आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ "आई" मुंबई

IN THE INCOME TAX APPELLATE TRIBUNAL "I" BENCH, MUMBAI

BEFORE S/SHRI B.R.BASKARAN (AM) AND RAMLAL NEGI, (JM)

आयकर अपील सं./I.T.A. No.1426/Ahd/2009

(निर्धारण वर्ष / Assessment Year :2005-06)

Indian Petrochemicals Corp.Ltd., (Now merged with Reliance Industries Ltd) P O Petrochemicals, Dist-Vadodara -391346	**बनाम**/ Vs.	The Addl. Commissioner of Income Tax, Range 1, Baroda, Gujarat
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

आयकर अपील सं./I.T.A. No.3921/Mum/2009

(निर्धारण वर्ष / Assessment Year :2005-06

Asstt. Commissioner –LTU, 28th Floor,Centre-1, World Trade Centre, Cuffe Parade, Mumbai-400005	**बनाम**/ Vs.	M/s Indian Petrochemicals Corp.Ltd (Now merged with Reliance Industries Ltd) P O Petrochemicals, Dist-Baroda -391346
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

स्थायी लेखा सं./जीआइआर सं./PAN :AAAC14415Q

आयकर अपील सं./I.T.A. No.4005/Mum/2013

(निर्धारण वर्ष / Assessment Year :2006-07

Asstt. Commissioner –LTU, 28th Floor, Centre-1, World Trade Centre, Cuffe Parade, Mumbai-400005	**बनाम**/ Vs.	M/s Indian Petrochemicals Corporation Ltd., (Now merged with Reliance Industries Ltd) 3rd floor, Maker Chamber-IV, Nariman Point, Mumbai-400021
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

स्थायी लेखा सं./जीआइआर सं./PAN : AAAC14415Q

अपीलार्थी ओर से / Assessee by	Shri Arvind Sonde
प्रत्यर्थी की ओर से/Revenue by	Shri B C S Naik

सुनवाई की तारीख / Date of Hearing : 14.10.2015
घोषणा की तारीख /Date of Pronouncement : 18.11.2015

आदेश / O R D E R

PER B.R. BASKARAN (AM)

The assessee and the Revenue have filed cross-appeals against the order dated 27.3.2009 passed by Ld CIT(A)-I, Baroda for assessment year 2005-06. The Revenue has also filed an appeal against the order of ld. CIT(A) dated 21.2.2013 for the assessment year 2006-2007. Since most of the issues urged in these appeals are identical in nature, these appeals were heard together and they are being disposed of by this common order, for the sake of convenience.

2. We shall first take up the appeal filed by the assessee for assessment year 2005-06, wherein the assessee has urged following issues:

a) Disallowance of Depreciation of Rs.1,44,71,000/- in respect of jetties constructed by the assessee and used for the purpose of business;
b) Addition of Cenvat Credit of Rs.3,11,32,910/;- and

3. The assessee is engaged in the business of manufacturing and selling of petrochemical products. The first issue relates to the disallowance of depreciation claimed on Jettys constructed by the assessee. The assessee had constructed a jetty at Narmada estuary at Dahej on behalf of Gujarat Maritime Board (GMB). The entire cost of Jetty was to be borne by the assessee and in lieu thereof, the assessee was entitled, firstly, to priority user of the said Jetty and secondly, to rebate by

way of lower wharfage charges/landing charges on the goods imported by the assessee through the Jetty. The assessee claimed depreciation of Rs.1,44,71,000/- on the construction cost so incurred @ applicable to Pland & machinery. The AO took the view that the rebate in wharfage/landing charges availed by the assessee should have been reduced from the cost of the asset before claiming depreciation. It was noticed that the rebate in wharfage charges claimed during the year amounted to Rs.2.02 and cumulatively, it amounted to Rs.16.68 crores. Since the rebate was more than the depreciation claimed by the assessee, the AO disallowed the entire depreciation.

4. The ld.CIT(A) by following the earlier decision of predecessor in appeal No.CAB/I-377/06-07 for the assessment year 2004-05 confirmed the same. Aggrieved by this decision of ld. CIT(A), the assessee is in appeal before us.

5. At the time hearing, the ld. Counsel appearing for the assessee submitted that an identical issue had come up before the co-ordinate Bench of the Tribunal in assessee's own case in ITA no. 664 and 665/Ahd./2008 (AYs:2003–04 and 2004–05) and the Tribunal, vide its order dated 29.06.2012, has decided the issue in favour of the assessee. Therefore, the ld.counsel prayed that by applying the same decision the claim of depreciation as prayed for by the assessee in this year be granted.

6. The ld. DR reiterated the facts of the case and relied on the orders of authorities below.

7. We heard both the parties and perused the material available before us. After considering the rival contentions and perusal of records as well as

the order of the co-ordinate Bench of Tribunal in the assessee's own case as relied upon by the ld.Counsel for the assessee, we find that the similar issue had come up before this Tribunal and the Tribunal vide paras 86 to 88 of the order (supra) has decided this issue in favour of the assessee. For the sake of convenience, we reproduce the relevant findings of the Tribunal as under:

> "86. We have carefully considered the submissions of the learned Representatives of the parties and the orders of the authorities below. We have also considered the order of the Tribunal dated 26th November 2007 (supra)
>
> 87. We observe that on identical facts, the Tribunal considered similar issue in the case of Reliance Ports and Terminals Ltd., and allowed the claim for depreciation on the cost incurred by the assessee on construction of jetties at Sikka Port, Gujarat, for GMB. In the said case, the assessee constructed jetties at Sikka Port, Gujarat of GMB primarily to serve imports of group companies at the port. As per the agreement entered into, the assessee was entitled to concession in wharfage charges i.e., land / shipping fee on use of jetty, which was to be set–off against capital investment made by the assessee. The assessee treated this right to use the jetty as an intangible asset and claimed depreciation on the cost incurred @ 25%. The Assessing Officer stated that the assessee was not entitled to depreciation on the cost of construction of jetty as the entire cost being reimbursed by GMB by way of rebate on the wharfage charges which otherwise the assessee was liable to pay in full. Further, the right to use the jetty was not in the nature of any business or commercial right similar to normally accepted intangible asset such as knowhow, patents, copy rights, trade marks, license, franchises or any other business or commercial rights in similar nature. That entire investment in the jetty was quantifiable and the return from the investment was specified based on which the rebate on wharfage charges was determined. It is relevant to state that in the said case, as per the agreement, the ownership of the jetty was to be with GMB although, the cost of building and jetty was made by the assessee. In the said case also, the assessee was required to pay landing and shipping fees (known as wharfage charges) @ 20% of the actual landing and shipping fees specified in the schedule of port charges. The balance 80% was required to be set–off against the capital investment i.e., the cost of the construction of jetties.

After the capital investment was recovered through such set–off, the assessee was required to pay landing and shipping fees at normal rate. The agreement was to remain in force for a period of 25 years or till such time such aggregate of the rebate obtained by the assessee in wharfage charges equaled the amount of construction of the jetties, whichever is earlier. The assessee spent ` 14,25,63,02,471, and treated the same as intangible asset under section 32(1) of the Act on the reasoning that it was license and also represent business and commercial right on which the assessee claimed depreciation @ 25%. The Assessing Officer did not agree with the assessee and disallowed the claim. The first appellate authority also confirmed the action of the Assessing Officer. Further, the Commissioner (Appeals) held that the expenditure to be allowed proportionately over a period of 25 years. Being aggrieved, the assessee filed appeal before the Tribunal. The Tribunal, after considering the submissions of the Representatives of the parties, held that by virtue of the terms of agreement, the assessee only acquired the commercial right or license and they are really an intangible asset within the meaning of section 32(1) of the Act. Thereafter, the Tribunal, vide Para–32, of the said order, held that the assessee is entitled for the depreciation by treating the expenditure as part of block of intangible asset. The relevant Para–32 of the said order, reads as follows:–

> "32. The question is whether the present expenses incurred by the assessee can be said satisfy the tests of being licences, franchises or any other business or commercial rights being intangible assets within the meaning of the aforesaid provisions. In our view, the Tribunal in the earlier year has already concluded that this expenditure is question is incurred wholly and exclusively for the purpose of business and the terms of the agreement which are extracted hereinabove clearly shows that the assessee has acquired some business or commercial right by incurring this expenditure. This expenditure has not resulted in the acquisition of any tangible asset like building, machinery, plant or furniture. Any other expenditure which did not result in the acquisition of these intangible assets can only be treated as intangible assets. In our view, substantial expenditure incurred by the assessee is for certain commercial considerations and business interest has resulted in business advantage to the assessee in the form of priority user of the infrastructure facility that was badly needed by the assessee and its associates concerns.

> The assessee would have been forced to incurred extra expenditure if this expenditure were not incurred by the assessee. After all the businessman does not incur any expenditure unless it gives some business advantage and the huge expenditure incurred by the assessee is only to get such business advantage like priority user by the assessee company and right to claim rebate on the wharfage charges payable or to guard against the possible increase in the wharfage charges that may be necessitated by efflux of time or economic inflation. All points are considered together, in our view, the expenditure in question give rise to acquisition of licence or other business or commercial right which are really in the nature of intangible asset and are fully covered within the meaning of section 32(1) of the Act. In the light of the above discussion, the contention of the assessee that the said expenditure is to be treated as an intangible asset, and therefore, the assets are entitled for appropriate depreciation by treating the said expenditure as part of the block of intangible asset is fair, reasonable and in accordance with the amendment provisions of law in this regard."

88. We observe that the terms of agreement of the assessee before us are similar to the terms of agreement which was considered in the case of Reliance Ports & Terminals Ltd. (supra) and entered into with GMB. The benefit which the assessee before us is entitled to get on account of construction of jetty are similar to the case considered by the Tribunal, vide its order dated 26th November 2007 (supra). The learned Departmental Representative, during the course of his submissions, has not pointed out any distinguished facts in the case before us viz–a–viz in the above case of Reliance Ports and Terminals Ltd. (supra). We observe that the decision in above case squarely apply to the facts of the case before us. Therefore, respectfully following the earlier order of the Tribunal dated 26th November 2007 (supra), we hold that the assessee is entitled for depreciation at the rate as applicable on the cost incurred for construction of jetty at Dahej. Hence, we allow ground no.3, of the appeal filed by the assessee by reversing the orders of the authorities below".

Consistent with the view taken by the Tribunal in the assessee's own case referred above, we hold that the assessee is entitled to claim depreciation

on the Jetty, referred above. Accordingly, we set aside the order of Ld CIT(A) on this issue and direct the AO to allow depreciation claimed by the assessee.

8. The next issue relates to the addition of unavailed Cenvat credit. The AO took the view that the value of cenvat credit lying unutilized at the close of the accounting period ought to have been included in the value of closing stock as per the provisions of section 145A of the Income Tax Act, 1961. Accordingly he made the addition of difference between unutilised cenvat credit as on last day and the first day of the accounting period amounting to Rs.3,11,32,910/- to the value of closing stcok which resulted in enhancement of total income of the assessee by that amount.

9. Before the ld. CIT(A), the assessee contended that it has followed the exclusive method of accounting, i.e. the method adopted by the assessee was to account for purchase, sale and closing stock of raw material on the net value excluding cenvat credit. The assessee contented that, in its books, the assessee did not debit the cenvat paid on purchase of raw material to the Profit and Loss account but carried the same to cenvat account and at the time of sale the cenvat payable by the assessee was reduced by the amount of cenvat credit available from the purchase of raw material. In case such cenvat credit remained unutilized the same was reflected in the balance sheet as an asset being in the form of receivable. Accordingly it was submitted that even if the inclusive method was followed the effect on the profit would be NIL. The ld.CIT(A) took into consideration the submissions of the ld.AR, the provisions of Accounting Standard-2, the provisions of section 145 of the Act and the decision of his predecessor for the assessment year 2004-05, in which he had held that "*…….However, no fault with the action of the AO in*

including this amount to the closing stock can be found. Under the circumstances, it is directed that the AO shall allow this duty/tax on actual payment basis in the year of payment u/s 43B of the Act". Accordingly, the ld. CIT(A) confirmed the action of the AO and gave similar directions to the AO. Hence the assessee is in appeal before us.

10. At the time hearing, the ld.counsel appearing for the assessee submitted that an identical issue had come up before the Ahmedabad Bench of the Tribunal in assessee's own case referred supra and Tribunal vide para 89 to 96 has discussed this issue elaborately and decided the same in favour of the assessee. Therefore, the ld.counsel prayed that by applying the same decision the addition made on account of cenvat credit be deleted.

11. The ld. DR reiterated the facts of the case and relied on the orders of authorities below.

12. We find that the similar issue had come up before the Tribunal in the assessee's own case (referred above) and it has been decided in favour of the assessee. For the sake of convenience, we reproduce the relevant findings of the Tribunal as under:

> "93. At the time of hearing, the learned Counsel for the assessee submitted that above issue is covered in favour of the assessee by the judgment of Hon'ble Jurisdictional High Court in the case of CIT v/s Mahalaxmi Glass Works Pvt. Ltd., [2009] 318 ITR 116 (Bom.) and also by the judgment of Hon'ble Delhi High Court in CIT v/s Mahavir Alluminium Ltd. [2008] 297 ITR 77 (Del.), wherein it has been held that if there is a change in valuation of closing stock in one end, there must necessarily be a corresponding change at the other end otherwise the true profit would not be reflected.

94. On the other hand, the learned Departmental Representative relied on the order of the Commissioner (Appeals).

95. We have considered the submissions of the learned Representatives of the parties and the orders of the authorities below as well as the cases relied on by the learned Counsel for the assessee (supra). We are of the considered view that if the valuation of closing stock is increased by the unavailed CENVAT / MODVAT, the purchases should also be increased by a similar amount. During the course of hearing, it was contended that purchases has been debited exclusive of the excise duty element i.e., by adopting net method of purchases and, accordingly, the closing stock of raw materials is valued exclusive of the unavailed CENVAT / MODVAT credit. We observe that Hon'ble Delhi High Court has held in the case of Mahavir Alluminium Ltd. (supra), after considering the decision in the case of CIT v/s Allahabad New Cotton Mills Ltd., AIR 1930 PC 56, that whenever there is change in the valuation at one end, there must necessarily be a corresponding change at the other end otherwise the true picture would not be reflected. In the case of Mahavir Aluminium Ltd. (supra), the issue related to closing valuation of adjustment of unutilised MODVAT credit. The Tribunal allowed the adjustment and in appeal the Hon'ble High Court confirmed the order of the Tribunal. The Hon'ble Jurisdictional High Court, after considering its earlier decision in the case of Melmould Corporation Ltd. (supra), and the decision of the Hon'ble Delhi High Court in the case of Mahavir Aluminium Ltd. (supra), has held as under:–

> "We are in respectful agreement with the reasoning and the finding given by the Delhi High Court."

96. In view of the above, we hold that if the closing stock to be increased on account of unutilised MODVAT credit, the corresponding opening stock of that year is also to be increased, as the Department has not disputed the fact that the purchases have been debited exclusive of the excise duty element i.e., by adopting net method of purchases. If the value of closing stock is increased by the MODVAT, the purchases should also be increased by a similar amount. Therefore, the issue is squarely covered in favour of the assessee by the decision of the Hon'ble Jurisdictional High Court (supra). Hence, ground no.4, taken by the assessee is allowed by

deleting the addition of Rs.91,29,312, made by the Assessing Officer."

Consistent with the view taken the Tribunal in the assessee's own case for the preceding year, we decide this issue in favour of the assessee. Accordingly, the order of Ld CIT(A) on this issue is set aside and the AO is directed to delete this addition.

13. Now we shall take up the appeal bearing No.ITA No.3921/Mum/2009 filed by the Revenue, whereinn following issues are urged:

a) Deletion of disallowance of Rs.51,21,254/- out of staff welfare expenses, being the contribution made to various clubs run by staff members;

b) Deletion of addition relating to sales tax exemption received from the Government of Gujarat by holding the same as capital receipt;

c) Deletion of disalalowance of lease rent charges of Rs.34,51,96,415/-, which was treated by the AO as finance charges.

The Revenue has also raised following additional grounds :

a) Deletion of addition of Rs.3,11,32,910/- made u/s 145A relating to unutilised Cenvat credit.

14. The additional ground urged by the revenue relates to the addition relating to Cenvat credit and the said issue has already been decided by us in favour of assessee, vide paras 8 to 12 of this order. Accordingly, we reject the additional ground urged by the revenue.

15. The facts relating to deletion of disallowance of contribution amounting to Rs.51,21,254/- out of Stafff welfare expenses are that the

assessee has made payment towards various clubs run by and meant for the staff and their families at Baroda, Nagothane and other stations. The AO, by invoking the provisions of section 40A(9) of the Act, disallowed the above said claim of the assessee. The ld. CIT(A) deleted the disallowance by following his decision rendered for assessment years 2000-01 to 2004-05.

16. At the time hearing, the ld.counsel appearing for the assessee submitted that an identical issue had come up before the co-ordinate Bench of the Tribunal in assessee's own case in ITA no. 664 and 665/Ahd./2008 (AYs:2003–04 and 2004–05), and ITA No.745/Ahd/2008 dated 29.06.2012 and the Tribunal, vide paras 59 to 64 and 100 to 103 of the order, has decided the issue in favour of the assessee. The ld. DR reiterated the facts of the case and relied on the assessment order.

17. We find that similar issue had come up before the co-ordinate bench of Tribunal and the Tribunal vide paras 59 to 64 of the order (supra) has decided this issue in favour of the assessee. Consistent with the view taken by the co-ordinate bench in the assessee's own case on identical issue in the earlier years, we uphold the order of Ld CIT(A) on this issue.

18. The next issue pertains treatment of sales tax exemption received from the Gujarat Government as capital receipt by Ld CIT(A). The AO observed that the assessee has received an amount of Rs.60,65,07,100/- on account of sales tax exemption granted by the Government of Gujarat and the assessee treated it as capital receipt. The AO, by following the decision of the Hon'ble Supreme Court in the chase of Sahney Steels and Press Works reported in 228 ITR 253(SC), treated it as revenue receipt and added the same to the total income of the assessee.

19. Before the ld.CIT(A), the assessee submitted that an identical issued had been before the Ahmedabad Bench of Tribunal in ITA No.3896/Ahd/2003, 437/Ahd/2007 and 3054/Ahd/2007 (AYs 2000-01 to 2002-03) in which the ld.CIT(A) held that the amount received by the assessee is capital in nature. The ld. CIT(A), after considering the facts of the case, case law relied upon by the parties and the precedent laid down by Special Bench of the Tribunal in DCIT V/s Reliance Industries ltd. (88 ITD 273) and also the decision rendered by the Ahmedabad Bench of the Tribunal in Nirma Ltd (ITA No.175/Ahd/2003), held that the AO was not justified in making the addition of Rs.60,65,07,100/- and hence directed the AO to delete the above said addition.

20. At the time of hearing, the ld.AR submitted that an identical issue had come up before the co-ordinate Bench of the Tribunal in assessee's own case in ITA no. 664 and 665/Ahd./2008 (AYs:2003–04 and 2004–05), and ITA No.745/Ahd/2008 dated 29.06.2012 and the Tribunal vide para 3 to 8 and 74 to 76 of the order and decided the issue in favour of the assessee. The ld.DR relied upon the order of AO.

21. We find that the issue urged by the revenue has been decided against the revenue by the Tribunal in assessee's own case in appeals cited supra. Accordingly, we do not find any infirmity in the decision taken by Ld CIT(A) on this issue.

22. The next ground urged by the revenue relates to deleting the disallowance of lease rent amounting to Rs.34,51,96,415/-, being the portion of lease rent held to be repayment of principal by the AO. The AO disallowed the lease rent in respect of two pipelines i.e. Hazira –Dahej

pipeline and Dahej-Baroda Pipelines following his observations made in the assessment years 2003-04 and 2004-05. Aggrieved by this, the assessee had preferred an appeal before the ld. CIT(A).

23. Before the ld.CIT(A), the assessee contended that similar issue has been decided in favour of the assessee by the ld.CIT(A) himself in his earlier order in Appeal No.CAB-I/391/2007-08, order dated 26.3.2009 for the assessment year 2004-05. The ld.CIT(A), by following his own order referred above, decided the issue in favour of the assessee. Aggrieved by the decision rendered by the ld.CIT(A), the Revenue is in appeal before us.

24. At the time of hearing, the ld.AR submitted that an identical issue had come up before the co-ordinate Bench of the Tribunal in assessee's own case in ITA no. 744/Ahd/2008 (AY-2003-04) dated 29.06.2012 and the Tribunal vide para 54 to 58 of the order decided the issue in favour of the assessee. Therefore, the ld.counsel prayed that by applying the same decision the ground raised by the revenue be dismissed. The ld.DR relied upon the order of AO.

25. We find that the issue urged by the revenue has been decided against the revenue by the co-ordinate Bench of the Tribunal in ITA No.744/Ahd/2008 (AY-2003-04) dated 29.6.2012. We find it convenient to reproduce para 58 of the order for sake of brevity:

> "58. We have considered the orders of the authorities below and earlier years order of the Tribunal in assessee's case (cited supra) and also the judgment of Hon'ble Gujarat High Court in the appeals filed by the Department against the order of the Tribunal for assessment year 1995–96 and 1996–97, copies placed at Pages–95 to 100 and 101 to 105 of the paper book. We observe that the lease rent paid by the assessee on the boiler has been allowed in the

> preceding assessment years. Respectfully following the earlier orders of the Tribunal and as confirmed by the Hon'ble Gujarat High Court (cited supra), we uphold the order of the Commissioner (Appeals) and dismiss ground no.1, raised by the Revenue".

Consistent with the view taken by the co-ordinate bench of Tribunal, we reject the ground No.3 taken by the Revenue.

26. Now will take the appeal taken by Revenue bearing ITA No.4005/Mum/2013 for assessment year 2006-07, wherein following issues are urged before us:

a) Deletion of addition of Rs.85,97,07,481/- pertaining to Sales tax incentive treating the same as capital receipt;
b) Deletion of depreciation claimed by the assessee amounting to Rs.65,12,000/- on jetties;
c) Deletion of addition of Rs.33,41,58,609/- out of least rent charges treating the same as finance lease.
d) Deletion of addition by rejecting the claim made u/s 80IA of the Act in respect of Captive power generation plant.

27. The first issue raised in this appeal pertains to sales tax incentives of Rs.85,97,07,481/-. We find that this issue is similar to that of the issue raised by the Revenue in ITA No.3921/Mum/2009 considered by us in the earlier paragraphs in AY-2005-06 and the same has been decided in favour of assessee in the earlier paragraphs. While deciding the issue in favour of assessee, we have also taken the cognizance of decision rendered by the co-ordinate Bench of the Tribunal in assessee's own case in ITA no. 664 and 665/Ahd./2008 (AYs:2003–04 and 2004–05), and ITA No.745/Ahd/2008 dated 29.06.2012. Accordingly, Ground No.1 taken by the Revenue is dismissed.

28. Ground No.2 pertains to depreciation claimed by the assessee of Rs.65,12,000/- on construction of jetties. We find that a similar issue has

been raised by the assessee vide Ground No.1 in the appeal bearing No.1426/Mum/2009 and we have decided this ground in favour of the assessee. Accordingly, to maintain consistency with the view taken earlier, we reject the Ground No.2 taken by the Revenue.

29. The next issue raised by the Revenue in this appeal pertains to deletion of lease rent amounting to Rs.33,41,58,609/-. We find that similar issue has been raised by the Revenue in Ground No.3 for the assessment year 2005-06 and we have rejected the ground taken therein. Accordingly, to maintain consistency with the stand so taken by us, we reject Ground No.3 taken by the Revenue.

30. The next issue raised by the revenue in this appeal is with regard to the deduction claimed u/s 80IA of the Act in respect of Captive power generation plant.

31. During the course of assessment proceedings, the AO observed that the assessee claimed deduction u/s 80IA(4) amounting to Rs.8651.99 lakhs in respect of its Captive Power Plant at Gandhar complex. The assessee claimed the deduction u/s 80IA in respect of power generation undertaking by taking price which the industrial consumers paid during the year under consideration for electricity purchased from State Power Distribution Agency. The AO initially took the view that the assessee is not eligible for benefit u/s 80IA in respect of Captive Power Plant, by holding that the circular no.178/28/2001-ITAI dated 3.10.2001 issued by Ministry of Finance, Department of Revenue, CBDT is not applicable to the assessee. Without prejudice to the above stand, the AO held that the market rate adopted by the assessee to compute the profit of the unit is not correct. Accordingly the AO adopted the average rate fixed by the

Regulatory Authority for procuring power generated by private operators as market value within the meaning of section 80IA(8) of the Act and accordingly worked out the profit. The workings made by the AO resulted in negative profit and hence the AO held that the assessee is not eligible to claim deduction u/s 80-IA of the Act and accordingly disallowed the claim of Rs.86,51,99,227/- made by the assessee.

32. Before the ld.CIT(A), the assessee made detailed submissions and relied upon various case laws which are discussed by the ld.CIT(A) in para 12.1 of his order. The ld. CIT(A) after considering the both parties submissions and case laws relied by both parties vide para 12.2 allowed the claim of the assessee. Being aggrieved by the decision of ld.CIT(A), the revenue is in appeal before us.

33. The ld.DR re-iterated the facts of the case and relied on the order of AO.

34. The ld. AR submitted that an identical issue had come up before Mumbai Bench of the Tribunal in the case of M/s Reliance Industries Ltd in ITA No.536/Mum/2012 (AY-2006-07) dated 29.5.2015 and the Tribunal after discussing each and every aspect of the facts, rulings, case law and findings of lower authorities has confirmed the decision taken by ld.CIT(A) in favour of the assessee.

35. We have considered the rival contentions of the parties on this issue and perused the record. We notice that an identical issue was considered by the co-ordinate bench of Tribunal in the case of Reliance Industries ltd referred above and for the sake of convenience, we reproduce the same as under:

"14. We shall now take up the appeal filed by the revenue. The assessee had set up captive power generating units and claimed deduction u/s 80IA of the Act in respect of profits computed for those units. The assessee claimed a deduction of Rs.131.43 lakhs as deduction. However, the AO took the view that the assessee has adopted higher market value for computing sale value of electricity and accordingly re-computed the profit of Captive power generating units by restricting the profit to 16% of the Capital base of the undertakings. For this purpose, the AO placed reliance on a notification issued by the Government of India, wherein the Ministry of Power has fixed 16% rate of return as reasonable rate of return. Accordingly, the AO reduced the profit of electricity undertakings owned by the assessee and accordingly restricted the deduction u/s 80IA of the Act to Rs.48.76 crores. The Ld CIT(A), however, granted relief to the assessee and hence the revenue has filed this appeal before us.

15. We have heard the parties and perused the record. We notice that the Ld CIT(A) has considered the provisions of sec. 80IA and accordingly come to the conclusion that there is merit in the claim of the assessee. For the sake of convenience, we extract below the relevant observations made by Ld CIT(A) on this issue:-

"A perusal of the said section reveals that where transfer of any goods or services by the eligible business to any other business carried on by the assessee is not recorded in the books of account of the eligible business at the market value of such goods or services as on the date of the transfer, then for the purposes of the deduction, the profits and gains of such eligible business is required to be computed as if the transfer has been made at the market value of such goods or services as on that date. As per the Explanation, 'market value' in relation to the goods would mean the price that such goods would ordinarily fetch in the open market. The proviso to sub-section (8) of sec. 80IA would come into operation only when in the opinion of the Assessing Officer, the computation of profits and gains of the eligible business in the manner provided in the main sub-section presents exceptional difficulty. It is, therefore, clear that the Assessing Officer, in order to invoke the proviso, must form an opinion based on the materials on record that the computation in the manner provided presented exceptional difficulties. It he does not form an opinion, he cannot invoke the proviso to determine

the profits & gains of the eligible business. It would, therefore, be required to be seen whether the AO has found, based on any material on record, and has brought any evidence or material on record, that the transfer of the goods by the eligible business, i.e. the power generating units, has not been recorded at the market value of such goods. It will also be required to be seen whether the AO has formed any opinion which would justify the invoking of the proviso to sec. 80lA(8), because it is the proviso that the AO has invoked to work out the deduction available to the assessee u/s 80lA.

Perusal of the facts on record show that the assessee had disclosed that it had sold/transferred electricity to related concerns and, that, the said transfer had been done at the fair market value of the goods. In the earlier assessment years in the regular assessments, the basis of taking the market value of the goods had been accepted by assessing Officer. I find that the Assessing Officer has assumed the power u/s 80lA(8) without bringing any material on record to show that the price recorded in the books by the eligible business did not correspond to the market value of the goods as on the date of the transfer. It is important to note that for giving a finding that a particular value did not correspond to the market value, the market value has to be found out. Hence, the section pre-supposes that there is another value attached to the said goods which would represent the market value of the goods. I find that there is nothing brought on record to show as to how the price recorded in the Books does not correspond to the market value of goods, when sold in the open market, especially in light of the reasons given by the assessee that such price corresponded to the market value of the goods.

I find that the Assessing Officer has rejected the value recorded by the eligible business by merely holding that the market value cannot be the purchase value of electricity but the price of the electricity, which the assessee can fetch in the open market. There being no open market for electricity during the period under review, the regulatory bodies fixed the price of electricity. He has further held that the tariff fixed for sale by the State Power Distribution Agency for industrial consumers could not be called as market price as the

regulatory fixes the tariff considering the wheeling charges, transmission loss due to leakage, past losses of the distribution agency, etc. In my opinion, the findings of the AO cannot be taken to be correct. Even though there may be no open market for the goods, an open market has to be presumed in respect of the goods in question in view of the categorical condition laid down in the provisions itself and the law laid down in this regard by the different Hon'ble Courts of the land and which have been relied upon by the assessee in its submissions. The Assessing Officer has not brought any material to show that the price charged was not in consonance with the market value. The AO has also not suggested, leave alone computed, as to what the market value of the goods should be. While the assessee has given detailed reasons as to why the price of the goods recorded by it corresponds to the market value, the Assessing Officer has not given any specific findings to hold as to why such price does not correspond to the market value of the goods and as to what was the market value of such goods. The assessee has contended that the rate charged to the end user by the State Electricity Board would provide the most appropriate basis to arrive at the market value. Since, the eligible unit is, in effect, transferring the goods to another business which is the end consumer, the cost to the end consumer, is required to be considered and not the tariff at which the 'Independent Power Producers' sell to the 'State Distribution Agency', which in turn sells to the State Electricity Board for further sale to the end users i.e., consumers, at a rate higher than the rate at which the 'State Distribution Agency' had procured the electricity at. Another important aspect which is required to be considered is that the rate at which the 'Independent Power Producers' sell to the State Distribution Agency' under the Electricity Act, 1948 is a regulated rate which is determined on the basis of the normative parameters determined by the Government of India under its Notification No. 251(E) dt. 30/03/1992. The normative parameters have been fixed by the Government, which is required to be followed by all, and no deviation in fixing the tariff is allowed. Hence, even here, the rate cannot be taken to be the "price that such goods would, ordinarily fetch in the open market" as this is the regulated rate fixed by the Government. It is also seen that the Assessing Officer has taken 16% return on capital base to work out the profits of the eligible business of the assessee

eligible for deduction u/s 80lA of the IT Act,1961. 16% return on capital base in Notification No. 251(E) dt. 30/3/1992 is only an exercise for fixation of tariff. It is one of the parameters out of many which is required to be taken into consideration for fixing the tariff in relation to the rate at which the Independent Power Producers sell their power to the State Distribution Agency. Hence, 16% return on capital base alone would not be relevant while computing the profits of the eligible business under the Act.

To sum up under sec. 80IA(8), the following conditions are required to be satisfied :-

a) Any goods or services held for the purposes of the eligible business are transferred to any other business carried on by the assessee.

b) 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.

c) It is only when condition (b) is satisfied then the Revenue gets a right to determine profits and gains of such eligible business at the market value of such goods or services as on the date of its transfer.

The Assessing Officer had considered the rate charged by the State Distribution Agency as the market value of the goods transferred by the eligible business in original assessment of the assessee. There is nothing on record to show as to how value of the goods adopted/taken by the assessee do not correspond to the market value of such goods, especially in light of the reasons given by the assessee. The AO has also not expressed any opinion as to how the computation of profits and gains of the business in the manner provided in the main sub-section presented exceptional difficulties. Hence, proviso to sec. 801A(8) could not have been invoked by him. It is also clear that the parameter relating to 16% of capital base is only an exercise for fixation of tariff and is only one of the many parameters taken into consideration for fixing the tariff under the old Electricity Act

of 1948. This parameter is for working out the tariff for sale to the Distribution agencies and not for sell to the end consumers and not for computing the profits and gains of the eligible business. In View of the aforesaid reasons, the order of the AO of working out the profits eligible for deduction on the basis of 16% return on capital base cannot be upheld.

As regards the submission relating to sec. 80A(6), I find that same submissions were made by the assessee before the Assessing Officer during the course of the reassessment proceedings. I find that the AO has not controverted the submissions of the assessee. I am also of the opinion that since the said sec. 80A(6) has been specifically made retrospective from a specific date, i.e., w.e.f. 01/04/2009, the same would apply only with respect to the A.Y. 2009-10 onwards and would not apply to the A.Y. 2006-07 in question. This is also clear from the fact that the Explanation to sec. 80IB(10) was inserted by the Finance (No.2) Act, 2009 and was made operational w.r.e.f. 01/04/2001 while sec. 80A(6) was also inserted by the Finance (No.2) Act, 2009 and was made operational w.r.e.f. 01/04/2009. Further, as per the Explanation to sec.80A(6), the market value means the price that such goods or services would fetch if these were sold by the undertaking or unit or enterprise or eligible business in the open market, subject to statutory or regulatory restrictions, if any. In the present case, the AO has not brought any material on record to show that the goods supplied by the undertaking were at a price higher than what it was required to supply as a result of any statutory or regulatory restrictions or as to what should have been the rate at which it was required to supply the goods as a result of any statutory or regulatory restrictions.

In the case of Reliance Infrastructure Ltd. (supra) Hon'ble Jurisdictional Mumbai Tribunal has held that the price that the unit paid to TPC for purchase of power would be the best basis for working out the profits of the business of generation of power even after the order MERC. In this case, the assessee, other than using power generated from its own captive generating units, was also purchasing power from TPC.

In the case of Jindal Steel and Power Ltd, reported in 16 SOT 509 (Del), Hon'ble Tribunal has held as follows:

" Section 43A of the Electricity (Supply) Act, 1948 also lays down rules and conditions for determining the tariff for the sale of electricity by a generating company to the State Electricity Boards. A perusal of the same reveals that the tariff is determined on the basis of various parameters contained therein. From the aforesaid, it is evident that on one hand it is only upon granting of specific consent that a private person can set up a power generating unit having restrictions on the use of power generated and at the same time the tariff at which a power generating unit can supply power to the Electricity Board is also liable to be determined in accordance with the statutory requirements. In this context it can be safely deduced that determination of tariff between the assessee and the Board can be said to be an exercise between a buyer and seller neither in a competitive environment and nor in the ordinary course of trade and business. It is an environment where one of the players has the compulsive legislative mandate not only in the realm of enforcing buying but also to set the buying tariff in terms of preset statutory guidelines. Therefore, the price determined in such a scenario cannot be equated with a situation where the price is determined in the normal course of trade and competition. Therefore, the price determined as per the Power Purchase Agreement cannot be equated with market value as understood in common parlance. We see no reason for not holding so for the purposes of section 80-IA(8) also. The price at which the power is supplied by the assessee to the Board is determined entirely by the Board in terms of the statutory regulations. Such a price cannot be equated with the market value as understood for the purposes of section 80-IA(8). The price recorded by the assessee at Rs. 3.72 pet unit can be considered to be the market value for the purposes of section 80-IA(8). This is for the reason that the assessee as an industrial consumer is also buying power from the Board and the Board supplies such power at the rate of Rs. 3.72 per unit to its consumers. This is the price at which the consumers are able to procure the power. Thus, under the given circumstances, it would be in the fitness of things to hold that the consideration recorded by the assessee's undertaking generating electric power for transfer of power for captive consumption at the rate of Rs. 3.72 per unit corresponds to the market value of power. Therefore, the AO is directed to allow relief to the assessee under section 80IA as claimed."

It is pertinent to note that the assessee is not supplying electricity to the State Electricity Board or to any other power distribution agency.

In the case of West Coast Mills Ltd. Reported in 100 TTJ 833 (Mum), the Hon'ble Tribunal has held as follows:

"Having held that the assessee is entitled for the deduction available under s. 80-IA, the next question is what should be the price attributable to the power generated and consumed by the assessee. The answer to the question is readily available in sub-s. (8) of s. 80-IA, which reads as below:

80-IA(8)

"Where any goods held for the purpose of the eligible profits are transferred to any other business carried on by the assessee, or where any goods 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 as on the date of 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 as on that date."

The above concept of transfer pricing is also apparent in r. 7 of IT Rules, 1962 provided for determining the income from agricultural produces consumed by the agriculturist-assessee in his business as raw material. The rule provides that in the case of income which is partially agricultural income and partially income chargeable as business income, in determining that part which is chargeable to income-tax, the market value of any agricultural produce which has been raised by the assessee and utilized as a raw material in such business shall be deducted at the prevalent market value. This principle has been considered and upheld by the Supreme Court in the case of Thiru Arooran Sugars Ltd. vs. CIT (1997) 142 CTR (SC)9 (1997) 227 ITR 432(SC). Therefore, we direct the assessing authority to work out the profits on the basis of the price of the power generated by the assessee at the average of the annual landed cost of

electricity purchased by the assessee from Karnataka State Electricity Board during the impugned previous year. It may be determined on the basis of payment details available from the bills issued by the Karnataka State Electricity Board, during the year under consideration."

During the course of the appellate proceedings, the assessee has submitted that the sale price of electricity by the captive generating units varies from Rs. 4.55 per KWH to Rs. 4.52 per KWH and for the sake of uniformity, the same had been taken at the average rate of Rs. 4.54 per KWH for computing the claim u/s 80lA for the power generating units. The working had been done based on the price of electricity charged by Dakshin Gujarat Vij Company, a state owned company which was the only supplier of electricity other than the captive power plants. In view of the decisions of the Hon'ble Tribunals as discussed above, the Assessing Officer will examine whether the submission of the assessee with respect to the rate taken is correct . If it is found that the rate charged by the suppliers is lower than the rate adopted for sale by the captive power generating units of the assessee, such rate would be taken by the AO for computing the profits of the eligible business, eligible for deduction u/s 80IA. However, if the rate charged by the suppliers is the same as the rate adopted for sale by the captive power generating units of the assessee, such rate adopted should be accepted for the purposes of working out the deduction u/s 80IA.

Subject to the above, this ground of appeal filed by the assessee is allowed".

16. At the time of hearing, the Ld A.R invited our attention to sec. 45 of The Electricity Act, 2003 and submitted that the restriction with regard to the charges to be collection on supply of electricity shall be applicable only to a "Distribution licensee" and the said restrictions shall not apply to the Captive power generating units.

17. Under these set of facts, we do not find any infirmity in the order of Ld CIT(A) on this issue."

Since the view taken by the Ld CIT(A) is in accordance with the order of the Tribunal referred above, we confirm the order of ld.CIT(A) on this issue and reject Ground No.4 of Revenue's appeal.

36. In the result, the appeal filed by the assessee for the assessment year 2005-06 is allowed and both the appeals filed by the Revenue are dismissed.

Pronounced accordingly on 18th Nov, 2015.

घोषणा खुले न्यायालय में दिनांकः 18th Nov, 2015 को की गई ।

Sd sd

(RAMLAL NEGI) (B.R. BASKARAN)

न्यायिक सदस्य / JUDICIAL MEMBER लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai: 18th Nov, 2015.

व.नि.स./ SRL , Sr. PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)- concerned
4. आयकर आयुक्त / CIT concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai concerned
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

True copy

सहायक पंजीकार (Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई /ITAT, Mumbai