

ORDER SHEET

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

ITA 426 of 2006

COMMISSIONER OF INCOME-TAX, KOLKATA-III
Versus
M/S. ITC LTD

BEFORE:

The Hon'ble JUSTICE GIRISH CHANDRA GUPTA

The Hon'ble JUSTICE ARINDAM SINHA

Date : 1st June, 2015.

For Appellant: Mr. R. N. Bandhopadhyay, Adv.
For Respondent : Mr. J. P. Khaitan, Sr. Adv. with
Mrs. N. Banerjee (Pal) and Mr. Akhilesh Gupta, Adv.

The Court : The subject matter of challenge in the appeal is a judgment and order dated 30th June, 2006 pertaining to the assessment year 2002-03. The facts briefly stated are that the assessee is engaged, inter alia, in the manufacture of paperboard. For the purpose of supplying uninterrupted power to the manufacturing unit, the assessee installed power-generating plant. The entire production of such plant was supplied to the paperboard manufacturing unit. Question arose (A) whether the assessee is entitled to the benefit under Section 80-IA? (B) If so, whether the benefit can be computed at the rate at which electricity was supplied by the Andhra Pradesh State Electricity Board to the paperboard manufacturing unit? The assessing officer held that the question of any benefit being derived by the assessee under Section 80 IA would not arise because the assessee did not earn any profit from out of the power-generating plant. He was also of the opinion that the assessee did not also qualify for the benefit under Section 80IA. The reasoning advanced by the assessing officer to

show that the assessee did not make any profit from out of the power-generating plant is as follows:-

"Without prejudice to the above discussion, the market rate taken by the assessee for determining the revenue of the claimed power undertaking is highly illogical. In the original return the assessee has taken the average rate of power purchased by it during the financial year 2001-02 but in the revised return only the rate charged by APSEB has been taken ignoring the rate charged by APGPCL. As per Section 80IA the market value in relation to any goods or services transferred by the assessee to any other business means the price that such goods or services would ordinarily fetch in the open market. In the instant case, the assessee has not taken the rate which would have been received by it, had it sold the power to outsiders. The purchase rate of power by the assessee cannot be taken as the market rate within the meaning of Section 80IA because the market value of the goods is to be determined on the basis of rate on which the goods/services can be sold in the open market. As the assessee has not sold the power generated by it to any outsider the market rate is not available. The assessee was requested to furnish the rate at which the power could have been sold to outsiders but the assessee has not furnished the same. M/s. Indian Aluminium Co. Ltd. is assessed under this Circle and it also has a power undertaking in Orissa. During the course of assessment proceedings for the assessment year 2002-03 the said company submitted that it has sold power to the Grid Corporation of Orissa Ltd. at 0.77 paise per unit. As the assessee has not submitted the market rate, i.e. the rate at which the power could have been sold to an outsider, the rate received by M/s. Indian Aluminium Co. Ltd. for its power undertaking can be taken as a comparable market rate at which the assessee could have sold the same in the open market. By taking the market rate at 0.77 paise per unit the profit or loss of the power undertaking is recomputed and it is noticed that there is a loss in the power undertaking considering the expenses determined by the assessee and consequently, no deduction u/s. 80IA is available to the assessee."

In an appeal preferred by the assessee, the CIT(A) held that there was in fact profit from the power-generating plant and he also held that the rate at 77 paise per unit adopted by the assessing officer was incorrect for the following reasons:-

"In this order, the Assessing Officer has without prejudice to the denying of benefit deduction u/s.80IA of the Income Tax Act 1961 to the appellant has observed that the market rate taken by the appellant for determining the revenue of the claimed power undertaking is highly illogical. Mentioning that the appellant had not furnished the rate at which the power could have been sold to the outsiders, the Assessing Officer has drawn reference from the case of the Indian Aluminium Company Limited which sold power to the Grid Corporation of Orissa @ Rs.0.77 unit and observed that if the same was applied in the case of the appellant and the profit or loss of the Power undertaking was recomputed the same would have resulted in a loss to the power undertaking considering the expenses determined by the assessee and no deduction U/s.80IA of the Income Tax Act 1961 was available to the appellant.

The appellant - on the other hand - has pleaded that the Assessing Officer's view regarding the unusually low Indian Aluminium rate of Rs.0.77 per unit could not be applied to the appellant's case because of the special arrangements between Indian Aluminium and Orissa State Electricity Board for sale of surplus power beyond the captive power consumption because of the special arrangement between Indian Aluminium and Orissa State Electricity Board which the assessee did not have with the Andhra Pradesh State Electricity Board. Placing reliance on the decision of the Hon'ble Supreme Court in Thiru Aruran Sugars Ltd. vs. CIT (223 ITR 432), the appellant has pleaded that the market price should imply the price the appellant would have to pay for getting the power requirement from an unrelated supplier at that particular place. Based on these observations the appellant has pleaded that the market value would have to be computed @4.45 per unit being the rate at which power was supplied by the Andhra Pradesh State Electricity Board.

The contention of the appellant has been examined. A perusal of the records show that based on the Andhra Pradesh State Electricity Board Rates the total fixed charges (in the nature of Demand Charges and additional Demand charges) are Rs.5,98,64,526/- and variable charges amount to Rs.56,25,94,466/- aggregating to Rs.62,24,58,992/- after taking into consideration the amount of cost incurred by the appellant shown at Rs.17,53,44,000/- (after rounding off), the revenue generated or the profit derived by the said power undertaking would work out to Rs.44,71,14,992/- (i.e. Rs.62,24,58,992/- minus Rs.17,53,44,000/-). As such, the deduction claimed u/s.80IA of the Income Tax Act 1961 is allowed to the extent of Rs.44,71,14,000/- (rounded off). This ground of appeal is partly allowed."

The learned Tribunal has affirmed the order of the CIT (A). Therefore, the revenue is once again before us in appeal. In so far as the question as regards the eligibility of the assessee to claim the benefit is concerned, reference may be made to sub-Section 8 of Section 80IA which reads as follows:-

" (8) 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, if any, for such transfer as recorded in the accounts of the eligible business does not correspond to the market value of such goods [or services] as on the date of the transfer, then, for the purposes of the deduction under this section, the profits and gains of such eligible business shall be computed as if the transfer, in either case, had been made at the market value of such goods [or services] as on that date :

Provided that where, in the opinion of the Assessing Officer, the computation of the profits and gains of the eligible business in the manner hereinbefore specified presents exceptional difficulties, the Assessing Officer may compute such profits and gains on such reasonable basis as he may deem fit.

[Explanation. - For the purposes of this sub-section, "market value", in relation to any goods or services, means -

- (i) the price that such goods or services would ordinarily fetch in the open market; or*
- (ii) 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."*

The aforesaid provision contemplates or does not militate against supply of electricity by the eligible unit to any other business of the assessee. Therefore the contention that the unit is not eligible because "the assessee has not sold power generated by the power undertaking to any outsider but has consumed 100% generated by its unit" does not appear to be logical. The premise for claiming the benefit according to Clause IV of Sub-section 4 of Section 80 IA is a setting up of an undertaking for the generation of power during the specified

period. The fact that the unit was set up within the specified period is not in dispute.

The mere fact that the power generated by the undertaking was in its entirety consumed by the other business of the assessee does not detract from the fact that the demand for power to that extent was reduced and the surplus to that extent could be supplied by the existing distribution undertakings to the public at large. The object of the legislature was to promote infrastructure for generating power, if the instant undertaking had not been set up the other business of the assessee would naturally have depended for its demand in its entirety upon the supply by the Andhra Pradesh State Electricity Board. Shortage of power throughout the country is a well-known phenomenon. The overall shortage of power to the extent of the power generated by the undertaking has, therefore, been reduced.

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.

In the case of *Tata Iron Steel Company Ltd. and Ors. -Vs- State of Bihar* reported in (1963) 48 ITR (S.C.) 123 the question arose as follows:-

"Sections 5 and 6 of the Bengal Cess Act, 1880 (as amended in Bihar), imposed a local cess in the case of mines and quarries on the annual net profits. The appellant companies which had taken on lease certain mines wherefrom they extracted the ore and utilised it in their factories for the manufacture of the metal and products out of those metals, claimed that they could not be said to have derived "annual net profits from the mines" when the ore mined by them was not sold as such but was utilised for the production of finished products which alone they sold:

Held, that in order that profit might result from the mining activity it was not necessary that the ore won from the mine should be the subject of sale in the same condition as it was when it came out of the mine. Even if the ore won was subjected to

processes to make the finished products, there would be a profit from the mining activity, and there was no negation of the concept of profit from the mine because the ore was so processed as to turn it into a different commodity. There could, therefore, in law be an annual profit from the mines in cases where the ore produced from them was not sold as ore but was utilised as a raw material for the manufacture of other products which were sold.

Where a provision like section 6 of the Act brings to tax solely the profit derived from a single activity there has necessarily to be an apportionment of the profit realised by the sale of the end product between what is attributable to that activity and what is attributable to the further processes which result in the manufacture of the finished product. This apportionment does not involve disintegration of the business of the taxpayer, and the principle that a person cannot trade with himself does not apply to such an apportionment."

Reference may also be made to the judgement in the case of *Textile Machinery Corporation Limited –Vs- CIT* reported in (1977) 107 ITR 195 (SC) where the question arose whether exemption under Section 15C of the Income Tax Act, 1922 could be claimed by the units established by the assessee, major parts of whose production were consumed by the existing business of the assessee. The Apex Court held that the benefit under Section 15C was available to the new businesses for the reasoning given, inter alia as follows:-

"The principal business of the assessee can be carried on even if the said two additional undertakings cease to function. Again, the converse is also true. The fact that the articles produced by the two undertakings are used by the boiler division of the assessee will not weigh against holding that these are new and separate undertakings. On the other hand, the fact that a portion of the articles produced in these two new industrial undertakings had been sold in the open market to others is a circumstance in favour of the assessee that the new industrial

units can function on their own. Use of the articles by the assessee is not decisive to deny the benefit of section 15C."

Reference may also be made to the judgement in the case of *Bajaj Tempo Limited –Vs- CIT* reported in (1992) 62 *Taxman* 480 (SC) wherein the following views were expressed:-

"The section, read as a whole, was a provision, directed towards encouraging industrialisation by permitting an assessee setting up a new undertaking to claim of not paying tax to the extent of six per cent in a year on the capital employed. But the legislature took care to restrict such benefit only to those undertakings which were new in form and substance, by providing that the undertaking should not be, 'formed' in any manner provided in clause (i) of sub-section (2) of Section 15-C. Each of these requirements, namely, formation of the undertaking by splitting up or reconstruction of an existing business or transfer to the undertaking of building, raw material or plant used in any previous business results in denial of the benefit contemplated under Sub-section (1). Since a provision intended for promoting economic growth has to be interpreted liberally, the restriction on it, too, has to be construed so as to advance the objective of the section and not to frustrate it."

Therefore the first question as regards eligibility of the assessee to claim benefit is answered in the affirmative and against the revenue.

The other question which requires consideration is whether the rate at which electricity was supplied by the Andhra Pradesh State Electricity Board to the paper board manufacturing unit could be taken into account for the purpose of computing the benefit under Section 80IA. The benefit under Section 80IA(8) cannot obviously be computed at a rate otherwise than the price that the electricity manufactured by the assessee would have fetched in the open market.

Mr. Khaitan, learned Senior Advocate appearing for the respondent assessee drew our attention to a judgment of the Apex Court in the case of *Thiru Arooran Sugars Ltd. Vs. C.I.T.* reported in (1997) 227 ITR 432 in which the Apex Court was considering the question pertaining to market value in relation to sugarcane and the following views were expressed:-

"Held, affirming the decision of the High Court, that it was not disputed that the assessee utilized sugarcane grown by it in its own field for its factory and also purchased a considerable amount of sugarcane from outside. Therefore, it was not the case of the assessee that sugarcane growers did not sell sugarcane in the ordinary course of their business in the region where the assessee carried on business. The assessee-company actually bought sugarcane from a large number of growers year after year in the ordinary course of business. The price at which it bought sugarcane must be taken to be the market price. If the price was controlled by the Sugarcane Control Order the controlled price would be taken as the market price because it was at this price that a willing buyer and a willing seller were expected to transact business."

Mr. Khaitan also drew our attention to an unreported judgment of the Madras High Court in Tax Case (Appeal) Nos.68 to 70 of 2010, wherein the following views were taken:-

"9. Therefore, there is no difficulty in holding that captive consumption of the power generated by the assessee from its own power plant would enable the respondent/assessee to derive profit and gains by working out the cost of such consumption of power inasmuch as the assessee is able to save to that extent which would certainly be covered by Section 80-IA(1). When such will be the outcome out of own consumption of the power generated and gained by the assessee by setting up its own power plant, we do

not find any lack of merit in the claim of the respondent/Assessee when it claimed by relying upon Section 80-IA (1) of the Income Tax Act by way of deduction of the value of such units of power consumed by its own plant by way of profit and gains for the relevant assessment years."

The aforesaid judgment of the Madras High Court, Mr. Khaitan pointed out, is based on a judgment of the Apex Court in the case of *Bhagwan Dass Jain Vs. Union of India And Others* reported in (1981) 128 ITR 315 wherein the following views were taken:-

"Even in its ordinary economic sense, the expression "income" includes not merely what is received or what comes in by exploiting the use of a property but also what one saves by using it oneself."

Mr. Khaitan, therefore, submitted that the rate at which electricity was purchased by the paper board unit from the Andhra Pradesh State Electricity Board could be taken to be the market rate which was adopted by the C.I.T. (Appeal) and the learned Tribunal. He also drew our attention to a judgment of the Chhattisgarh High Court in the case of *C.I.T., Raipur Vs. Godawari Power & Ispat Ltd.* reported in (2014) 42 taxmann.com 551 (Chhattisgarh) wherein the following views were taken:-

"28. The Chhattisgarh-Company is a company which is generating power. It is neither consumer of the electricity, nor it is supplying power to a consumer. It also cannot sell power to any consumer directly : it has to compulsorily sell it to the Board.

29. The power sold by the Chhattisgarh-Company to the Board is a sale to a company which itself supplies power to the consumers. It is not sale of power to the consumer.

30. The Steel-Division of the Assessee is a consumer. The CPP of the Assessee supplies electricity to the Steel-Division. Had the Steel-Division not taken power from the CPP then it had to purchase power from the Board. The CPP has charged the same rate

from the Steel-Division that the Steel-Division had to pay to the Board if the power was purchased from the Board.

31. The market value of the power supplied to the Steel-Division should be computed considering the rate of power to a consumer in the open market and it should not be compared with the rate of power when it is sold to a supplier as this is not the rate for which a consumer or the Steel-Division could have purchased power in the open market. The rate of power to a supplier is not the market rate to a consumer in the open market.

32. In our opinion, the AO committed an illegality in computing the market value by taking into account the rate charged to a supplier: it should have been compared with the market value of power supplied to a consumer. "

The last point urged by Mr. Khaitan was that the point as regards computation has not been raised by the appellant and therefore Court should not extend the scope of appeal by bringing in the question not put forward in the appeal.

We have considered the submission advanced by Mr. Khaitan but we are unable to agree with him. The benefit under Section 80IA 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."

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 Limited Vs. CIT* (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.

Therefore, the view taken both by the Tribunal and the C.I.T. (A) on the basis of the judgment of *Thiru Arooran Sugars Ltd.* (supra) is altogether incorrect.

The judgment of the Chhattisgarh High Court in the case of Godawari Power & Ispat Ltd. cannot be followed for the same reasons. The judgment of the Madras High Court cited by Mr. Khaitan has no manner of application because that judgment is based on the principle that money saved is money earned. The principle is no doubt true but the question is, "which unit of the assessee has saved the money?" Is it the paper manufacturing unit which saved the money? Or is it the power generating unit which saved the money? By installing power generating unit the assessee has benefited itself by getting uninterrupted supply of power and has also benefited itself by getting electricity at a lower cost which otherwise was not possible. Therefore, the money was saved by the paper unit and not by the electricity unit. We are as such unable to agree with the views rendered by the Madras High Court.

Our attention was drawn by Mr. Khaitan to an unreported judgment of this Court in the case of C.I.T. Vs. Graphite India Limited, wherein the assessee had computed the receipts for captively consumed power at the rate at which it had purchased power from the board. That appeal preferred by the revenue was not admitted by this Court and was dismissed at the admission stage without examining of the matter. Therefore, that judgment does not constitute a precedent. Another judgment was drawn to our attention by Mr. Khaitan which is in the case of C.I.T. -Vs- Kanoria Chemicals & Industries Ltd. reported in (2013) 35 taxmann.com 566 (Calcutta) to which one of us was a party (Girish Chandra Gupta, J.). That judgment was rendered on concession. Therefore, that judgment also does not constitute a precedent.

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 80IA". 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.

Reference in this regard may also be made to the proviso to Sub-Section 4 of Section 260A of the I. T. Act. The assessee, in such a case is entitled to notice that a further substantial question of law is involved. Such notice has duly been given and the assessee has made its submission recorded hereinabove.

For the aforesaid reasons the second question is answered in the negative and in favour of the revenue. The appeal is partly allowed.

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.

(GIRISH CHANDRA GUPTA, J.)

(ARINDAM SINHA, J.)

sm/sb.