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IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION [INCOME TAX]
ORIGINAL SIDE

ITA/25/2024
PRINCIPAL COMMISSIONER OF INCOME TAX 2, KOLKATA
VS
M/S DHUNSERI VENTURES LTD.

BEFORE :
THE HON'BLE THE CHIEF JUSTICE T.S SIVAGNANAM
-A N D-
HON'BLE JUSTICE CHAITALI CHATTERJEE (DAS)
DATE : 20th August, 2025.

Appearance :
Mr. Tilak Mitra, Adv.
Mr. Prithu Dudhorea, Adv. ...for appellant.

Mr. J. P. Khaitan, Sr. Adv.
Mr. Pratyush Jhunhunwalla, Adv.,
Ms. Akshara Shukla, Adv.
Mr. Aritra Nag, Adv....for respondent

The Court :- This appeal filed by the revenue under section 260A of the Income Tax Act, 1961 [the Act] is directed against the order dated 29.8.2022 passed by the Income Tax Appellate Tribunal, "C" Bench, Kolkata [Tribunal] in ITA/1989/Kol/2019 for the assessment year 2015-2016.

The appeal was admitted on 31.1.2024 on the substantial questions of law.

We have elaborately heard Mr. Tilak Mitra, learned advocate for the appellant and Mr. J. P. Khaitan, learned senior counsel assisted by Mr. Pratyush Jhunhunwalla, learned advocate for the respondent.

It cannot be disputed by the revenue that the substantial questions of law no.(iii), (iv), (v), (vi), (vii) and (viii) are covered by the decision of this Court in the case of *Principal Commissioner of Income Tax Vs. Star Paper Mills Ltd.*, [2025] 172 taxmann.com 391 as well as the decision in *Principal Commissioner of Income Tax, Central-I vs. Rungta Mines Ltd.*, [2025] 176 taxmann.com 410 [Cal]. The ratio of the said decision being that where assessee transferred power from its Captive Power

Plants [CPPs] to non-eligible units and benchmarked transaction using internal CUP method adopting average annual landed cost of electricity paid by its manufacturing units to State Electricity Boards [SEBs], since CPPs were established for captive use and not for sale to SEB's, internal CUP was most appropriate method in determining the arm's length price. The relevant paragraphs of the judgment are quoted hereinbelow :

"14. It is not in dispute that the main business of the assessee is not generating power to sell the same to distribution companies/SEBs. It is also not in dispute that the Captive Power Plants (CPPs) were established by the assessee for its own need, i.e. for supply of uninterrupted power to its manufacturing units as well as to save the cost of power purchased from SEBs. If such be the factual position the Arm's Length Price cannot be determined by taking the average market rates of power supply units to distribution companies as the assessee is not in the business of selling power to distribution companies. Therefore, the Arm's Length Price has to be determined bearing in mind the reason behind establishment of the CPPs namely to ensure uninterrupted power and to save on cost of electricity which otherwise has to be paid to the State Electricity Board.

15. At this juncture, it would be relevant to take note of the Electricity Act, 2003. Section 2(8) of the Act defines "Captive Generating Plant" to mean a power plant set up by any person to generate electricity primarily for its own use and includes its power plant set up by any cooperative society or association of persons for generating electricity primarily for use of members of such cooperative society or association. Section 9 of the Act deals with Captive Generation. Subsection 1 of Section 9 commences with a non obstante clause and states that notwithstanding anything contained in the Electricity Act, 2003, a person may construct, maintain or operate a Captive Generating Plant and dedicated transmission lines.

16. The first proviso states that the supply of electricity from Captive Generating Plant through grid can be regulated in the same manner as the generating station of a generating company.

17. The second proviso states that no license shall be required under the Electricity Act for supply of electricity generated from Captive generating plant to any licensee in accordance with the provisions of the Act and the Rules and Regulations made

thereunder and to any consumer subject to Regulations made under Sub Section 2 of Section 42. Sub Section 2 of Section 9 states that every person, who has constructed a Captive Generating Plant and maintains and operates such plant shall have the right to open access for the purpose of carrying electricity from his Captive Generating Plant to the destination of his use. Section 42 of the Act deals with duties of the distribution licensees and open access. Thus, the scheme of the Act is that a person may construct, maintain or operate a Captive Generating Plant and dedicated transmission lines and captive plants will have the right to open access for the purpose of carrying electricity from captive plants to the destination of its use and no surcharge is leviable in case open access is provided to captive units by the central or state transmission utility or the transmission licensee involved in the distribution/transmission of power. Further the provision make it clear that there is no embargo to other power generating companies to directly sell the power to such consumer at mutually agreed rate. This being not the legal position when the decision in ITC Limited was rendered, the said decision could not have been relied upon by the TPO/assessing officer.

18. We concur with the views expressed by the learned tribunal that the consumer/contracting parties will certainly desire to purchase electricity at lesser rate than the rates offered by State Electricity Board whereas the Captive Power Plants/generating companies would desire to get maximum rate on the sale of power in unregulated and uncontrolled transaction and both the parties would settle at mutually agreed rates irrespective of the rates at which the State Electricity purchases power from other generating units.

19. The learned tribunal in the case of Star Paper Mills Limited Versus DCIT Circle 4 Kolkata held that where the assessee company, engaged in business of manufacturing and sale of paper, had set up Captive Power Plant (CPP) to meet its requirements of its paper manufacturing units which also availed power from State Electricity Board, the said transaction being in nature of specified domestic transaction, transfer price of power supplied by CPP was to be bench marked at annual average of landed cost at which power was being purchased by manufacturing units from State Electricity Board. The revenue carried the matter on appeal before this court and the appeal filed by the revenue was dismissed and the said decision is reported in (2025) 172 taxman.com 391 (Kolkata). In the said appeal, the following two substantial questions of law were taken up for consideration:-

"(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?

20. The Court took note of the decision of the Hon'ble Supreme Court in CIT Versus Jindal Steel and Power Limited. In the said case, the assessee having found that the electricity supplied by the State Electricity Board was inadequate and to meet the requirements of its industrial units, set up captive power generating units to supply electricity to its industrial units which was done at a particular rate. The surplus power if any, generated was to be wheeled out to the electricity board grid 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 of consideration is as to the quantum of deduction which the assessee would be entitled to claim under Section 80IA of the Act. The assessing officer held that the market value of the electricity should be computed based on the rate fixed by the State Electricity Board for the electricity which is purchased by the assessee. The Dispute Resolution Panel (DRP) affirmed the view taken by the assessing officer and the matter was challenged before the tribunal. The tribunal followed the decision in the assessee's own case for an earlier assessment year which order had become final as the department did not prefer any appeal under Section 260A of the Act. In the batch of cases, in Jindal Steel

and Power one of the appeals was an appeal filed by the assessee namely ITC Limited against the judgment of the Division Bench of this court in Commissioner of Income Tax Versus ITC Limited (supra) in CA No. 9920 of 2016 and this appeal was allowed by the Hon'ble Supreme Court by order dated 07.12.2023 and the Hon'ble Supreme Court held as follows:-

"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."

21. The Hon'ble Supreme Court after taking note of the relevant provisions of the Income Tax Act, and in particular Section 80IA held that the market value of the power supplied by State Electricity Board to the Industrial consumers should be construed to be the market value of electricity and it should not be compared with

the rate of power sold to or supply 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. It was further held that the State Electricity Boards rate when it supplies power to the consumer have to be taken as market value for computing the deduction under Section 80IA of the Act. Thus, applying the decision of the Hon'ble Supreme Court in Jindal Steel and Power and in the light of the reasoning given in the preceding paragraphs, we hold that the learned tribunal rightly dismissed the appeals filed by the revenue."

In the light of the above decision, the substantial question nos.(iii) to (viii) are answered against the revenue.

This leaves us with the first two substantial questions of law, i.e. (i) and (ii), which relate to restricting the corporate guarantee fee @ 0.5% as has been done by the learned Tribunal in the impugned order. To test the correctness of the decision of the learned Tribunal we have carefully gone through the findings recorded from paragraph 6 of the impugned order and we find that the revenue had placed reliance on a decision of a Coordinate Bench of the Mumbai Tribunal in the case of *Rose India Pvt. Ltd. vs. DCIT, [2021] 127 taxmann.com 591 [Mumbai Tribunal]*, wherein the Tribunal held that where a corporate guarantee to benchmark was issued by and on behalf of the Associate Enterprise, the arm's length guarantee fee would be 0.5%. The Tribunal took note of the facts of the case and also the submissions made on either side and held that it would be reasonable if the corporate guarantee fee of 0.5% is applied to benchmark the international transaction and, accordingly, partly allowed the revenue's appeal setting aside the order passed by the CIT[A] and directed the assessing officer to benchmark the transactions by applying 0.5%. We are at a loss to understand as to why the revenue is on appeal as against the said finding, more particularly when it was the revenue's case before the learned Tribunal that the arm's length guarantee fee should be 0.5% by placing reliance on the decision of the

Tribunal in the case of *Rose India Pvt. Ltd.* Apart from that, we find that the substantial question nos.(i) and (ii), as suggested by the revenue, also involve the factual adjudication which has been done by the learned Tribunal and, therefore, we find that no substantial questions of law no.(i) and (ii) as suggested by the revenue arise for consideration. Accordingly, the appeal fails and the same is dismissed.

(T.S. SIVAGNANAM, CJ)

(CHAITALI CHATTERJEE (DAS), J.)

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