted the arguments advanced by the ld DR that average rate of Rs. 3.47 per unit as calculated on the basis of sale data of power by independent CPPs

/IPPs as determined by various tariff orders should be taken as ALP however can not overlook the fact that the said transactions did not take place under similar market conditions and that price cannot be taken as ALP under CUP method. The power supplied by the CPPs to non eligible units was business to consumer (commonly known As B2C) meaning thereby the rate at which the ultimate consumers can purchase the power for their consumption is relevant. In the instant case before us, the B2C market comprises the sale of power by SEB and other distribution companies to different categories of consumers. Thus, the power sold by other CPPs/IPPs to unrelated parties was in altogether different market conditions which is business to business commonly known as B2B model and the said rate represented the rate at which the distribution companies purchased power from generation companies. Further no consumer can buy the power in the open market at a rate generation companies sell power to distribution companies. Thus, we do not find any force in the contentions of the ld DR that rate at which the power was sold to unrelated parties by the CPP is the ALP. We also note that decision of the Calcutta High court in the case of CIT Vs ITC 236 Taxman 612 which was relied by the TPO/AO and the functional dissimilarity between CPPs and SEB have been considered by the coordinate bench of the tribunal in the case of Star Paper Mills Ltd Vs DCIT in ITA No. 127/Kol/2021. Therefore, we are inclined to uphold the order of Ld. CIT(A) by holding that the ALC at which the power is procured by non-eligible units from SEB is the most appropriate ALP to bench mark the specified domestic transactions and accordingly the order passed by Ld. CIT(A) is upheld by dismissing the revenue's appeal on this issue. The grounds of appeal pertaining to this issue are dismissed.

10. Keeping in view, the judicial pronouncement as discussed above and considering the facts of the assessee, we do not find any illegality in the impugned order. The Ld. CIT(A) has not only discussed the facts rather discussed judicial pronouncement on the issue of assessee passed by the Hon'ble High Courts as well as ITAT and thereafter allow the appeal of the assessee on this issue. We do not find any infirmity in the impugned order, accordingly, the order passed by the Ld. CIT(A) is hereby affirmed and the appeal of the revenue is dismissed.

In the result, the appeal filed by the revenue is dismissed.

Order is pronounced in the open court on 15th May, 2025

Sd/-

Sd/-

(Sanjay Awasthi /संजय अवस्थी)
 Accountant Member/लेखा सदस्य

(Pradip Kumar Choubey /प्रदीप कुमार चौबे)
 Judicial Member/न्यायिक सदस्य

Dated: 15th May, 2025

SM, Sr. PS

Copy of the order forwarded to:

1. Appellant- DCIT, Circle-5(1), Kolkata
2. Respondent – Dhunseri Ventures Ltd.,4A, Dhunseri House, Woodworn park,
Kolkata-700020
3. Ld. CIT(A)- 22, Kolkata
4. Ld. Pr. CIT- , Kolkata
5. DR, Kolkata Benches, Kolkata (sent through e-mail)

True Copy

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata