2023 INSC 1053

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.13771 OF 2015

COMMISSIONER OF INCOME TAX APPELLANT(S)

VERSUS

M/S JINDAL STEEL & POWER LIMITED
THROUGH ITS MANAGING DIRECTOR RESPONDENT(S)

WITH

CIVIL APPEAL NO.13773 OF 2015

CIVIL APPEAL NO.5524 OF 2017

CIVIL APPEAL NO.7425 OF 2019

CIVIL APPEAL NO. OF 2023
(ARISING FROM SLP (CIVIL) NO.15564 OF 2020)

CIVIL APPEAL NO.13775 OF 2015

CIVIL APPEAL NO.13774 OF 2015

CIVIL APPEAL NO.9920 OF 2016

CIVIL APPEAL NO.6986 OF 2016

CIVIL APPEAL NOS.9781-9782 OF 2017

CIVIL APPEAL NO.9917 OF 2017

CIVIL APPEAL NO.941 OF 2020

CIVIL APPEAL NO. OF 2023
(ARISING OUT OF SLP (CIVIL) NO.5871 OF 2020)

CIVIL APPEAL NO. OF 2023
(ARISING OUT OF SLP (CIVIL) NO.792 OF 2021)

CIVIL APPEAL NO.8983 OF 2017

CIVIL APPEAL NO.1805 OF 2020

J U D G M E N T

UJJAL BHUYAN, J.

There are three special leave petitions in this batch, viz., SLP (C) No.15564 of 2020, SLP (C) No.5871 of 2020 and SLP (C) No.792 of 2021. Leave in these special leave petitions are therefore granted.

2. Core issue raised in this batch of civil appeals being identical, those were heard together and are being disposed of by this common judgment and order.

3. We have heard Mr. Rupesh Kumar, learned counsel for the revenue representing the appellants; Mr. S. Ganesh and Mr. Percy Pardiwala, learned senior counsel as well as Mr. D. Nageswar Rao, learned counsel for the respondent assessee.

4. All the appeals are by the revenue assailing orders of various high courts dismissing its appeals filed under Section 260A of the Income Tax Act, 1961. The core and common issue raised in all the appeals is the recomputation of deduction under Section 80 IA of the Income Tax Act, 1961 by the assessing officer which was set aside by the Income Tax Appellate Tribunal and upheld by the High Courts by accepting the contention of the assessee. Revenue is aggrieved as it contends that the recomputation of deduction made by the assessing officer was interfered with by the Income Tax Appellate Tribunal and

affirmed by the High Courts without appreciating the fact that the profits of eligible business of captive power generation plants of the assessees were inflated by adopting an excessive sale rate per unit for power supply to the assessees own industrial units for captive consumption as opposed to the rate per unit at which power was supplied by the assessees to the power distributing companies i.e. the State Electricity Boards which is contended to be the market rate.

4.1. Additionally, there are three other issues which were argued by learned counsel for the appellant at the time of hearing. The first additional issue is whether the Income Tax Appellate Tribunal could ignore compliance to statutory provision relating to exercise of option to adopt Written Down Value (WDV) method in place of straight line method while computing depreciation on the assets used for power generation. This additional issue has been raised by the revenue in Civil Appeal No.13771 of 2015 (Commissioner of Income Tax Vs. M/s Jindal Steel and Power Ltd.). Revenue has also raised the issue of expenditure in Civil Appeal No.7425 of 2019 (Commissioner of Income Tax Vs. M/s Reliance Industries Ltd.). The expenditure claimed by the assessee was disallowed by the assessing officer which was affirmed by the first appellate authority i.e., Commissioner of Income Tax (Appeals). On appeal by the assessee, the Income Tax Appellate Tribunal set aside the order of the Commissioner of Income Tax (Appeals) which decision has been affirmed by the High Court. The third additional issue relates to what is called carbon credit – whether

it is a capital or revenue receipt. This additional issue has been raised in Civil Appeal No.9917 of 2017 (Assistant Commissioner of Income Tax Vs. M/s Godawari Power and Ispat Pvt. Ltd.) and also in Civil Appeal No.8983 of 2017 (Assistant Commissioner of Income Tax Chhattisgarh Vs. M/s Godawari Power and Ispat Pvt. Ltd.)

RECOMPUTATION OF DEDUCTION UNDER SECTION 80 IA OF THE INCOME TAX ACT, 1961.

5. At the outset let us deal with the core issue i.e., recomputation of deduction claimed by the assessee under Section 80 IA of the Income Tax Act, 1961 (briefly 'the Act' hereinafter).

6. Though this issue has been raised and urged in all the civil appeals, Civil Appeal No.13771 of 2015 was argued and taken up as the lead case. Since the issue raised is common to all the appeals, it is not necessary to refer to the factual details of each of the appeals separately though the price per unit of electricity supplied by the assessee to the power distributing companies/ State Electricity Boards and to their captive plants are different. However, that would not have any material bearing on the analysis as the question of law is identical in all the appeals. Since we have taken Civil Appeal No.13771 of 2015 as the lead appeal insofar the core issue is concerned, all reference for the sake of convenience would be to the facts of this appeal.

7. In this appeal, the assessee is M/s Jindal Steel and Power Ltd, Hisar. The assessee is a public limited company engaged in the business of generation of electricity, manufacture of sponge iron, M.S. Ingots etc. Assessment year under consideration is 2001-2002. Since electricity supplied by the State Electricity Board was inadequate to meet the requirements of its industrial units, the assessee set up captive power generating units to supply electricity to its industrial units. Surplus power was supplied by the assessee to the State Electricity Board. The assessee which is the respondent in this appeal filed return of income on 29.10.2001 declaring nil income. The total income computed by the assessee at nil was arrived at after claiming various deductions, including under Section 80 IA of the Act. Since there was substantial book profit of the assessee, net book profit being Rs.1,11,43,36,230.00, income tax was levied under Section 115 JB of the Act at the rate of 7.5 per cent along with surcharge and interest.

7.1. The return of income filed by the assessee was processed by the assessing officer under Section 143 (1) of the Act. After such processing, certain refund was made to the assessee. Thereafter, the case was selected for scrutiny following which statutory notices under Section 143 (2) and 142 (1) of the Act were issued calling upon the assessee to furnish details for clarification which were complied with by the assessee. During the assessment proceedings, the issue relating to deduction under Section 80 IA of the Act came up for consideration. Assessee had claimed deduction under the said

provision of a sum amounting to Rs.80,10,38,505.00. The deduction claimed under Section 80 IA related to profits of the power generating units of the assessee. It was noticed that the assessee had shown a substantial amount of profit in its power generating units. The power generated was used for its own consumption and also supplied to the State Electricity Board in the State of Chhattisgarh and prior to the creation of the State of Chhattisgarh, to the State Electricity Board of the State of Madhya Pradesh. The electricity generated by the assessee in its captive power plants at Raigarh (Chhattisgarh) was primarily used by it for its own consumption in its manufacturing units; while the additional/surplus electricity was supplied to the State Electricity Board. Assessee had entered into an agreement on 15.07.1999 with the State Electricity Board as per which assessee had supplied the surplus electricity to the State Electricity Board at the rate of Rs.2.32 per unit. Thus, for the assessment year under consideration, the assessee was paid at the rate of Rs.2.32 per unit for the surplus electricity supplied to the State Electricity Board.

7.2. It was further noticed by the assessing officer that the assessee had supplied power (electricity) to its industrial units for captive consumption at the rate of Rs.3.72 per unit. Assessing officer took the view that the assessee had declared inflated profits by showing supply of power at the rate of Rs.3.72 per unit to its sister units i.e., for captive consumption. According to the assessing officer, there was no justification to claim electricity charge at the rate of

Rs.3.72 per unit for supply to its own industrial units when the assessee was supplying power to the State Electricity Board at the rate of Rs.2.32 per unit. Assessing officer observed that the profit calculated by the assessee (power generating units) at the rate of Rs.3.72 per unit was not the real profit; the price per unit was inflated so that profit attributable to the power generating units could qualify for deduction from the taxable income under the Act. Thus, it was held to be a colourable device to reduce taxable income. On such an assumption, the assessee was asked to explain its claim of deduction under Section 80 IA of the Act which the assessee complied with.

7.3. Response of the assessee was considered by the assessing officer. By the assessment order dated 26.03.2004 passed under Section 143 (3) of the Act, the assessing officer held that Rs.3.72 claimed by the assessee as the rate at which power was supplied by it to its own industrial units was not the true market value. According to the assessing officer, the rate of Rs.2.32 per unit agreed upon between the assessee and the State Electricity Board and at which rate surplus electricity was supplied by the assessee to the State Electricity Board was the market value of electricity. Therefore, for the purpose of computing the profit of the power generating units, the selling rate of power per unit was taken at Rs.2.32. On that basis, assessing officer held that there was an excessive claim of deduction of Rs.1.40 per unit on captive consumption (Rs.3.72 - Rs.2.32), following which the assessing officer worked out the excess deduction claimed by the

assessee under Section 80 IA at Rs.31,98,66,505.00. Therefore, the assessing officer restricted the claim of deduction of the assessee under Section 80 IA at Rs.48,11,72,000.00 (Rs.80,10,38,505.00 – Rs.31,98,66,505.00).

8. Aggrieved by the aforesaid reduction in the claim of deduction under Section 80 IA of the Act, the assessee preferred appeal before the first appellate authority i.e. Commissioner of Income Tax (Appeals), Rohtak (referred to hereinafter as 'CIT (A)'). By the appellate order dated 16.05.2005, CIT (A) held that the action of the assessing officer in restricting deduction under Section 80 IA in respect of 22,84,76,505 units by Rs.1.40 per unit (Rs.3.72 – Rs.2.32) was justified and hence confirmed the reduction of deduction under Section 80 IA.

9. Assailing the order of CIT (A), assessee preferred further appeal before the Income Tax Appellate Tribunal, Delhi Bench – I, Delhi (briefly 'the Tribunal' hereinafter) which was registered as ITA No.3485/Delhi/05 for the assessment year 2001-02. We may also mention that revenue had filed a cross appeal arising out of the same order before the Tribunal but on a different issue which may not be necessary to be gone into for the purpose of the present appeal. The grievance of the assessee before the Tribunal in its appeal was against the action of CIT (A) in affirming the reduction of deduction under Section 80 IA of the Act made by the assessing officer at

Rs.48,11,72,000.00 as against Rs.80,10,38,505.00 claimed by the assessee.

9.1. In its order dated 07.06.2007, Tribunal noted that the dispute between the parties related to the manner of computing profits of the undertaking of the assessee engaged in the business of generation of power for the purpose of relief under Section 80 IA of the Act. The difference between the assessee and the revenue was with regard to the determination of the market value of electricity per unit so as to compute the income accrued to the assessee on supply made by it to its own manufacturing units. After referring to the provisions of Section 80 IA of the Act, more particularly to sub-section (8) of Section 80 IA and also upon an analysis of the meaning of the expression "market value", Tribunal came to the conclusion that the price at which electricity was supplied by the assessee to the State Electricity Board could not be equated with the market value as understood for the purpose of Section 80 IA (8) of the Act. In this regard, Tribunal also analysed various provisions of the Electricity (Supply) Act, 1948 and the agreement dated 15.07.1999 entered into between the assessee and the State Electricity Board. Consequently, Tribunal was of the view that the stand of the revenue could not be approved whereafter it was held that the price recorded by the assessee at Rs.3.72 per unit was the market value for the purpose of Section 80 IA (8) of the Act. Thus, the Tribunal upheld the stand of the

assessee and set aside the order of CIT (A) by directing the assessing officer to allow relief to the assessee under Section 80 IA as claimed.

10. Aggrieved by the aforesaid finding rendered by the Tribunal, revenue preferred appeal before the High Court of Punjab and Haryana under Section 260 A of the Act which was registered as Income Tax Appeal No.53 of 2008. The High Court in its order dated 02.09.2008 disposed of the appeal by following its order dated 02.09.2008 passed in the connected ITA No.544 of 2006 (Commissioner of Income Tax, Hisar Vs. M/s Jindal Steel and Power Ltd). That was an appeal by the revenue on the same issue against the order dated 31.3.2006 passed by the Tribunal in the case of the assessee itself i.e. ITA No.3663/Del/2005 for the assessment year 2000-2001. Insofar allowance of deduction under Section 80 IA of the Act is concerned, the High Court answered the question against the revenue as it was submitted at the bar that the issue already stood covered by the previous decision against the revenue.

11. Respondent assessee has filed counter affidavit. It has contended that the only issue to be considered is whether deduction claimed by the assessee under Section 80 IA of the Act should be computed by taking Rs. 2.32 per unit being the price at which electricity was sold to the State Electricity Board as the market value of the electricity or the price of Rs. 3.72 per unit being charged by the

State Electricity Board for supply of electricity to the industrial consumers including the assessee.

11.1. Assessee had claimed deduction under Section 80 IA in respect of its two undertakings engaged in generation of power at Raigarh (Chhattisgarh). Power produced in the captive power plants was primarily for use by the respondent assessee in its steel plants. Availability of electricity from the state grid was not adequate to meet the requirements of the assessee. In order to ensure uninterrupted power supply which was crucial for attaining operational efficiency, the captive power generating units were set up by the assessee to meet the power requirements of its manufacturing units.

11.2. It is stated that power generated from the captive power generating units of the assessee were consumed in its manufacturing units. In the event of surplus power being generated, that was supplied to the Madhya Pradesh Electricity Board (later on to the Chhattisgarh State Electricity Board after creation of the State of Chhattisgarh) at the price fixed for procurement of surplus power from the captive power plants in the State by the State Electricity Board.

11.3. Generation and sale of power was a monopoly of the State. Approval was granted for setting up of captive power plants by the manufacturing units for the purpose of meeting their power requirement subject to the terms and conditions imposed. The surplus power, if any, could be sold under a power purchase agreement

entered into between the captive power producer and the State Electricity Board.

11.4. In terms of the Electricity (Supply) Act, 1948 read with the provisions of the power purchase agreement entered into between the assessee and the State Electricity Board, the surplus power that was not captively consumed could not be sold in the open market to any third party consumer except with the prior permission of the State Electricity Board, that too, subject to technical feasibility and on the terms and conditions imposed by the State Electricity Board. In view of the restrictions imposed by the State Electricity Board, it was not economically viable for any third party consumer to purchase power generated by the captive power plants owned by the assessee. The same necessarily had to be sold to the State Electricity Board.

11.5. It is stated that the assessee had been maintaining separate accounts for both the units. Supply of electricity from the captive power plants to its manufacturing units was made and recorded at the price at which electricity was sold by the State Electricity Board to the manufacturing units owned by the respondent assessee and to other industrial consumers, being the fair market value of electricity in terms of Section 80 IA (8) of the Act. According to the respondent, the determination of profits eligible for computation of deduction under Section 80 IA was supported by the following:

(a) Computation of profits under Section 80 IA with details of captive revenue of the power undertaking;

(b) Copy of unitwise profitability of the Raigarh division;

(c) Power purchase agreement entered into with the State Electricity Board; and

(d) Copies of electricity bills received from the State Electricity Board for electricity supply to the industrial consumers.

11.6. Respondent has stated that since part of the electricity produced was captively consumed by the manufacturing units owned by it, the rate of transfer of power was recorded at the market rate i.e. the rate at which electricity was supplied by the State Electricity Board to the industrial consumers i.e. Rs. 3.72 per unit. The transfer was not recorded at the rate at which the surplus electricity was sold by the respondent assessee to the State Electricity Board i.e. Rs. 2.32 per unit since that was the price as per the agreement which could not be treated as the market value of power in as much as the State Electricity Board was the only buyer of the surplus power.

11.7. The above stand of the assessee was not accepted by the assessing officer who held that the inter unit transfer of power by the assessee from its power plants to its industrial units should have been Rs. 2.32 per unit being the price at which power was sold to the State Electricity Board and not Rs. 3.72 being the price charged by the State

Electricity Board. Assessing officer therefore recomputed the deduction claimed by the assessee under Section 80 IA by treating Rs. 2.32 as the market value of electricity per unit and consequently reduced the deduction under Section 80 IA.

11.8. After referring to the provisions of Section 80 IA of the Act, more particularly to sub-section (5) and sub-section (8) thereof, it is contended by the respondent that the price at which goods are transferred from one business of the assessee to another business should be at arm's length i.e. the same should correspond to the market value of such goods for computing the profits of eligible business. In this connection, reference has been made to the expression "market value" as has been defined in the explanation below the proviso to sub section (8) of Section 80 IA. It is stated that the expression "market value" would mean the price that such goods would ordinarily fetch in the open market. It is submitted that sub-section (8) of Section 80 IA is *pari-materia* to sub-section (6B) of Section 80J of the Act. After referring to Circular No.169 dated 23.06.1975 of the Central Board of Direct Taxes (CBDT), respondent assessee has contended that sub-section (8) of Section 80 IA seeks to provide that the profits of the eligible business should be computed by reckoning inter unit transfer of goods and services at the price such goods would ordinarily fetch on sale in the open market.

11.9. Thereafter, respondent assessee has referred to the meaning of the expression “market price” and also various case laws on such meaning. Assessee has contended that in order to determine the market price of any goods or services, open market conditions must exist. In other words, there must be willingness on the part of the buyer to purchase and the seller to sell the goods. In such a situation, the price determined by the market forces of demand and supply is the market price of such goods. However, in case of any transaction of purchase and sale taking place on account of certain obligations on the part of either side affecting the determination of the price of the goods, such a price cannot be said to be the market price.

11.10. Elaborating further, respondent assessee has stated that under the Electricity (Supply) Act, 1948, generation and distribution of power is the monopoly of the State. As per the power purchase agreement, captive producers of power were allowed to sell the same in the open market subject to stringent conditions making it unviable for third party consumers to purchase surplus power from captive power plants. In the absence of any willing purchaser, the surplus power i.e. power in excess of the requirement of the manufacturing units had to be fed into the state grid which is governed by the agreement entered into with the State Electricity Board. It is contended that the same virtually amounted to a forced sale as the assessee was not in a position to bargain for the rate at which surplus power should have been otherwise sold. On the contrary, assessee was obliged to sell the

surplus power to the State Electricity Board at the price mandated by the Board. Adverting to the power purchase agreement, it is stated that the power generated by the captive power plants was required to be consumed by its manufacturing units at Raigarh. The agreement stipulated that assessee could not sell surplus power generated by it to other consumers except on the terms and conditions stipulated by the Board thereby making third party sale of surplus power unviable. In these circumstances, the surplus electricity generated by the captive power plants had to be fed into the transmission system of the grid.

11.11. The rate of purchase of power by the State Electricity Board from the assessee was determined and dictated by the power purchase agreement. In case such rate was not accepted by the assessee, the power purchase agreement was not forthcoming. The power generated by the captive power plants, surplus to the requirement of the manufacturing units of the assessee, would in such circumstances not realise any value. It is thus contended that the said sale rate i.e. the rate at which the surplus power was supplied by the assessee to the State Electricity Board was not the rate at which the power was available in the open market. As a matter of fact, this was also not the rate at which electricity was sold by the State Electricity Board to the industrial consumers including the assessee.

11.12. Electricity was supplied by the State Electricity Board to the assessee and similar other industrial consumers at the rate of Rs. 3.72 per unit. As against this, the State Electricity Board fixed the rate payable to the assessee for the surplus power generated and fed into the state grid at Rs. 2.32 per unit for the financial year 2000-2001 corresponding to the assessment year 2001-2002.

11.13. In the above context, respondent assessee has asserted that the rate fixed by the State Electricity Board for purchase of surplus power from the assessee cannot be treated as the market price of power. Assessee was under an obligation to sell the excess power to the State Electricity Board and at such a rate fixed by the agreement. It is mentioned that during the period under consideration, there was monopoly of State Electricity Board as far as power supply was concerned and there was no open market for sale and purchase of electricity. The rate prescribed by the State Electricity Board was the price imposed upon the assessee as a condition precedent to sell excess power to the only purchaser i.e. State Electricity Board. It is the price at which assessee had to supply electricity to the State Electricity Board under compulsion. Such a price cannot be regarded as determined by the market forces which is the *sine qua non* for determining market value.

11.14. Respondent has also mentioned that for the assessment year 2000-2001, the assessing officer had sought to disturb the book

profits computed under Section 115 JA of the Act by substituting Rs.2.32 per unit as the price for sale of power generated including for the power captively consumed by the manufacturing units of the respondent. The Tribunal and the High Court did not approve of the decision of the assessing officer in seeking to disturb the computation of book profit under Section 115 JA of the Act. Revenue preferred Special Leave Petition (SLP (C)…CC No.10935 of 2009) against the decision of the High Court affirming the order of the Tribunal. However, the same was dismissed by this court *vide* the order dated 11.09.2009.

11.15. In these circumstances, Tribunal was fully justified in reversing the finding of CIT (A) who had affirmed the decision of the assessing officer. Reasonings given by the Tribunal for discarding the rate of Rs. 2.32 as the market value of the surplus electricity per unit supplied by the assessee to the State Electricity Board and in accepting the rate adopted by the assessee i.e. Rs. 3.72 at which rate the State Electricity Board was supplying electricity to the industrial consumers including the respondent assessee are correct and justified. The High Court had rightly upheld the order of the Tribunal. No case for interference is made out. Therefore, all the civil appeals filed by the revenue on this issue may be dismissed.

12. Mr. Rupesh Kumar, learned counsel for the appellant vehemently argued that the assessee had deliberately inflated its profits on account of generation of electricity only with a view to claim

higher deduction under Section 80 IA of the Act. Firstly, the Tribunal and thereafter the High Court had failed to appreciate this aspect of the matter.

12.1. He submits that while the assessee was selling power to the State Electricity Board at Rs. 2.32 per unit, it was selling the very same power to its sister concern (industrial units) for self-consumption at a much higher price of Rs. 3.72 per unit. It was thus clear that assessee was showing higher receipts and thereby higher profits from power generation which in turn was used to claim higher deduction under Section 80 IA of the Act.

12.2. Learned counsel has referred to the assessment order dated 26.03.2004 and submits therefrom that the assessing officer was fully justified in holding that Rs. 3.72 per unit shown by the assessee as the rate at which it was supplying electricity to its captive industrial units, was not the true market value. Refuting the contention of the assessee, it is contended that the rate of Rs. 3.72 charged by the State Electricity Board from its consumers could not be treated as the true market value because the State Electricity Board had to take into account various factors while determining the rate of electricity. This included distribution losses, expenses on infrastructure for distribution of power, subsidy allowed to some categories of consumers like farmers, other administrative and management expenses including expenses on collection of bills etc.

12.3. He further submits that supply of surplus electricity by the assessee to the State Electricity Board was governed by an agreement entered into between the assessee and the State Electricity Board. This agreement was voluntarily entered into by the two parties i.e. the assessee and the State Electricity Board. It was a voluntarily agreement without any element of compulsion or force. Nobody had compelled the assessee to agree to the price fixed by the State Electricity Board. He submits that there is no evidence to prove that the contracted rate of electricity of Rs. 2.32 per unit was imposed upon the assessee by the State Electricity Board. Therefore, the assessing officer was justified in treating Rs. 2.32 per unit as the fair market rate.

12.4. Elaborating on this aspect, Mr. Rupesh Kumar, learned counsel submits that the definition of "market value" as appearing in sub-section (8) of Section 80 IA has to be given a reasonable meaning. He has referred to Section 80 IA of the Act as it stood at the relevant point of time, more particularly to sub-section (8) thereof. He also lays emphasis on the proviso to sub-section (8) and the explanation below the proviso. Thereafter, learned counsel has referred to the dictionary meaning of the expression "market value" and how the same is to be determined.

12.5. Adverting to the provisions of the Electricity (Supply) Act, 1948, learned counsel submits that under Section 43 thereof, the

State Electricity Board may enter into agreements with any person producing electricity within the state for the purchase of the same by the said board of any surplus electricity which that person may be able to dispose of, on such terms as may be agreed upon. Such a provision, he submits, finds manifestation in Section 43A whereby and whereunder a generating company has been given the liberty to enter into a contract for the sale of electricity generated by it with the State Electricity Board. He submits that under the successor Electricity Act, 2003, there is also provision for captive generation of electricity.

12.6. Learned counsel has referred to a decision of this Court in *M/s Printers House Private Limited Vs. Mst. Saiyadan,* (1994) 2 SCC 133, to buttress the point that market value of a thing has to be determined by reference to the price which a willing vendor might reasonably expect to obtain from a willing purchaser. Though that was a case relating to land acquisition, he submits that the principle laid down therein for computation of market value would hold good for the present case as well. He submits that market value or market price is relatable to the price at which the goods are available in the open market where prices are determined by the laws of supply and demand.

12.7. Learned counsel has also referred to Section 80A more particularly to sub-section (6) thereof which he submits is *pari-materia* to the provision of sub-section (8) of Section 80 IA including the

explanation thereto. He submits that the expression "market value" has been defined in relation to any goods or services sold or supplied to mean the price that such goods or services would fetch if those were sold by the undertaking or unit or enterprise or eligible business in the open market, subject to statutory or regulatory restrictions. Applying the above provision to the present case, he submits that the price at which surplus electricity was supplied by the assessee to the State Electricity Board was subject to the power purchase agreement which was a statutory arrangement. Therefore, the price paid by the State Electricity Board to the assessee for supply of excess electricity would be the market value which would mean that Rs. 2.32 per unit would be the market value of electricity supplied by the assessee to its captive industrial units. In this connection, learned counsel has also placed reliance on Circular No.5/2010 dated 03.06.2010 of the Central Board of Direct Taxes which clarifies that the explanation to sub-section (8) of Section 80 IA has been amended retrospectively from 01.04.2003 onwards to the effect that Section 80 IA would not apply to a business referred to in sub-section (4) which is in the nature of a works contract awarded by any person including the central or state government and executed by an undertaking or enterprise referred to in sub-section (1). He therefore submits that both the Tribunal and the High Court fell in error in accepting the contentions of the assessee that Rs. 3.72 per unit was the market

value of electricity supplied by its captive generating plants to its own industrial units.

12.8. Learned counsel has placed reliance on a decision of the Calcutta High Court in *Commissioner of Income Tax Vs. I.T.C. Limited,* (2015) 64 Taxman.com 214, and submits therefrom that the assessee's generating units cannot claim any benefit under Section 80 IA of the Act computed on the basis of rates chargeable by the distributable licensee from the consumer. The benefit can only be claimed on the basis of rates fixed by the tariff regulatory commission for sale of electricity by the generating companies. According to him, in so far the present case is concerned, instead of the tariff regulatory commission, it would be the rate fixed by the power purchase agreement.

12.9. He, therefore, submits that the order passed by the High Court affirming the decision of the Tribunal is liable to be set aside and the order passed by the assessing officer as affirmed by the CIT(A) is liable to be restored. Consequently, the civil appeals should be allowed.

13. *Per contra,* learned senior counsel for the respondent assessee submits that there is no merit in all the appeals filed by the revenue on the issue of deduction under Section 80 IA of the Act. It is submitted that revenue is not justified in treating the price of electricity paid by the State Electricity Board to the assessee for

supply of surplus electricity by the assessee to the said electricity board as the market value replacing the market value of electricity per unit projected by the assessee. As a result of such erroneous decision, revenue had reduced the profits of the assessee and consequently the quantum of deduction under Section 80 IA of the Act. Tribunal was justified in accepting the contention of the assessee that the rate of electricity at which electricity was supplied by the State Electricity Board to the industrial consumers including the assessee was in fact the market value of electricity per unit and thereby restoring the claim of the assessee.

13.1. Learned senior counsel submits that Section 80 IA provides for deduction in respect of profits and gains from industrial undertakings or enterprises engaged in infrastructure development etc. Assessee has industrial units for which uninterrupted power supply was required. Power supply by the State Electricity Board was found to be inadequate. Therefore, assessee had set up its own captive power plants to supply electricity to its industrial units. Surplus power was supplied to the state grid for which a power purchase agreement was entered into by the assessee with the State Electricity Board. Assessee had claimed deduction under this provision and while computing the deduction had taken the price at which electricity was supplied by the State Electricity Board to the industrial consumers including the assessee as the market value and not the price paid by

the State Electricity Board to the assessee for the supply of surplus electricity.

13.2. It is pointed out that there is a power purchase agreement between the assessee and the State Electricity Board as per which the surplus power was supplied by the assessee to the state grid for which State Electricity Board paid Rs. 2.32 per unit to the assessee. Revenue had questioned computation of market value of electricity supplied by the captive generating plants of the assessee to its industrial units as being on the higher side and thereafter contended that the rate at which the assessee sold surplus power to the State Electricity Board was the market value of electricity.

13.3. Reverting back to Section 80 IA of the Act, learned counsel has drawn the attention of the court to clause (iv) of sub-section (4) and submits that an undertaking involved in generation or distribution of power is entitled to claim deduction under Section 80 IA of the Act. Respondent assessee fulfils the conditions for claiming such deduction and is, therefore, entitled to claim such deduction. Sub-section (8) of Section 80 IA provides that for the purpose of deduction under Section 80 IA, profits and gains of eligible business are to be computed as if the transfer was done on the market value on that date. Proviso to Section 80 IA(8) requires the assessing officer to compute the profits and gains in the manner provided. If the assessing officer finds difficulty while computing in such manner, he is

empowered to compute profits and gains on such reasonable basis as he may deem fit. Referring to the explanation below the proviso to sub-section (8) of Section 80 IA, he submits that the market value as contemplated in sub-section (8) would mean the price that such goods would ordinarily fetch on sale in the open market.

13.4 Adverting to the facts of the present case, learned counsel submits that adoption of the rate of Rs. 2.32 per unit by the revenue was purely on a presumptive basis. He submits that the industrial units of the assessee are the consumers. The captive power plants of the assessee supplies electricity to the industrial units. Had the industrial units not obtained power from the captive power plants of the assessee, then it would have had to purchase power from the State Electricity Board. State Electricity Board was supplying electricity to the industrial consumers at the rate of Rs. 3.72 per unit. Therefore, the industrial units of the assessee would have had to pay the aforesaid amount for electricity. In such situation, Tribunal was fully justified in holding that the rate at which electricity was supplied by the State Electricity Board to the industrial consumers was the market value of electricity supplied by the captive power plants of the assessee to its industrial units. He further submits that the rate at which the assessee had supplied surplus electricity to the State Electricity Board i.e. Rs. 2.32 per unit could not be termed as the market value in as much as that was the contracted price as per the power purchase agreement. Being a contracted price, the power tariff between the

assessee and the State Electricity Board as per the power purchase agreement was not worked out in a competitive environment.

13.5 Referring to the provisions of the Electricity (Supply) Act, 1948 as well as the successor Electricity Act, 2003, learned counsel for the assessee submits that under the statutory regime prevalent at the relevant point of time, the State Electricity Board had virtual monopoly in the matter of generation and distribution of electricity. Though there was provision for generation of electricity for self-consumption, the power purchase agreement entered into between the assessee and the State Electricity Board is traceable to such statutory framework. Such a contract can be termed as a captive contract as the assessee had no other option but to accept the terms and conditions including the rate offered by the State Electricity Board. In such a captive contract, the State Electricity Board is certainly the dominant partner. The price as per such contract, therefore, cannot be termed as the market value of electricity. In fact, the explanation below the proviso to sub-section (8) of Section 80 IA defines the market value as the price at which the goods in question would ordinarily fetch in the open market. Therefore, the market value in such circumstances can only be the rate at which the State Electricity Board was supplying electricity to the industrial consumers including the assessee. Elaborating further, he submits that the value of transaction of electricity between the two units of the assessee should be at arm's

length which would mean that the price in such a transaction should be such as between unrelated persons in an uncontrolled condition.

13.6 After referring to relevant provisions of the Act including Section 80J and Section 80A of the Act and the related Circular No. 169 of the CBDT, learned counsel has referred to the meaning of "market value" as per various dictionaries. Reliance has been placed on several judicial pronouncements to highlight the significance of the expression "market value". Finally, learned counsel for the assessee submits that the view taken by the revenue is erroneous and, therefore, the Tribunal and the High Court were justified in deciding the issue in favour of the respondent assessee. The civil appeals being devoid of any merit are thus liable to be dismissed.

14. Submissions made by learned counsel for the parties have received the due consideration of the Court.

15. Since the core issue is relatable to Section 80-IA of the Act, it would be apposite to advert to and analyse the aforesaid provision. Section 80-IA deals with deductions in respect of profits and gains from industrial undertakings or enterprises engaged in infrastructure development etc. Let us first take up sub-section (1), which reads as under:

> *(1) Where the gross total income of an assessee includes any profits and gains derived from any business of an industrial undertaking or an enterprise referred to in sub-section (4) (such business being hereinafter referred to as the eligible business), there shall, in accordance with and subject to the provisions of this section, be*

> *allowed, in computing the total income of the assessee, a deduction from such profits and gains of an amount equal to hundred per cent of profits and gains derived from such business for the first five assessment years commencing at any time during the periods as specified in sub-section (2) and thereafter, twenty-five per cent of the profits and gains for further five assessment years :*
> **Provided** *that where the assessee is a company, the provisions of this sub-section shall have effect as if for the words "twenty-five per cent", the words "thirty per cent" had been substituted.*

15.1. From the above, what is evident is that where the gross total income of an assessee includes any profits and gains derived from any business of an industrial undertaking or an enterprise which are referred to in sub-section (4), referred to as eligible business, this section provides that a deduction shall be allowed in computing the total income. Such deduction shall be allowed from the profits and gains of an amount which is equivalent to hundred percent of the profits and gains derived from such business for the first five assessment years as specified in sub-section (2) and thereafter twenty five percent of the profits and gains for a further period of five assessment years. As per the proviso, if the assessee is a company, then the benefit for the further five years would be thirty percent instead of twenty five percent.

15.2. Since there is a reference to sub-section (2) in sub-section (1), we may mention that as per sub-section (2), the deduction specified in sub-section (1) may be claimed by the assessee at its option for any ten consecutive assessment years out of fifteen years

beginning from the year in which the undertaking or the enterprise develops and begins to operate any infrastructure facility or starts providing telecommunication service or develops an industrial park or generates power or commences transmission or distribution of power. In the proviso, there is a reference to clause (b) of the explanation to clause (i) of sub-section (4). Where the assessee begins operating and maintaining any infrastructure facility referred to in the said provision, the benefit can be availed of by the assessee for twenty years in place of fifteen years.

15.3. Sub-section (4) of Section 80-IA has some relevance to the present proceeding. Therefore, the same is extracted as under:

> *(4) This section applies to—*
> *(i) any enterprise carrying on the business of (i) developing, (ii) maintaining and operating or (iii) developing, maintaining and operating any infrastructure facility which fulfils all the following conditions, namely :—*
> *(a) it is owned by a company registered in India or by a consortium of such companies;*
> *(b) it has entered into an agreement with the Central Government or a State Government or a local authority or any other statutory body for (i) developing, (ii) maintaining and operating or (iii) developing, maintaining and operating a new infrastructure facility subject to the condition that such infrastructure facility shall be transferred to the Central Government, State Government, local authority or such other statutory body, as the case may be, within the period stipulated in the agreement;*
> *(c) it has started or starts operating and maintaining the infrastructure facility on or after the 1st day of April, 1995:*
> **Provided** *that where an infrastructure facility is transferred on or after the 1st day of April, 1999 by an enterprise which developed such infrastructure facility (hereafter referred to in this section as the transferor*

enterprise) to another enterprise (hereafter in this section referred to as the transferee enterprise) for the purpose of operating and maintaining the infrastructure facility on its behalf in accordance with the agreement with the Central Government, State Government, local authority or statutory body, the provisions of this section shall apply to the transferee enterprise as if it were the enterprise to which this clause applies and the deduction from profits and gains would be available to such transferee enterprise for the unexpired period during which the transferor enterprise would have been entitled to the deduction, if the transfer had not taken place.

Explanation.—*For the purposes of this clause, "infrastructure facility" means,—*

(a) a road, bridge, airport, port, inland waterways and inland ports, rail system or any other public facility of a similar nature as may be notified by the Board in this behalf in the Official Gazette;

(b) a highway project including housing or other activities being an integral part of the highway project; and

(c) a water supply project, water treatment system, irrigation project, sanitation and sewerage system or solid waste management system;

(ii) any undertaking which has started or starts providing telecommunication services whether basic or cellular, including radio paging, domestic satellite service or network of trunking and electronic data interchange services at any time on or after the 1st day of April, 1995, but before the 31st day of March, 2000.

Explanation.—*For the purposes of this clause, "domestic satellite" means a satellite owned and operated by an Indian company for providing telecommunication service;*

(iii) any undertaking which develops, develops and operates or maintains and operates an industrial park notified by the Central Government in accordance with the scheme framed and notified by that Government for the period beginning on the 1st day of April, 1997 and ending on the 31st day of March, 2002 :

Provided *that in a case where an undertaking develops an industrial park on or after the 1st day of April, 1999 and transfers the operation and maintenance of such industrial park to another undertaking (hereafter in this section referred to as the transferee undertaking) the*

deduction under subsection (1), shall be allowed to such transferee undertaking for the remaining period in the ten consecutive assessment years in a manner as if the operation and maintenance were not so transferred to the transferee undertaking;

(iv) an industrial undertaking which,—

(a) is set up in any part of India for the generation or generation and distribution of power if it begins to generate power at any time during the period beginning on the 1st day of April, 1993 and ending on the 31st day of March, 2003;

(b) starts transmission or distribution by laying a network of new transmission or distribution lines at any time during the period beginning on the 1st day of April, 1999 and ending on the 31st day of March, 2003:

Provided *that the deduction under this section to an industrial undertaking under sub-clause (b) shall be allowed only in relation to the profits derived from laying of such network of new lines for transmission or distribution.*

15.4. As per sub-section (4) (iv), Section 80-IA is applicable to an industrial undertaking which is set up in any part of India for the generation or generation and distribution of power if it begins to generate power at any time during the period commencing on the 1st day of April 1993 and ending on the 31st day of March, 2003; and starts transmission or distribution by laying a network of new transmission or distribution lines at any time during the period beginning on the 1st day of April, 1999 and ending on the 31st day of March, 2003. Proviso below clause (iv) says that such deduction shall be allowed only in relation to the profits derived from laying of such network of new lines for transmission or distribution.

15.5. Crucial to the present discourse is sub-section (8) of Section 80- IA. Sub-section (8) reads as under:

> *(8) Where any goods held for the purposes of the eligible business 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 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 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, means the price that such goods would ordinarily fetch on sale in the open market.*

15.6. Sub-section (8) says that where any goods held for the purposes of the eligible business 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 but the consideration 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 the transfer, then for the purposes of deduction under Section 80-IA, the profits and gains of such eligible business shall be computed as if the transfer had been made at the market value of such goods as on that date. The proviso says that if the assessing officer finds exceptional difficulties in computing the profits and gains of the eligible business in the manner

specified in sub-section (8), then in such a case, the assessing officer may compute such profits and gains on such reasonable basis as he may deem fit. The explanation below the proviso defines "market value" for the purpose of sub-section (8). It says that market value in relation to any goods means the price that such goods would ordinarily fetch on sale in the open market.

15.7. Thus, Section 80IA (8) provides that where goods or services held for the purposes of eligible business are transferred to any other business carried on by the assessee, the price charged for such transfer should correspond to the market value of such goods or services as on the date of transfer. If the price of goods or services transferred is overstated in comparison to the market value, the assessing officer has the competence to recompute the profit by substituting the market value of such goods. The explanation below sub-section (8) defines the expression "market value" to mean the price that such goods or services would ordinarily fetch in the open market. That takes us to the expression "open market" which is however not defined.

15.8. Since the expression "open market" is not defined, we will analyze the said expression in conjunction with the expression "market value", though at a subsequent stage of the judgment.

16. We may also advert to the relevant provisions of the Electricity (Supply) Act, 1948 (briefly "the 1948 Act" hereinafter),

which was the enactment governing the field at the relevant point of time. As per Section 43 of the 1948 Act, the State Electricity Board was empowered to enter into arrangements for purchase or sale of electricity under certain conditions. Sub-section (1) says that the State Electricity Board may enter into arrangements with any person producing electricity within the State for purchase by the State Electricity Board on such terms as may be agreed upon of any surplus electricity which that person may be able to dispose of. Thus, what sub-section (1) provides is that if any person who produces electricity has surplus electricity, he may dispose of such surplus electricity by entering into an arrangement with the State Electricity Board for supply of such surplus electricity by him and purchase thereof by the State Electricity Board.

16.1. Section 43A provides for the terms, conditions and tariff for sale of electricity by a generating company. It says that a generating company may enter into a contract for the sale of electricity generated by it with the State Electricity Board of the State in which the generating station owned or operated by the generating company is located or with any other person with the consent of the competent government.

16.2. As per Section 44, no person can establish or acquire a generating station or generate electricity without the previous consent in writing of the State Electricity Board. However, such an embargo

would not be applicable to the Central Government or any corporation created by a central act or any generating company. As per Section 45, the State Electricity Board has been empowered to enter upon and shut down a generating station if the same is in operation contravening certain provisions of the 1948 Act.

17. In so far facts of the present case are concerned, there is no dispute. Since electricity from the State Electricity Board to the industrial units of the assessee was inadequate, the assessee had set up captive power plants to supply electricity to its industrial units. For disposal of the surplus electricity, the assessee could not supply the same to any third-party consumer. Therefore, in terms of the provisions of Section 43A of the 1948 Act, the assessee had entered into an agreement dated 15.07.1999 with the State Electricity Board as per which, the assessee had supplied the surplus electricity to the State Electricity Board at the rate of Rs. 2.32 per unit determined as per the agreement. Thus, for the assessment year under consideration, the assessee was paid at the rate of Rs. 2.32 per unit for the surplus electricity supplied to the State Electricity Board. We may mention that the State Electricity Board had supplied power (electricity) to the industrial consumers at the rate of Rs. 3.72 per unit

18. There is also no dispute that the assessee or rather, the captive power plants of the assessee are entitled to deduction under Section 80-IA of the Act. For the purpose of computing the profits and

gains of the eligible business, which is necessary for quantifying the deduction under Section 80-IA, the assessee had recorded in its books of accounts that it had supplied power to its industrial units at the rate of Rs. 3.72 per unit which rate is disputed by the revenue as not being the market value of electricity.

19. While the assessing officer accepted the claim of the assessee for deduction under Section 80-IA, he, however, did not accept the profits and gains of the eligible business computed by the assessee on the ground that those were inflated by showing supply of power to its own industrial units for captive consumption at the rate of Rs. 3.72 per unit. Assessing officer took the view that there was no justification on the part of the assessee to claim electricity charge at the rate of Rs. 3.72 for supply to its own industrial units when the assessee was supplying surplus power to the State Electricity Board at the rate of Rs 2.32 per unit. Finally, the assessing officer held that Rs. 2.32 per unit was the market value of electricity and on that basis, reduced the profits and gains of the assessee thereby restricting the claim of deduction of the assessee under Section 80-IA of the Act.

20. We have already analyzed Section 80-IA of the Act. There is no dispute that respondent-assessee is entitled to deduction under Section 80-IA of the Act for the relevant assessment year. The only issue is with regard to the quantum of profits and gains of the eligible business of the assessee and the resultant deduction under Section 80

IA of the Act. The higher the profits and gains, the higher would be the quantum of deduction. Conversely, if the profits and gains of the eligible business of the assessee is determined at a lower figure, the deduction under Section 80-IA would be on the lower side. Assessee had computed the profits and gains by taking Rs. 3.72 as the price of electricity per unit supplied by its captive power plants to its industrial units. The basis for taking this figure was that it was the rate at which the State Electricity Board was supplying electricity to its industrial consumers. Assessing officer repudiated such claim. According to him, the rate at which the assessee had supplied the surplus electricity to the State Electricity Board i.e., Rs. 2.32 per unit, should be the market value of electricity. Assessee cannot claim two rates for the same good i.e., electricity. When it supplies electricity to the State Electricity Board at the rate of Rs. 2.32 per unit, it cannot claim Rs. 3.72 per unit for supplying the same electricity to its sister concern i.e., the industrial units. This view of the assessing officer was confirmed by the CIT (A).

21. We have noticed that the Tribunal had rejected such contention of the revenue which has been affirmed by the High Court. In this proceeding, we are called upon to decide as to which of the two views is the correct one.

22. Reverting back to sub-section (8) of Section 80-IA, it is seen that if the assessing officer disputes the consideration for supply of

any goods by the assessee as recorded in the accounts of the eligible business on the ground that it does not correspond to the market value of such goods as on the date of the transfer, then for the purpose of deduction under Section 80-IA, the profits and gains of such eligible business shall be computed by adopting arm's length pricing. In other words, if the assessing officer rejects the price as not corresponding to the market value of such good, then he has to compute the sale price of the good at the market value as per his determination. The explanation below the proviso defines market value in relation to any goods to mean the price that such goods would ordinarily fetch on sale in the open market. Thus, as per this definition, the market value of any goods would mean the price that such goods would ordinarily fetch on sale in the open market.

23. This brings to the fore as to what do we mean by the expression "open market" which is not a defined expression.

24. Black's Law Dictionary, 10th Edition, defines the expression "open market" to mean a market in which any buyer or seller may trade and in which prices and product availability are determined by free competition. P. Ramanatha Aiyer's Advanced Law Lexicon has also defined the expression "open market" to mean a market in which goods are available to be bought and sold by anyone who cares to. Prices in an open market are determined by the laws of supply and demand.

25. Therefore, the expression "market value" in relation to any goods as defined by the explanation below the proviso to sub-section (8) of Section 80 IA would mean the price of such goods determined in an environment of free trade or competition. "Market value" is an expression which denotes the price of a good arrived at between a buyer and a seller in the open market i.e., where the transaction takes place in the normal course of trading. Such pricing is unfettered by any control or regulation; rather, it is determined by the economics of demand and supply.

26. Under the electricity regime in force, an industrial consumer could purchase electricity from the State Electricity Board or avail electricity produced by its own captive power generating unit. No other entity could supply electricity to any consumer. A private person could set up a power generating unit having restrictions on the use of power generated and at the same time, the tariff at which the said power plant could supply surplus power to the State Electricity Board was also liable to be determined in accordance with the statutory requirements. In the present case, as the electricity from the State Electricity Board was inadequate to meet power requirements of the industrial units of the assessee, it set up captive power plants to supply electricity to its industrial units. However, the captive power plants of the assessee could sell or supply the surplus electricity (after supplying electricity to its industrial units) to the State Electricity Board only and not to any other authority or person. Therefore, the

surplus electricity had to be compulsorily supplied by the assessee to the State Electricity Board and in terms of Sections 43 and 43A of the 1948 Act, a contract was entered into between the assessee and the State Electricity Board for supply of the surplus electricity by the former to the latter. The price for supply of such electricity by the assessee to the State Electricity Board was fixed at Rs. 2.32 per unit as per the contract. This price is, therefore, a contracted price. Further, there was no room or any elbow space for negotiation on the part of the assessee. Under the statutory regime in place, the assessee had no other alternative but to sell or supply the surplus electricity to the State Electricity Board. Being in a dominant position, the State Electricity Board could fix the price to which the assessee really had little or no scope to either oppose or negotiate. Therefore, it is evident that determination of tariff between the assessee and the State Electricity Board cannot be said to be an exercise between a buyer and a seller in a competitive environment or in the ordinary course of trade and business i.e., in the open market. Such a price cannot be said to be the price which is determined in the normal course of trade and competition.

27. Another way of looking at the issue is, if the industrial units of the assessee did not have the option of obtaining power from the captive power plants of the assessee, then in that case it would have had to purchase electricity from the State Electricity Board. In such a scenario, the industrial units of the assessee would have had

to purchase power from the State Electricity Board at the same rate at which the State Electricity Board supplied to the industrial consumers i.e., Rs. 3.72 per unit.

28. Thus, market value of the power supplied by the assessee to its industrial units should be computed by considering the rate at which the State Electricity Board supplied power to the consumers in the open market and not comparing it with the rate of power when sold to a supplier i.e., sold by the assessee to the State Electricity Board as this was not the rate at which an industrial consumer could have purchased power in the open market. It is clear that the rate at which power was supplied to a supplier could not be the market rate of electricity purchased by a consumer in the open market. On the contrary, the rate at which the State Electricity Board supplied power to the industrial consumers has to be taken as the market value for computing deduction under Section 80 IA of the Act.

29. Section 43A of the 1948 Act lays down the terms and conditions for determining the tariff for supply of electricity. The said provision makes it clear that tariff is determined on the basis of various parameters. That apart, it is only upon granting of specific consent that a private entity could set up a power generating unit. However, such a unit would have restrictions not only on the use of the power generated but also regarding determination of tariff at which the power generating unit could supply surplus power to the

concerned State Electricity Board. Thus, determination of tariff of the surplus electricity between a power generating company and the State Electricity Board cannot be said to be an exercise between a buyer and a seller under a competitive environment or a transaction carried out in the ordinary course of trade and commerce. It is determined in 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 the extant 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. Consequently, the price determined as per the power purchase agreement cannot be equated with the market value of power as understood in the common parlance. The price at which the surplus power supplied by the assessee to the State Electricity Board was determined entirely by the State Electricity Board in terms of the statutory regulations and the contract. Such a price cannot be equated with the market value as is understood for the purpose of Section 80IA (8). On the contrary, the rate at which State Electricity Board supplied electricity to the industrial consumers would have to be taken as the market value for computing deduction under Section 80 IA of the Act.

30. Thus on a careful consideration, we are of the view that the market value of the power supplied by the State Electricity Board to the industrial consumers should be construed to be the market value

of electricity. It should not be compared with the rate of power sold to or supplied to the State Electricity Board since the rate of power to a supplier cannot be the market rate of power sold to a consumer in the open market. The State Electricity Board's rate when it supplies power to the consumers have to be taken as the market value for computing the deduction under Section 80-IA of the Act.

31. That being the position, we hold that the Tribunal had rightly computed the market value of electricity supplied by the captive power plants of the assessee to its industrial units after comparing it with the rate of power available in the open market i.e., the price charged by the State Electricity Board while supplying electricity to the industrial consumers. Therefore, the High Court was fully justified in deciding the appeal against the revenue.

32. Revenue has relied upon the decision of the Calcutta High Court in **CIT Vs. ITC Ltd.** (*supra*). In that case, the High Court rejected the first contention of the revenue that the assessee therein was not entitled to the benefit under Section 80-IA of the Act because the power generated was consumed at home or by other business of the assessee. After holding so, the High Court however, answered the question on the point of computation of profits and gains of the eligible business against the assessee. On going through the judgment, we find that facts of that case are clearly distinguishable from the facts of the present batch of appeals. It is noticeable that

though an opportunity was granted by the assessing officer to the assessee to adduce evidence to justify the price of electricity sold by it to its paper unit, the same could not be availed of by the assessee. The electricity generated was sold by the assessee entirely to its paper unit. There was no surplus electricity to be supplied to the State Electricity Board and consequently, there was no contract between the assessee and the State Electricity Board determining the rate of tariff for the electricity supplied by the assessee to the State Electricity Board. On the other hand, it was noticed that the Electricity Act, 2003 had come into force whereby and whereunder, the rate at which electricity could be supplied is determined, notably by Sections 21 and 22 thereof. That apart, there is the tariff regulatory commission which has the mandate for fixing the rates for sale and purchase of electricity by the distribution licensee. Thus it was noted that there is an inbuilt mechanism to ensure permissible profit both to the generating companies and to the distribution licensees. Therefore, it was held by the High Court that the assessee's generating unit could not claim any benefit under Section 80-IA of the Act computing the profits and gains on the basis of the rate chargeable by the distribution licensee from the consumer and that the benefit could only be claimed on the basis of the rates fixed by the tariff regulatory commission for sale of electricity by the generating company. Facts being clearly distinguishable, this decision can be of no assistance to the revenue.

33. Before parting with this issue, we may mention that reliance placed by Mr. Rupesh Kumar, learned counsel for the revenue on the definition of the expression "market value" as defined in the explanation below sub-section (6) of Section 80 A of the Act is totally misplaced inasmuch as sub-section (6) was inserted in the statute with effect from 01.04.2009 whereas in the present case we are dealing with the assessment year 2001-2002 when this provision was note even borne.

34. That being the position, we have no hesitation in answering this issue in favour of the assessee and against the revenue.

EXERCISE OF OPTION TO ADOPT WRITTEN DOWN VALUE METHOD.

35. We may now take up the first of the three additional issues. As we have noted at the very outset, the issue is or the question raised by the revenue is whether the Tribunal could ignore compliance to the statutory provisions relating to exercise of option to adopt Written Down Value (WDV) method in place of the straight line method while computing depreciation on the assets used for power generation. This issue has been raised by the revenue in Civil Appeal No. 13771/2015 (CIT Vs. M/s Jindal Steel and Power Ltd.) in the following manner:

> Whether on the facts and in the circumstances of the case, the High Court was justified in upholding the order of the Tribunal that compliance to statutory provisions of exercising option to adopt WDV method

in place of straight line method prescribed under the statutory provision on the assets used for power generation can be waved in the case of the assessee?

36. This issue arises in the case of the respondent-assessee M/s Jindal Steel and Power Ltd., Hisar for the assessment year 2001-2002. While dealing with the core issue, we have already made a brief description of the status of the assessee. It is, therefore, not necessary for a repetition of the same. What is however discernible from the assessment order dated 26.03.2004 passed under Section 143(3) of the Act is that the assessee had purchased twenty five MV turbines on and around 08.07.1998 for the purpose of its eligible business. Assessee claimed depreciation on the said turbines at the rate of 25% on WDV basis. On perusal of the materials on record, assessing officer held that in view of the change in the law with regard to allowance of depreciation on the assets of the power generating unit w.e.f. 01.04.1997, the assessee would be entitled to depreciation on straight line method in respect of assets acquired on or after 01.04.1997 as per the specified percentage in terms of Rule 5 (1A) of the Income Tax Rules, 1962. Assessing officer however noted that the assessee did not exercise the option of claiming depreciation on WDV basis. Therefore, it would be entitled to depreciation on straight line method.

36.1. After obtaining the clarification of the assessee, assessing officer held that since the assessee did not exercise the option of adopting WDV method, therefore, in view of the provision of Rule 5

(1A) of the Income Tax Rules, 1962 (briefly 'the Rules' hereinafter), it would be entitled to depreciation on the straight line method. On that basis, as against the depreciation claim of the assessee of Rs. 2,85,37,634.00, the assessing officer allowed depreciation to the extent of Rs. 1,59,10,047.00.

37. In the appeal before the CIT (A), the assessee contended that the assessing officer had erred in limiting the allowance of depreciation on the turbines to Rs. 1,59,10,047.00 as against the claim of Rs. 2,85,37,634.00. However, *vide* the appellate order dated 16.05.2005, CIT (A) confirmed the disallowance of depreciation made by the assessing officer.

38. On further appeal by the assessee before the Tribunal, *vide* the order dated 07.06.2007, the Tribunal on the basis of its previous decision in the case of the assessee itself for the assessment year 2000-2001 answered this question in favour of the assessee.

39. When the matter came up before the High Court in appeal by the revenue under Section 260A of the Act, the High Court referred to the proviso to sub-rule (1A) of Rule 5 of the Rules and affirmed the view taken by the Tribunal. The High Court held that there was no perversity in the reasoning of the Tribunal and therefore, the question raised by the revenue could not be said to be a substantial question of law.

40. Rule 5 provides for the method of calculation of depreciation allowed under Section 32 (1) of the Act. It says that such depreciation of any block of assets shall be allowed, subject to provisions of sub-rule (2), as per the specified percentage mentioned in the second column of the table in Appendix-I to the Rules on the WDV of such block of assets as are used for the purposes of the business or profession of the assessee during the relevant previous year. In so far the present case is concerned, it is not in dispute that sub-rule (2) has no application. We may, therefore, refer to sub-rule (1A) along with the provisos thereto which read as under:

> *(1A) The allowance under clause (i) of sub-section (1) of section 32 of the Act in respect of depreciation of assets acquired on or after 1st day of April, 1997 shall be calculated at the percentage specified in the second column of the Table in Appendix IA of these rules on the actual cost thereof to the assessee as are used for the purposes of the business of the assessee at any time during the previous year:*
> ***Provided** that the aggregate depreciation allowed in respect of any asset for different assessment years shall not exceed the actual cost of the said asset:*
> ***Provided further** that the undertaking specified in clause (i) of sub-section (1) of section 32 of the Act may, instead of the depreciation specified in Appendix IA, at its option, be allowed depreciation under sub-rule (1) read with Appendix I, if such option is exercised before the due date for furnishing the return of incomes under sub-section (1) of section 139 of the Act,*
> *(a) for the assessment year 1998-99, in the case of an undertaking which began to generate power to prior 1st day of April, 1997; and*
> *b) for the assessment year relevant to the previous year in which it begins to generate power, in case of any other undertaking :*
> ***Provided also** that any such option once exercised shall be final and shall apply to all the subsequent assessment years.*

40.1. Thus, what is noticeable is that as per sub-rule (1A), the allowance under clause (i) of sub-section (1) of Section 32 of the Act in respect of depreciation of assets acquired on or after the 1st day of April, 1997 shall be calculated at the percentage specified in the second column of the table in Appendix-IA to the Rules. As per the first proviso, the aggregate depreciation of any asset should not exceed the actual cost of that asset. The second proviso says that the undertaking specified in clause (i) of sub-section (1) of Section 32 of the Act may instead of the depreciation specified in Appendix-IA may opt for depreciation under sub-rule (1) read with Appendix-I but such option should be exercised before the due date for furnishing the return of income under sub-section (1) of Section 139 of the Act. The last proviso clarifies that any such option once exercised shall be final and shall apply to all the subsequent assessment years.

41. Before we proceed further, we may briefly refer to the relevant Appendix-1 which was applicable for assessment years 1988-1989 to 2002-2003 as well as to Appendix-1A. Appendix-1 provides for a table of rates at which depreciation is admissible. While the first column refers to the block of assets, such as, tangible assets, including buildings, furniture and fittings, machinery and plant etc., and intangible assets, the second column mentions the relatable depreciation allowance as per percentage of WDV. On the other hand, Appendix-1A has been inserted by the Income Tax (Twelfth

Amendment) Rules, 1997 with retrospective effect from 02.04.1997. While column one of Appendix-1A mentions about the class of assets, column two provides for the relatable depreciation allowance of such class of assets as per the percentage of actual cost. From a comparison of the two appendixes, it is evident that the depreciation allowance as per percentage of WDV in Appendix-1 is higher than the depreciation allowance as per percentage of actual cost under Appendix-1A.

42. From a conjoint reading of Rules 5(1) and (1A) of the Rules read with Appendix-1 and Appendix-1A, it is evident that while sub-rule (1) provides for allowance of depreciation in respect of any block of assets in terms of the second column of the table in Appendix 1, sub-rule (1A) enables an assessee to seek allowance of depreciation of assets acquired on or after the 1st day of April, 1997 as per the percentage specified in the second column of the table in Appendix-1A on actual cost basis. However, the second proviso to sub-rule (1A) clarifies that an assessee may opt for depreciation under Appendix-1 instead of Appendix-1A but such option has to be exercised before the due date for furnishing the return of income under sub-section (1) of Section 139 of the Act.

43. In the instant case, there is no dispute that the assessee had claimed depreciation in accordance with sub-rule (1) read with Appendix-I before the due date of furnishing the return of income. The

view taken by the assessing officer as affirmed by the first appellate authority that the assessee should opt for one of the two methods is not a statutory requirement. Therefore, the revenue was not justified in reducing the claim of depreciation of the assessee on the ground that the assessee had not specifically opted for the WDV method.

44. A similar issue was examined by this Court in *CIT Vs. GR Govindarajulu,* (2016) 16 SCC 335, wherein it has been held that the law does not mention any specific mode of exercising such an option. The only requirement is that the option has to be exercised before filing of the return. In that case, assessee had set apart a sum of Rs. 32 lakhs to be spent for charitable purposes in the following year and claimed deduction of the entire amount under Section 11 of the Act which deals with income from property held for charitable or religious purposes. This claim of the assessee was denied by the assessing officer on the ground that no option for this purpose was exercised by the assessee before filing of the return. Though the assessee had stated so in the return itself, that was not treated as exercising the option in a valid manner. All the appellate authorities answered this issue in favour of the assessee. When the revenue approached this Court by way of civil appeal, this Court opined that the law does not mention any specific mode of exercising the option. The only requirement is that the option has to be exercised before filing of the return. This Court held that if the option is exercised when the return

is filed, that would be treated as in conformity with the requirement of Section 11 of the Act.

45. Applying the aforesaid principle to the facts of the present case, we are in agreement with the view expressed by the Tribunal and the High Court that there is no requirement under the second proviso to sub-rule (1A) of Rule 5 of the Rules that any particular mode of computing the claim of depreciation has to be opted for before the due date of filing of the return. All that is required is that the assessee has to opt before filing of the return or at the time of filing the return that it seeks to avail the depreciation provided in Section 32 (1) under sub-rule (1) of Rule 5 read with Appendix-I instead of the depreciation specified in Appendix-1A in terms of sub-rule (1A) of Rule 5 which the assessee has done. If that be the position, we find no merit in the question proposed by the revenue. The same is therefore answered in favour of the assessee and against the revenue.

DELETION OF ADDITION MADE BY THE ASSESSING OFFICER ON ACCOUNT OF PAYMENT MADE BY THE ASSESSEE TO SHRI S.K. GUPTA AND HIS GROUP OF COMPANIES.

46. This brings us to the second of the additional issues which is the deletion of the addition of Rs. 3,39,95,000.00 made by the assessing officer on account of payment made by the assessee to Shri SK Gupta and his group of companies. This issue has been raised by

the revenue in Civil Appeal No. 7425/2019 (CIT Vs. M/s Reliance Industries Ltd.).

47. Respondent assessee in this case is M/s Reliance Industries Ltd. and the assessment year under consideration is 2006-2007. Assessee claimed allowance of expenditure of about Rs. 3.39 crores on account of payments made to one Shri SK Gupta and his group of companies. The assessing officer *vide* the assessment order dated 19.03.2008 passed under Section 143 (3) of the Act, referred to the statement of Shri S.K. Gupta recorded during the search operations and held that the said person had not rendered any service to the assessee so as to receive such payments. Therefore, the assessing officer disallowed such claim of expenditure of the assessee and added the same to the income of the assessee.

48. On an appeal by the assessee, CIT(A) *vide* the order dated 27.01.2009 confirmed the disallowance of professional fee paid by the assessee to Shri S.K. Gupta and his group of companies.

49. On further appeal by the revenue, Tribunal *vide* the order dated 29.05.2015 set aside the view taken by CIT (A). Tribunal on perusal of the materials on record, noted that Shri S.K. Gupta had retracted his statement within a short time by filing an affidavit. He thereafter got his further statement recorded where he reiterated his stand taken in the affidavit. In view of the above, Tribunal set aside

the order of the assessing officer as affirmed by the CIT (A) and allowed the claim of the assessee.

50. Revenue preferred appeal before the High Court of Bombay under Section 260A of the Act raising the above issue along with another issue. The High Court *vide* the order dated 30.01.2019 answered the above issue in favour of the assessee and against the revenue by holding that no substantial question of law arose from the decision of the Tribunal.

51. From the materials on record, we find that the assessing officer had solely relied upon the statements made by Shri S.K. Gupta on 12.12.2006 and 23.12.2006 during the course of the search. However, the assessing officer overlooked the fact that within a short span of time, Shri S.K. Gupta had retracted from the said statements by filing an affidavit on 05.02.2007. Thereafter, he reiterated the statements made by him in the affidavit dated 05.02.2007 in a statement recorded on 08.02.2007. We find that in the later statements, Shri S.K. Gupta had categorically stated that he had rendered services to the assessee. He also mentioned that the name of the assessee was not referred to as one of the beneficiaries of the accommodation bills in his earlier statement. He had categorically stated that he had rendered service to the assessee and that the assessee had not obtained any bogus accommodation bills from him. Assessing officer had dis-believed the affidavit as well as the

subsequent statement of Shri S.K. Gupta without any justifiable and cogent reason. That apart when the revenue had relied upon the retracted statement of Shri S.K. Gupta, it ought to have provided an opportunity to the assessee to cross-examine Shri S.K. Gupta which was however denied. Thus, revenue was not justified in disallowing the claim of professional expenses of the assessee on account of payment to Shri S.K. Gupta and his group of companies.

52. Therefore, we agree with the view taken by the High Court. As noted by the High Court, the entire issue is based on appreciation of the materials on record. Tribunal had scrutinized the materials on record and thereafter had recorded a finding of fact that there were sufficient evidence to justify payment made by the assessee to Shri SK Gupta, a consultant of the assessee, and that the assessing officer had wholly relied upon the statement of Shri Gupta recorded during the search operation which was retracted by him within a reasonable period. In these circumstances, we are of the view that there is no admissible material to deny the claim of expenditure made by the assessee. Accordingly, this issue is answered in favour of the assessee and against the revenue.

WHETHER CARBON CREDIT IS CAPITAL OR REVENUE RECEIPT.

53. This brings us to the last of the three additional issues i.e., whether carbon credit is capital or revenue receipt. This additional issue has been raised by the revenue in Civil Appeal No. 9917/2017

(ACIT Vs. M/s Godawari Power and Ispat Pvt. Ltd.) and in Civil Appeal No. 8983/2017 (ACIT Vs. M/s Godawari Power and Ispat Pvt. Ltd.). In the two appeals, revenue has raised the question as to whether receipts on sale of carbon credit is a capital receipt whereafter assessee is not liable to pay any tax.

54. We may mention that before the Tribunal in Civil Appeal No. 9917/2017, the assessee had questioned amongst others the finding of CIT (A) confirming the decision of the assessing officer that an amount of Rs. 4,47,75,122.00 realised on account of carbon credit had no direct and immediate nexus with the income of the power division and hence did not qualify for deduction under Section 80-IA (4) (iv) of the Act. On due consideration, Tribunal *vide* the order dated 31.03.2016 held that carbon credit is generated under the Kyoto Protocol and because of international commitments. Carbon credit emanates out of such technology and plant and machinery which contribute to reduction of greenhouse gases. That apart, carbon credits are also meant to promote environmentally sound investments which are admittedly capital in nature. Therefore, Tribunal held that carbon credit is a capital receipt.

55. Against the aforesaid decision of the Tribunal, revenue preferred appeal before the High Court of Chhattisgarh under Section 260A of the Act. From a reading of the High Court order dated 15.11.2016, we find that the only issue raised by the revenue before

the High Court was relating to disallowance of deduction by the assessing officer under Section 80-IA (4) (iv) of the Act. Question of carbon credit being capital receipt or not was not raised. In other words, revenue had accepted the decision of the Tribunal as regards carbon credit and did not challenge the said decision before the High Court. In fact, in the proceedings dated 11.09.2009 it was agreed by both the sides (including the revenue) that the only question which arose for consideration of this Court was as regards interpretation of Section 80-IA of the Act. Therefore, the issue relating to carbon credit was not raised or urged by the revenue. If that be the position, revenue would be estopped from raising the said issue before this Court at the stage of final hearing. That apart, there is no decision of the High Court on this issue against which the revenue can be said to be aggrieved and which can be assailed. In the circumstances, we decline to answer this question raised by the revenue and leave the question open to be decided in an appropriate proceeding.

56. For the aforesaid reasons, the civil appeals are hereby dismissed. However, there shall be no order as to cost.

.....J.
[B. V. NAGARATHNA]

.....J.
[UJJAL BHUYAN]

NEW DELHI;
06.12.2023