

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**TAX APPEAL NO. 544 of 2016****With****TAX APPEAL NO. 708 of 2016**

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PR. COMMISSIONER OF INCOME TAX-VADODARA-1....Appellant(s)

Versus

GUJARAT ALKALIES AND CHEMICALSLTD....Opponent(s)

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Appearance:

MR KM PARIKH, ADVOCATE for the Appellant(s) No. 1

MR MANISH J SHAH, CAVEATOR for the Opponent(s) No. 1

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CORAM: HONOURABLE MR.JUSTICE AKIL KURESHI

and

HONOURABLE MR.JUSTICE A.J. SHASTRI**Date : 03/10/2016****ORAL ORDER****(PER : HONOURABLE MR.JUSTICE AKIL KURESHI)**

1. The appeal is filed by the Revenue containing several questions. However, while admitting the Tax Appeal on 12.7.2016, only following questions were entertained.

”(i) Whether on the facts and in the circumstances of the case and in law, the ITAT was justified in upholding the decision of CIT(A) that deduction u/s 80IA(4) is allowable to the assessee for generation of power for captive consumption?

(ii) Whether the Tribunal was right in law in allowing the assessee's claim of deduction of Rs.1954 Crores u/s 80IA(4)

of the I.T. Act, 1961, when the assessee had adopted rate of power generation at Rs.4.73 per unit, rate on which the GEB supplied power to its consumers, ignoring the rate of Rs.2.36 per unit, the rate on which power generating company supplied its power to GEB?”

1. Subsequently, concerning the same assessee for the separate assessment year, Revenue filed Tax Appeal No.708/2016 raising the same questions. This tax appeal was admitted for consideration of following substantial question of law :

“1. Whether, on the facts and circumstance of case, the Tribunal was right in law in allowing the deduction u/s.80IA(4) of the Act without appreciating that the assessee had captive power generation plant and therefore the claim u/s. 80IA(4) of the Act was not allowable as held by the Hon'ble ITAT Bench A Chennai vide in the case of Chettinand Cement Corporation Ltd. in ITA No. 1026 (Mds)/2005?

2. Whether on the facts and circumstance of case, the Tribunal was right in law in allowing the claim u/s. 80IA(4) as claimed by the assessee on the basis of purchase price of power from GEB, without appreciating the fact that assessing officer had rightly calculated the amount eligible for deduction u/s. 80IA after applying the rate at Rs. 2.47 per unit which became 'Nil' as after applying rate at Rs. 2.47 per unit, there is LOSS of Rs. 4243.19 lakh, instead of profit shown by the assessee for the unit?”

2. In both the tax appeals though slightly differently worded, the questions concerning the same assessee are identical and concern the issue of deduction under section 80IA of

the Income Tax Act granted to the assessee by the Tribunal on captive power generation plant. The second question is with respect to recognising such claim on the basis of purchase price of power from GEB and substituting the rates of 2.47 per unit adopted by the Assessing Officer.

3. Since both the issues are covered by various judgments of this Court, we do not find it necessary to record facts at any length. Division Bench of this Court by judgement dated 22.11.2011 in Tax Appeal No.2092/2010 in somewhat similar controversy observed as under :

“3. With respect to Question [B], the issue pertains to sub-Section (8) of Section 80IA of the Income Tax Act, 1961. The assessee had a CPP Unit generating electricity, which was supplying it to a general unit. The electricity generated is being supplied to other consumers also. The CPP unit charged Rs.5.40 ps. per unit from the general unit. The Assessing Officer applying sub-Section (8) of Section 80IA restricted the same to Rs.5.32 ps. per unit and, thereby, restricted the deductions claimed by the assessee under Section 80IA of the Act. This restriction was primarily on the basis that the rate of Rs.5.40 ps. charged by Gujarat Electricity Board (“ GEB” for short) was inclusive of 8 paise per unit of electricity duty. This component of electricity duty the Assessing Officer discarded for the purposes of ascertaining market value of the electricity generated by the CPP Unit and supplied to its general unit.

4. CIT (Appeals) confirmed the view of the Assessing Officer on the same line of reasoning. The Tribunal, however, on further appeal by the assessee, reversed the orders passed by the Revenue authorities referring to and relying upon the decisions of other Tribunals. The Tribunal was of the opinion that the market value of the electricity supplied by the CPP Unit to the general unit would be the same being

charged by GEB from the consumers.

5. Counsel for the Revenue contended that the component of 8 paise per unit was the electricity duty which GEB was not authorized to retain but had to pass on to the Government. In essence, GEB was only collecting 8 paise per unit as electricity duty for and on behalf of the Government. He submitted that the market value of the electricity should be reckoned on Rs.5.32 ps. per unit as was done by the Revenue authority.

6. Under sub-Section(8) of Section 80IA of the Act, if it is found that where any goods or services held for the purposes of the eligible business are transferred to any other business carried on by the assessee or where any goods or services held for the purposes of any other business carried on by the assessee are transferred to the eligible business and in either case the consideration for such transfer does not correspond to the market value of such goods as on the date of the transfer, then for the purposes of deduction under Section 80IA in case of the eligible business as if the transfer had been made at the market value of such goods or services. It is in this context that the question of substituting the actual consideration by the market value comes into picture.

7. We may notice that the Tribunal did not accept the contention of the assessee that the electricity is neither goods nor services and that, transfer of electricity, therefore, would not be covered under sub-Section (8) of Section 80IA of the Act. However, in so far as the Tribunal's reasoning to adopt the market value of the goods at Rs.5.40 ps. per unit is concerned, we find no error. Undisputedly, GEB supplied the electricity to its consumers at the same rate. This, therefore, was a market value of the electricity supplied by the CPP Unit to the general unit. The fact that this amount of Rs.5.40 ps. comprises of a component of 8 paise, which was electricity duty, to our mind, would make no difference in so far as the market value is concerned. To a consumer, the price

being paid remains 5.40 ps. per unit. The fact that the seller retains only Rs.5.32 ps. out of the said collection and passes on 8 paise per unit to the Government in the form of electricity duty, to our mind, would make no difference. This question is, therefore, not required to be considered.”

4. This was followed in case of **Commissioner of Income-tax v. Shah Alloys Limited** in Tax Appeal No.2093/2010. This was reiterated in Tax Appeal No.1646/2010 in case of **ACIT Bharuch Circle, Bharuch Through Commissioner v. Pragati Glass Works Pvt Ltd.** (order dated 30.1.2012), in which following observations were made :

“7. To our mind, Tribunal has committed no error. Assessing Officer and CIT(Appeals) while adopting Rs.4.51 per unit as the value of electricity generated by eligible unit of assessee and supplied through its non eligible unit only worked out cost of such electricity generation. In fact CIT(Appeals) in terms recorded that Rs.4.51 was computed as the reasonable value of the electricity generated by eligible unit of assessee. This amount included Rs.4.17 per unit which was the cost of electricity generation and Rs.0.34 per unit which was duty paid by the assessee to GEB for such power generation. Thus the sum of Rs.4.51 per unit only represented the cost of electricity generation to the assessee. In Section 80IA(8) of the Act what is required to be ascertained is the market value of the goods transferred by the eligible business, when such transfer is by eligible business to another non eligible business of the same assessee and the consideration recorded in the accounts of the eligible business does not correspond to market value of such goods. Term “Market Value” is further explained in explanation to said sub-section to mean in relation to any goods or services, price that such goods or services will ordinarily fetch in the open market. To our mind sum of Rs.4.51 per unit of electricity only

represented cost of electricity generation to the assessee and not the market value thereof. It is not in dispute that the GEB charged Rs.5 per unit for supplying electricity to other industries including non eligible unit of the assessee itself. Tribunal therefore, while adopting the said base figure and excluding excise duty therefrom to work out Rs.4.90 as the market value of the electricity generated by the assessee, to our mind, committed no error. It can be easily seen that if the assessee were to supply such electricity or was allowed to do so in the open market, surely it would not fetch Rs. 4.51 per unit but Rs.5 per unit as was being charged by GEB. Since the excise duty component thereof would not be retained by the assessee, Tribunal reduced the said figure by the nature of excise duty and came to the figure of Rs.4.90 to ascertain the market value of electricity generated by the eligible unit and supplied to non eligible business of the assessee. No error was committed by the Tribunal. No question of law therefore, arises. Tax Appeal is dismissed.”

5. Issue once again reached the Division Bench of this Court in case of **Commissioner of Income-tax-I v. Alembic Limited** in Tax Appeal No.471/2009 and connected appeals. The Division Bench referring to earlier judgments of the Court held as under :

“11. We have considered the submissions made by the learned counsel for the parties. We have also considered the case laws cited by the learned counsel for the assessee. Taking into consideration the judgements of this court and other High Courts, cited above, we are of the opinion that the Tribunal has rightly allowed the claim of the assessee. In that view of the matter, we do not find any infirmity in the order of the Tribunal. Therefore, we answer question (C) and (D) in favour of the assessee and against the revenue.”

6. Issues are thus considered on number of occasions by the Court and held against the Revenue. Questions are answered against the Revenue. Both the tax appeals are therefore, dismissed.

(AKIL KURESHI, J.)

(A.J. SHASTRI, J.)

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