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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **ITA 725/2019**

THE PR. COMMISSIONER OF INCOME TAX -6

..... Appellant

Through: Mr. Sunil Agarwal, Sr.SC with
Mr. Utkarsh Tiwari, Adv.

versus

NALWA STEEL & POWER LIMITED Respondent

Through: Ms. Ananya Kapoor, Mr.
Shivam Yadav, Mr. Tarun
Chanana and Mr. Sumit
Lalchandani, Adv.

CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA

**HON'BLE MR. JUSTICE PURUSHAINDR KUMAR
KAURAV**

ORDER

06.03.2024

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1. The Principal Commissioner seeks to impugn the order of the Income Tax Appellate Tribunal [“ITAT”] dated 31 December 2018 and has proposed the following questions of law:

“2.1 Whether on the facts and circumstances of the case, the ITAT was justified in holding that the price at which State Electricity Board sells electricity to industrial consumer is representative of the price that electricity would ordinarily fetch in the open market in terms of section 80-IA(8) of the Income Tax Act, 1961 [“Act”]?

2.2. Whether on the facts and circumstances of the case, the ITAT justified in deleting the adjustment made on account of managerial remuneration while the



Transfer Pricing Officer [“**TPO**”] has established that excessive payment was made on account of managerial remuneration to Ms. Shallu Jindal?

2.3. Whether on the facts and circumstances of the case the ITAT was justified in holding that Ms. Shallu Jindal who happens to be close relative of promoter Shri O.P. Jindal ‘was key personnel in respect of various policy decision which was reflected in minutes of various board meeting’ whereas per record available with TPO, it was noticed that Shallu Jindal did not attend even a single Board Meeting and details furnished by the assessee during TP proceeding revealed that Ms. Shallu Jindal was active in social commitments. The ITAT failed to appreciate that the assessee did not submit details with respect to Ms. Shallu Jindal called by the TPO during TP proceeding. Perversity of fact has been held to be question of law?

2.4. Whether on the facts and circumstances of the case, the ITAT was justified in not allowing the allocation of common expenses under section 80-IA of the Act to eligible and non-eligible unit on the basis of ratio between eligible and non-eligible units?

2.5. Whether on the facts and circumstances of the case, the ITAT erred in facts and law in allowing the bank guarantee commission under Section 40(a)(ia) of the Act invoking the provision laid down by the Notification No. 56/2012 no deduction of TDS on certain cases, issued by CBDT vide F, No. 275/53/2012-



IT(B)]SO 3069, dated 31.12.2012?”

2. Insofar as Question no. 2.1 and dealing with the disallowance of the deduction under Section 80-IA(8) of the Act is concerned, we note that the issue would stand concluded in light of the judgment rendered by us in ITA 797 of 2019. Dealing with an identical challenge, we had while dismissing that appeal, held as follows:

“2. In so far as the issues raised in question (a) are concerned, our attention was drawn to the following conclusions as rendered by the Supreme Court in **Commissioner of Income Tax v. M/s. Jindal Steel & Power Ltd.** [2023 SCCOnLine SC 1632]

"73. 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 80IA of the Act.

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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.

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.

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78. Before parting with this issue, we may mention that reliance placed by Mr. Rupesh Kumar, learned counsel for the revenue on the definition of the expression “market value” as defined in the explanation below sub-section (6) of Section 80 A of the Act is totally misplaced inasmuch as sub-section (6) was inserted in the statute with effect from 01.04.2009 whereas in the present case we are dealing with the assessment year 2001-2002 when this provision was not even borne."

3. We are apprised that when an identical question was raised in ITA 208/2019 inter partes, the Court had on a perusal of the view taken by the ITAT found that no justification existed for the question in that respect being framed or considered. We, in this regard take note of the order dated 06.03.2019 passed in ITA 208/2019 and consequently observe that proposed question (a) would not give rise to any substantial question of law.

4. That only leaves us to consider whether to admit the appeal on question (b). In so far as the question on reject coal and iron ore is concerned, the ITAT has on a due consideration of the rival submissions which were addressed come to the following conclusions:-

"6. On this aspect, Ld. AR brought to our notice that this issue was dealt with at length by a coordinate bench of this Tribunal in the order dated 24/4/2018 in ITA No. 4449/de1/2010 and batch for the Assessment Years 2006-07 to 2009-10 in assessee's own case wherein the assessee advanced an alternative plea that if the sale proceeds are not allowed as sale of reject coal and iron ore fine dust and since the costs have already been included there to, the purchase cost of these material have to be deducted.

We have gone through the order and vide paragraph No. 49, this aspect was considered by a coordinate Bench of this Tribunal, and while considering the case of the assessee in the light of the decision of the Hon'ble Apex Court in the case of CIT vs. Punjab Stainless Steel Industries vide Civil appeal No. 3288 and 4491 of 2009 and 4898 of 2010, accepted the alternative plea of the assessee and remanded the matter with a direction to the Ld. AO to deduct the sale proceeds of those items from the cost of raw materials used in the manufacturing process and then accordingly determine the profit of the undertaking to allow the deduction under section 80 IB as per the revised profits so computed.



In the light of the observations made by a coordinate Bench of this Tribunal in the above case, we have considered the submissions of the assessee in this case also and allow their plea for remanding the matter to the file of the Ld. Assessing Officer for compliance with the above direction. Having regard to the facts and circumstances of the case, while allowing the prayer of the assessee, we set aside the findings of the Ld. CIT(A) on this aspect and remand the matter to the file of the Ld. Assessing Officer for complying with the above directions, after affording an opportunity to the assessee. Grounds of appeal of the assessee are, therefore, allowed for statistical purposes."

5. Bearing in mind the aforesaid conclusions and the fact that the plea for rejection of sale proceeds from reject coal and iron ore was taken in the alternative, with the assessee claiming that the same if not accepted should be adjusted against the purchase cost and consequently leading to the remand of proceedings to the Assessing Officer, we find no justification to entertain the instant appeal.

6. Consequently, no substantial question of law arises in the instant appeal and we find no justification to interfere with the ITAT's impugned order dated 15 January 2019.

7. The appeal fails and shall stand dismissed on the aforesaid terms."

3. Insofar as the issue of excessive remuneration to a related party is concerned, the ITAT has held as follows:

"15. We have heard both the parties and perused all the relevant material available on record. It is pertinent to note that the partial additions on account of managerial remuneration amounting to Rs. 8,22,798 which was paid to Ms. Shallu Jindal's contractual advisory service to AE and other services provided by her were not disputed by the Revenue at any point of time. The same is already taxed in the hands of Ms. Shallu Jindal. The Ld. AR pointed out through the documents that she is the director of the company and is a key personnel in respect of various policy decisions which was reflected in minutes of all board meetings. The submission of the Ld. AR was that the basis for disallowance is not sustainable because the competitive figures have no bearing on the present assessee. From the records it can be seen that the remuneration paid to director has not been disallowed in past years and therefore the submission of the Ld. AR that the rule of consistency has to be followed in the present assessment year as well. The case laws relied upon by Ld. AR of the Hon'ble Delhi High Court is relevant to that extent and support the case of the assessee. The comparison



done by the Assessing Officer between the remuneration paid by the assessee company to Ms. Shallu Jindal with the remuneration paid by Essar Steel Ltd to Sh. Ashutosh Agarwala is not proper as well considering the facts that the assessee company is a profit making venture whereas Essar Steel Ltd. is incurring losses. It should also be noted that the assessee company has also complied with all the provisions of the Companies Act, 1956, relating to the payment of managerial remuneration to its managerial personnel appointed and the said payment of managerial remuneration has also been approved by the Board of Directors. The reference made to Circular No. 6P dated 08.07.1968 issued by the CBDT is apt in the present case. Thus, the Assessing Officer was not correct in making addition on account of managerial remuneration. Ground No.3 (b) is allowed.”

There is no challenge before us to the aforesaid recordal of facts and which seems to suggest that no disallowance in this regard have been made in the earlier years.

4. That then takes us to Question no. 2.4 and which has been disposed of by the ITAT upon recordal of the following conclusions:

“18. We have heard both the parties and perused all the relevant material available on record. From the records it can be seen that these expenditures were already allocated to eligible and non-eligible unit on the basis of generally accepted accountancy principles, on the basis of identified cost drivers and in a prudent manner by the assessee company. The Assessing Officer/TPO / DRP re-allocated the expenditure in the ratio of turnover between eligible and non-eligible units without any investigation and without collecting any material. The Assessing Officer/TPO/DRP has not brought on record any discrepancy on part of the assessee company in relation to the method of allocation adopted by the assessee company. The Tribunal (Third Member decision) in case of DCIT vs. Delhi Press Samachar Patra (P)Ltd. held as under:

“39. It is clear from the assessment orders that income shown and expenses claimed by the assessee have been duly allowed in the assessment order. None of the expenditure has been treated as ingenuine or not connected or related to the business carried out by the assessee. In the above background and without any material, and without any justification on the part of the AO, some of the expenses claimed by the assessee were held to be inflated in Unit No. I and were deflated in Unit Nos. II and III. Entire case of AO in both the assessment years is based on surmises and



conjectures. The learned CIT(A) had passed a fair, rationale and just order. There was no scope to interfere with the impugned orders as rightly held by the learned AM in his proposed order. On similar facts claim in earlier years was allowed to the assessee.

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43. I see some parallel between the facts of the above cited case and case in hand, because profit was disclosed in Unit Nos. II and III on which deduction under s. 80-1 was claimed and no profit was disclosed in Unit No. I on which no such deduction was permissible and expenses in aforesaid Unit No. I were much higher than in the other two units. It was probable that more expenses were claimed in Unit No. I and some of the expenses of Unit Nos. II and III were diverted and claimed in Unit No. I. But no presumption under the law could be raised that expenses were so diverted. The assessee has produced accounts and details and, therefore, correct position "could have been ascertained from the material statement of relevant persons including management and staff of the assessee could have been examined." But without any investigation and without collecting any material an arbitrary assessment by holding that expenses in Unit No. I should be proportionate to those in Unit Nos. II and III was made. Assessment based on such inference has to be held as arbitrary.

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46. It is evident from above that even when the material produced by the assessee is rejected, the authorities cannot proceed to levy whatever tax they may levy. The assessment must be based on some material. If it is not based on any material then it has to be held to be capricious and arbitrary. The question which is raised in most of the cases before the Tribunal is whether the assessment by the AO have been made in accordance with law. The aforesaid question has be determined objectively and not by raising merely doubts and certainly not by entertaining suspicion against the assessee, or against people connected with the assessment or disposal of appeals. If the Tribunal does not discharge its duties with responsibility as enjoined under the law, the confidence that is placed by the public on the Tribunal would stand eroded. With the aforesaid observations, I agree with the order proposed by learned AM, confirming the impugned orders of CIT(A). Let the matter be now placed before the regular Bench for disposal in accordance with law in both the assessment years."

Thus, from perusal of the Assessment Order/Order of the TPO/Directions of the DRP, in the present case none of the



authorities have doubted that there was no expenses. In facts, the Assessing Officer/TPO/DRP re-allocated the expenditure in the ratio of turnover between eligible and non-eligible units without bringing into the light the flaw or inaccuracy or any suitable explanation involved in relation to the method of allocation adopted by the assessee company. Hence, Ground No. 3(c) is allowed.”

5. A reading of the aforesaid paragraphs established that the issues which are sought to be canvassed here, do not give rise to any substantial questions of law. Proceeding then to Question no. 2.5, we find that it has been negated by the ITAT in the following terms:

“24. We have heard both the parties and perused all the relevant material available on record. The DRP has directed to delete the bank guarantee commission and without appreciating the same, the Assessing Officer made an addition which is unsustainable. Therefore, we direct the Assessing Officer to comply with the directions of the DRP and grant the relief to the Assessee. Ground NO.5 is allowed.”

6. Since, the ITAT has merely directed the Assessing Officer [“AO”] to comply with the directions issued by the DRP and which bind the AO in any case, we find no justification to entertain the instant appeal on this solitary question.

7. The appeal consequently fails and shall stand dismissed.

YASHWANT VARMA, J.

PURUSHAINDRA KUMAR KAURAV, J.

MARCH 06, 2024/p