

OD - 12

IN THE HIGH COURT AT CALCUTTA
Special Jurisdiction [Income Tax]

ORIGINAL SIDE

BEFORE :

THE HON'BLE CHIEF JUSTICE T.S. SIVAGNANAM

And

THE HON'BLE JUSTICE BIVAS PATTANAYAK

ITAT/214/2024

IA NO: GA/2/2024

PRINCIPAL COMMISSIONER OF INCOME TAX 2
KOLKATA

VS

STAR PAPER MILLS LTD

Appearance :

Ms. Smita Das De, Advocate

Mr. Prithu Dudheria, Advocate

..for Appellant.

Mr. J.P. Khaitan, Senior Advocate

Mr. Pratyush Jhunhunwala, Advocate

...for Respondent.

HEARD ON : 5.2.2025

DELIVERED ON : 5.2.2025

T.S. SIVAGNANAM, CJ. : This appeal filed by the revenue under Section 260A of the Income Tax Act, 1961 (the Act) is directed against the order dated July 10, 2023 passed by the Income Tax Appellate Tribunal, Bench - C, Kolkata (the Tribunal) in ITA No.424/Kol/2022 for the assessment year 2018-19.

Though the revenue has suggested nine substantial questions of law, we find the following two questions alone to be relevant which are quoted hereinbelow :

"(a) *WHETHER in facts of the case and in law, the Hon'ble ITAT is justified upholding the internal CUP applied by the assessee to benchmark the transaction (sale of power) to its AE, as well as computation of deduction under section 80-IA of the Act, whereas as per explanation to section 80-IA(8) of the Act, "market value" in relation to any goods or services, means (a) the price that such goods or services would ordinarily fetch in the open market; or (b) the arm's length price as defined in clause (ii) of section 92F, where the transfer of such goods or services is a specified domestic transaction referred to in section 92BA?*

b) *WHETHER in facts of the case and in law, the Hon'ble ITAT is justified in not appreciating the finding of the TPO that the assessee's generating unit cannot as such claim any benefit under section 80IA of the Income Tax Act computed on the basis of rates charged by the distribution licensee from the consumer. The benefit can only be claimed on the basis of the rates fixed by the tariff regulation commission for sale of electricity by the generating companies to the distribution company?*

We have heard Ms. Smita Das De, learned senior standing counsel assisted by Mr. Prithu Dudheria, learned senior standing counsel appearing for the appellant/revenue and Mr. J.P. Khaitan, learned senior advocate assisted by Mr. Pratyush

Jhunjhunwala, learned advocate appearing for the respondent/assessee.

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.9920/2016 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 :

"28. Thus, the 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.

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.

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."

In the light of the above decision, the appeal filed by the revenue has to necessarily fail. Accordingly, the appeal is dismissed and the substantial questions of law are answered against the revenue. The connected application stands closed.

(T.S. SIVAGNANAM)
(CHIEF JUSTICE)

I agree.

(BIVAS PATTANAYAK, J.)

