

ORDER SHEET

ITA NO.107 OF 2011
WITH
ITA NO.103 OF 2011
IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION(INCOME-TAX)
ORIGINAL SIDE

C.I.T., KOLKATA-I
Versus
M/S. TATA METALIKS LTD, KOLKATA

BEFORE:

The Hon'ble JUSTICE GIRISH CHANDRA GUPTA

The Hon'ble JUSTICE ARINDAM SINHA

Date : 3rd August, 2016.

MR.S.B.SARAF, ADVOCATE FOR APPELLANT IN ITA NO.103 OF 2011
MRS.SOMA MISHRA CHATTERJEE ADVOCATE FOR APPELLANT IN ITA NO.107 OF 2011
MR.J.P.KHAITAN, SR.ADVOCATE, MR.SANJOY BHOWMIK, MR.SIDDHARTH DAS, MR.C.S.DAS, MR.HARSHIT KHANDAR,
ADVOCATES FOR RESPONDENT

The Court : Both the appeals are directed against a common judgment and order dated 23rd October, 2009 passed by the Income Tax appellate Tribunal, “B” Bench Kolkata by which ITA Nos.785 and 752/Kol/2008 pertaining to the assessment years 2003-04 and 2004-

05 together with cross objections nos.61 and 62/Kol/2008 preferred by the assessee were disposed of by dismissing the appeals preferred by the revenue. Consequently, the cross objections were also disposed of. The revenue has come up in appeal.

Two separate appeals have been preferred, namely, ITA No.103 of 2011 and ITA No.107 of 2011. Mr.Saraf appeared in ITA 103 of 2011 and Mrs. Chatterjee appeared in ITA No. 107 of 2011.

In both the appeals common question was formulated which reads as follows:-

“Whether the learned Tribunal below committed substantial error of law in holding that the claim of deduction under section 80IA on profit from capital power unit was allowable notwithstanding the fact that such profit arose from consumption of power generated by the other units of the assessee itself and as such there is no sale to outside party and, therefore, there was no real profit and, as such, claim of deduction was not allowable in law.”

On behalf of the revenue, it was contended that the question is now covered in favour of the revenue by a judgment of this Court in the

case of *CIT Vs. ITC Ltd.* reported in (2016) 236 Taxman 612 (Calcutta), wherein the following views were taken.

“We are, as such, unable to hold that the benefit under Section 80IA is not available to the assessee because the power generated was consumed at home or by other business of the assessee. It is now well-settled that a statute granting incentives for promoting growth and development should be construed liberally so as to advance the objective of the provision and not to frustrate it.”

The aforesaid views, prima facie, would support the order under challenge. But the views, expressed above, were qualified by what was held in paragraphs 17 and 18 of the report which are as follows:-

“17. We have considered the submission advanced by Mr. Khaitan but we are unable to agree with him. The benefit under Section 80-IA was intended to encourage the business of generating power. An entrepreneur who wants to avail the benefit of Section 80IA cannot hope to get any benefit more than what has been contemplated by the Act. It was a fortuitous circumstance that the entrepreneur in this case has a home consumption of electricity which any other entrepreneur engaged in the generation of electricity would not have. But that cannot

be a reason why two entrepreneurs engaged in the same business will get benefit at rates computed differently. In order to avoid any such discrimination, the legislature has taken care to provide that the price which can be charged has to be the same, which electricity would fetch in the open market. It is true that at the relevant point of time the explanation added to sub-section 8 of Section 80-IA quoted above was not there in the statute. But this fact by itself does not advance the case of the assessee because what was already there during the relevant assessment year reads as follows:-

‘Explanation.- For the purposes of this sub-section, “market value”, in relation to any goods or services, means the price that such goods or services would ordinarily fetch in the open market.’

18. Clause 2 to the explanation has been added to clarify what was obvious already. The assessing officer was correct in the view he took that the assessee can compute the price of the electricity sold to the paper unit at the market rate and for that purpose he also gave an opportunity to adduce evidence to the assessee. The assessee did not, however, avail the same and contented itself by disclosing the price at which power was

purchased by the paper unit of the assessee from the Andhra Pradesh State Electricity Board. The rate at which electricity was purchased from Andhra Pradesh State Electricity Board by the paper unit of the assessee can by no means be the market rate at which the power plant of the assessee could have sold its production in the open market. In the open market the buyer would obviously be a distribution company or a company engaged both in generation and distribution. Therefore, the rate at which electricity is sold to any such company can only be the market rate contemplated by the section. The judgment in the case of Thiru Arooran Sugars Ltd. (supra) has no manner of application for the simple reason that the Court in that case was concerned with the question as to the market value of sugarcane grown by the assessee at home. The Supreme Court was of the opinion that the sugarcane grown at home would be deemed to have been sold to the sugar mill at the same rate at which sugar cane was purchased by the sugar mill. That obviously is correct because if the sugarcane grown at home had not been sold to the sugar mill of the assessee itself, the sugarcane would have been sold in the open market. The rate of sale in the open market would be the same at which sugarcane was purchased by the

sugar mill of the assessee. But in the case before us the electricity generated by the assessee could not be sold to anyone other than a distribution company or a company which is engaged both in generation and distribution. The rate at which electricity could have been sold to any such company is not the same at which such companies sale electricity to the consumers. The rate at which electricity can be supplied to a consumer by the distribution licensee and the rate at which the generating companies can sell electricity to the distribution licensee are governed respectively by Sections 61 and 62 of the Electricity Act 2003. There is tariff regulatory commission which fixes both the rates for sale and purchase of electricity by the distribution licensee. There are provisions in Section 62 so that the generating companies can recover expected revenue on the basis of the tariff fixed by the commission. There are similarly provisions in Section 61 so that the distribution licensee can derive reasonable return. There is thus an in-built mechanism to ensure permissible profit both to the generating companies and the distribution licensees. The assessee's generating unit cannot as such claim any benefit under Section 80-IA of the I.T. Act computed on the basis of rates chargeable 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.”

Mr. Khaitan, learned senior advocate, submitted that the CIT(A) disagreeing with the assessing officer held that *“moreover, the said method has been accepted by the Department in the subsequent years. Hence, I hold that the transfer price adopted by the appellant is justified. Accordingly, Ground Nos.11 & 12 taken by the appellant are allowed.”*

Mr.Khaitan submitted that the revenue did not challenge the aforesaid finding of the CIT(A) before the learned Tribunal. He, in support of his submission, drew our attention to the grounds of appeal before the learned Tribunal, in particular, ground no.3 that the revenue was in appeal only with regard to question as to whether benefit of section 80IA was available to the assessee who is engaged in consuming the electricity generated at home. The ground no.3 reads as follows:-

“That on the facts and in the circumstances of the case the order of the ld.CIT(A) failed to consider the theory of mutuality as has been upheld by the Apex Court in various cases while allowing claim of deduction u/s 80IA of the Act.”

We are unable to accept this submission of Mr.Khaitan. The ground no.3 does not, on a plain reading, appear to suggest that the transfer price adopted by the assessee which was upheld by the CIT(A) was not challenged by the revenue. That challenge appears to be there in ground no.3.

Be that as it may, the first question is bound to be whether the assessee is entitled to any benefit under section 80IA. If that question is answered in the affirmative, then only question will arise as to the rate computation of such benefit.

This question was also involved in the case of CIT Vs. ITC Ltd. and an identical contention raised by the assessee was repelled by the Division Bench by holding, inter alia, as follows:-

“The last submission, advanced by Mr.Khaitan that this point was not taken by the appellant, has not impressed us. The point is certainly involved in the appeal because the CIT(A) reversed the finding of the assessing officer that the rate at which electricity was supplied by the Andhra Pradesh State Electricity Board “cannot be taken as the market rate within the meaning of Section 80-IA”. The learned Tribunal has upheld that finding. The revenue is in appeal. The decision to reverse the finding is based on a wrong determination of a substantial question of law

and is therefore amenable under Sub-Section (6) of Section 260A of the I.T. Act, 1961. Moreover when this Court is satisfied that the case involves the aforesaid question, it has a corresponding duty to decide the same.”

Both the appeals are therefore disposed of following the earlier judgment of this Court in the case of CIT Vs. ITC Ltd. with identical direction as was passed in the aforesaid case, which is as follows:

“Considering the view we have taken, for ends of justice the matter shall now go back to the assessing officer. He shall give an opportunity to the assessee to adduce evidence as regards market rate at which electricity could have been sold to the distribution licensee by a generating company. Based on such evidence the quantum of benefit under Section 80IA shall be worked in accordance with law.”

The question is, accordingly, answered and the appeal is partly allowed.

(GIRISH CHANDRA GUPTA, J.)

(ARINDAM SINHA, J.)