**IN THE INCOME TAX APPELLATE TRIBUNAL**
**HYDERABAD ' A ' BENCH, HYDERABAD.**

**BEFORE SHRI S.S. GODARA, JUDICIAL MEMBER AND**
**SHRI L. P. SAHU, ACCOUNTANT MEMBER**
**(Through Virtual Hearing)**

**ITA No.268/Hyd/2019**
**(Assessment Year : 2014-15)**

Dy. Commissioner of Income Tax,
Circle 2(1), Hyderabad. .....Appellant.

Vs.

M/s. Kakatiya Cement Sugar & Industries,
Hyderabad. .....Respondent.
PAN AABCK 1868J

Appellant By : Smt. N. Esther (D.R.)
Respondent By : None.

Date of Hearing : 31.05.2021.
Date of Pronouncement : 23.07.2021.

## O R D E R

**Per Shri S.S. Godara, J.M.** :

This Revenue's appeal for Asst. Year 2014-15 arises from the Commissioner of Income Tax (Appeals)-2, Hyderabad's order dt.18.12.2018 passed in case No.10292/2017-18/CIT(A)-2 in proceedings under Section 143(3) of Income Tax Act, 1961 ('the Act').

Case called twice. None appeared on behalf of the assessee. It is accordingly proceeded exparte.

2. The Revenue has proposed the following substantive grounds in this appeal :

> *"1. In the facts and circumstances of the case, whether the CIT(A) is correct in law in holding that cogeneration power plant is an independent undertaking eligible for deduction u/s.80IA of the Income Tax Act,1961 when the operations are integrated with the existing sugar plant ?*
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> *2. In the facts and circumstances of the case, whether the CIT(A) is correct in law in holding that generation of LP steam which is a waste product with no value is equal to generation of power which is eligible for deduction u/s. 80IA of the Income Tax Act ?*
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> *3. In the facts and circumstances of the case, whether the CIT(A) is correct in law in holding that LP steam has definite value where as such LP steam has no market value and I fact a marketable commodity ?"*
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> .

3. We notice with the able assistance of learned department representative that the CIT(A) detailed discussion holding the assessee as eligible for 80IA deduction reads as under :

**6.** The Decision:

The appellant has filed various grounds of appeal being 9 in number. It is seen that the AO has held that the power plant is not eligible for deduction u/s. 80IA on account of various issues as illustrated in para 5 to para 9 of the order, it is seen that the AO has further stated that similar issues came up at various stages beween A.Y. 2007-08 to A.Y. 2013-14. It is seen that the Hon'ble ITAT has passed the order for A.Y. 2010-11 in which the coordinate Bench in assessee's own case for A.Y. 2007-08 in ITA No. 931 and 1051/Hyd/2011 dated 10.02.2012 has held that the claim of the appellant is allowed. The same is reproduced as under:

*6. We have heard the parties and perused the orders of revenue authorities as well as other materials on record. Ld. counsels for both the parties have agreed before us that the issue in dispute is squarely covered by the decision of the ITAT in assessee's own case for preceding AYs 2007-08 to 2009-10. Copies of the orders were also placed before the Bench. On perusal of the order passed by the coordinate bench in assessee's own case for AY 2007-08 in ITA Nos. 931 & 1051 /Hyd/2011, dated 10/02/2012, it is observed that the Tribunal while considering the issue of disallowance of assessee's claim of deduction u/s 80IA by AO on the allegation that the power generation unit is a continuation of the old business and has been set up by splitting up of business in existence, negatived the finding of AO and allowed assessee's claim of deduction observing as under:*

> *"17. We have considered the rival submissions and perused the materials available on record. We find that the assessee company under license obtained from APERC commenced a distinct industrial undertaking for the generation of power. It is an undisputed fact that the premises of the undertaking are distinct from the sugar unit. Separate technology is used and loan was also obtained at concessional rate from government agencies like IREDA. The lower authorities are not correct in holding that the power plant was not a distinct unit although all government authorities including the Electricity Regulatory Authority considered it as such. The true principle as laid down by the Apex Court, in the case of Textile Machinery Corporation Ltd., Vs. CIT [supra], directly and squarely applies to the facts of the case. In the instant case, the true test is not whether the new industrial undertaking connotes expansion of the existing business of the assessee but whether it is all the same a new an identifiable undertaking separate and distinct from the existing business of the assessee but whether it is all the same a new and identifiable undertaking separate and distinct from the existing business. The lower authorities agrees that from 2002-03, a new co-generation plant was put up and also they agrees that installation of sophisticated and high capacity machinery to produce steam and electricity*

*has taken place in the place of existing old technology. Thus, they impliedly agree that the new machinery and plant have been installed under separate licence and premises. Even though the decision of Textile machinery [supra] was concerned with the clause dealing with reconstruction of existing business but the expression 'not formed' was construed to mean that the undertaking should not be a continuation of the old but emergence of a new unit. Therefore, even if the undertaking is established by transfer of building, plant or machinery, it is not formed as a result of such transfer, in our considered view; the assessee could not be denied the benefit. We also find that a new undertaking for manufacture of power with steam as by-product was formed out of fresh funds, in separately identifiable premises, under a separate license with manifold increase in capacity with new machinery and buildings without transfer of any portion of the old buildings or machinery which pre-existed. The power and steam produced earlier was part of the sugar unit and could service only the sugar unit and hence was at best by-product of the sugar unit manufacturing facility. The new unit had power as the main product and apart from servicing the captive consumption in the sugar unit also serviced the cement unit power requirements, which the old captive power plant was not doing and the surplus power is being supplied to APTRANSCO in terms of an agreement. The pricing of power is also subjected to the various power tariff prescriptions. It can be clearly seen that the new undertaking is therefore not formed by the splitting up of the old undertaking. The old undertaking for the manufacture of power still exists. There is no case also made out by the lower authorities that the new undertaking is formed by the splitting up of the existing business. The leaned DR refers to the judgment of the Kerala High Court in the case of chembra Peak Estates Ltd Vs CIT reported in 85 ITR 401 which is clearly distinguished by the learned counsel for the assessee as referred above. Further, the Supreme Court in the case of Textile Machinery Corporation (cited supra) wherein the Supreme Court categorically held that new unit established by the assessee for manufacturing articles used as intermediate products in the old division, which the assessee was buying from the market earlier, is not reconstruction of business already in existence. To constitute reconstruction, there must be transfer of assets of the existing business to the new industrial undertaking. In our opinion, generation of power unit is separate and distinct undertaking for which separate approval was obtained and recognised by the IREDA and it cannot be said that splitting of existing business structure. Therefore, in our considered opinion, the lower authorities are not correct in denying the deduction under section 80IA of the Act. Hence, we decide this issue in favor of the assessee company and against the Revenue."*

*Similar view was again expressed by the Tribunal in assessee's own case in the succeeding AYs 2008-09 and 2009-10 in ITA Nos. 917/Hyd/12, dated 12/10/2012 and ITA No. 1024/Hyd/13, dated 05/02/14. Therefore, there being no difference in the factual position relating to assessee's claim of deduction u/s 80IA in the impugned AY, there is no reason to deny such deduction to assessee in the impugned AY. Accordingly, we do not find any infirmity in the order of Id. CIT(A) in allowing assessee's claim of deduction u/s 80IA after following the*

decision of ITAT on the issue. We, therefore, uphold the order of Id. CIT(A) by dismissing the ground raised.

7. The next issue, which is common in ground nos. 3 & 4 is, with regard to deduction claimed by assessee on cost of steam sold to sugar unit.

8. Briefly, the facts relating to this issue are, in course of assessment proceeding, AO while denying assessee's claim of deduction u/s 80IA also held that steam is not a power as envisaged u/s 80IA. He was also of the view that steam is only a bye-product, it cannot be said to be income from the business of power generation. AO opined that since no value has been ascribed by APERC in tariff fixation, its value has been taken at nil. He also observed that since the cost of fuel has been fully considered in fixing the tariff no separate addition in respect of fuel cost can be allowed. AO observed that since deduction claimed u/s 80IA is denied to assessee on the amount of Rs. 118.55 lakhs representing the value of steam sold, but, the value of steam has been arrived at nil, income of the sugar division is to be increased to the extent of Rs. 118.55 lakhs. Being aggrieved of such addition, assessee preferred appeal before Id. CIT(A). Ld. CIT(A) finding that similar issue has been decided in favour of assessee by ITAT in assessee's own case for AYs 2007-08, 2008-09 and 2009-10, deleted the addition.

9. We have considered the submissions of the parties and perused the orders of revenue authorities as well as other materials on record. Both the counsels agreed before us that the issue in dispute is squarely covered in favour of assessee by the decisions of the coordinate bench. The orders by the coordinate bench in this regard in assessee's own case for AYs 2007-08 to 2009-10 were also placed before the bench. On perusal of the orders passed by the coordinate bench in assessee's own case that the coordinate bench in ITA No. 1024/Hyd/13, dated 05/02/2014, while deciding identical issue, held as under:

> "15. After hearing the parties and perusing the record we find that the similar issue came up for consideration in AY 2007-08 and 2008- 09 in assessee's own case. In AY 2008-09, the coordinate bench held as follows:
>
> "6. After hearing both the parties on this, we are of the opinion that the same issue was considered by this Tribunal in assessee's own case for A. Y. 2007-08 in ITA No. 931/Hyd/2011. The Tribunal vide order dated 10.2.2012 held as follows:
>
> 21. We have considered the rival submissions and perused the materials available on record. We find that the lower authorities did not dispute that the profit credited to Profit and Loss Account in respect of steam is only Rs. 11.43 Lakhs. Thus, even assuming that steam is not power as held by the Assessing Officer, at best the department could have treated only Rs. 11.43 lakhs as ineligible profits for the purpose of claiming the deduction under section 801A of the Act. To hold otherwise, would be a gross error as the expenditure debited to the profit and loss account of the power unit is still being retained by the department while making the computation. The CIT [A] also agrees that steam has no value as no price was charged for the same in the earlier year but ignores the fact that in the absence of gross total income in the earlier year no exemption could have been claimed. Therefore, we direct that only Rs.11.43 lakhs is to be treated as ineligible profits for the purpose of deduction under section 801A of the Act and for the balance sale amount of steam to sugar division, the assessee company is

eligible for deduction under section 80IA of the Act. For this proposition, we place reliance on the order of the Tribunal in the case of DCW Ltd. vs. Add!. CiT, ITA No. 126/Mum/2008, AY2003-04 dated 29th January, 2010 reported in 42 DTR (Mumbai) (Trib.) 369 at page 383 para 18.8 which reads as under:

"18.8 the next item of miscellaneous income is the income from sale of steam produced by the assessee. Briefly the facts and nature of steam are that the captive power undertaking also has waste heat recovery boiler, which is part of the power undertaking. The power generated by the running of diesel generating set is used in the manufacture of caustic soda. Running of diesel generating sets produce heat, which is recovered from the waste heat recovery boiler in the form of steam. During the year ended March, 2002, the total quantity of steam generated is 1,02,295 MT. The said steam is used as power for the manufacture of PVC and limenite and 6,240 MT was used towards internal consumption. Durng the year 66,900 MT of steam was consumed in the manufacture of PVC and 29,065 MT was consumed in the manufacture of limenite.

18.9 The submission of the learned Authorised Representative of the assessee is that since power in the form of steam was generated by the captive power plant and consumed in the manufacture of PVC and limenite, therefore, the assessee is entitled for deduction under s. 80IA. Further, the learned Authorised Representative submitted that on identical set of acts, the Department filed SLP before Hon'ble Supreme Court against the judgement of Hon'ble Madras High Court in Tax Case No. 1773 of 2008 and vide judgement dt. 6th November, 2008, the Apex Court, dismissed the Department's appeal against the decision of Tribunal holding that the assessee was entitled to claim deduction under s. 80-IA of the Act on the value of steam used for captive consumption by the assessee. CIT vs. Tanfac Industries Ltd., SLP(C) No. 18537 of 2009 (319 ITR 8 and 9). In the light of above discussion, we find that steam produced by the assessee is eligible unit is a by-product and income from sale of steam is the income derived from industrial undertaking, therefore, deduction under s. 80-IA is allowable. We, accordingly, set aside the order of CIT(A) on this issue and the claim of the assessee is allowed."

22. The ground raised by the assessee with regard to deduction u/s. 80IA in respect of sale of steam to the sugar unit is partly allowed."

7. In view of the above order of the Tribunal, in principle, we agree with the findings of the CIT(A). However, the calculation of value of the steam produced by the power plant has to be determined after considering the cost and production record of respective unit and thereafter quantification of deduction has to be done in accordance with the order of the Tribunal cited supra. This issue is remitted back to the file of the Assessing Officer with a direction to the assessee to furnish necessary records for the purpose of determining the value of the steam produced and transferred to sugar unit.

*16. As the issue under consideration is identical to that of the case decided by the coordinate bench in assessee's own case for AY 2007- 08 and 2008-09, respectfully following the same, we remit the issue back to the file of the Assessing Officer with a direction to decide the issue after examining the records that will be furnished by the assessee before him. The assessee is directed to furnish necessary records for the purpose of determining the value of the steam produced and transferred to sugar unit. This ground is allowed for statistical purposes."*

*Since the facts in dispute in the present appeal are materially same and the order passed by ld. CIT(A) is fully in terms with the order of the Tribunal, we have no hesitation in upholding the same by dismissing the ground raised.*

*10. The last issue raised by the department in ground no. 5 is relating to reduction in power charges.*

*11. During the assessment proceeding, AO noticed that assessee has adopted a rate of 3.48% in respect of electricity supplies made to AP Transco, sugar and cement divisions. He observed that initially the Govt. of AP vide GO Ms. No. 93 dated 18/11/97 announced uniform incentives to all projects based on renewable sources of energy for purchase of power by APSEB/AP Transco. The rate was fixed at Rs. 2.25 per unit with 5% escalation per annum with 1997-98 as base year. AO observed that APERC was constituted on 03/04/1999 in pursuance to AP Electricity Reform Act, 1998. The purchase agreements signed by AP Transco with non-conventional energy developers included a provision for review of incentives by the APERC with effect from 01/04/2004. AO observed that in pursuance with the powers conferred under the Electricity Act, 2003, APERC invited proposals for tariff fixation from 01/04/2004. After hearing all concerned, commission passed an order dated 20/03/2004 fixing tariffs for various sources of energy. In case of bagasse cogeneration plants, it arrived at two types of tariff, a fixed cost and a variable cost. AO noticed that as assessee is into the sixth year of operations, the fixed cost of tariff is Rs. 1.51 per unit and the variable cost for the year 2007-08 has been fixed at Rs. 1.18 per unit. AO observed that the order of APERC further laid down a condition that no fixed tariff will be applicable if plant load factor exceeds 55% as the variable tariff would take care of the costs. However, they have been compensated with an incentive of 21.5 paise per unit for delivery in excess of 55% PLF. AO noticed that in case of assessee as the PLF is below 55%, assessee is entitled to a price of 2.69 per unit. AO observed that tariff fixed by APERC was challenged before the Tribunal and thereafter the order of the Tribunal was challenged before the Hon'ble Supreme Court by AP Transco. AO observed that, though, the matter has not yet reached finality, but, still, assessee company has been raising invoices on AP Transco @ 3.48 per unit, which is the price as on 31/03/2004 as per the old tariff. AO observed that assessee had entered into agreement with NEDCAP on 16/08/2000 as per which it is under an obligation to follow the directions of APERC. Thereafter, AO referring to various judicial precedents, rejected the income shown from power generation unit by reducing it by an amount of Rs. 4,12,84,308 by treating per unit price at Rs. 2.69. Being aggrieved of such revision in price of power by AO, assessee preferred appeal before ld. CIT(A).*

*12. Before Id. CIT(A), it was submitted by assessee that the appellate tribunal before which power tariff fixed by APERC was challenged, has given a decision in favour of the power units. Assessee referring to provisions of section 801A(8) also submitted that as per the said provision, the market value is the value which would ordinarily fetch in the open market and in case of supply of electricity the fair market value would be the rate at which AP Transco charges its customers. Ld. CIT(A) after considering the submissions of assessee in the light of the observations made by ITAT in assessee's own case held as under:*

> *"10. The submissions and the orders of the ITAT and Appellate Tribunal for electricity cited supra have been duly perused. It is opined that the rate fixed by APERC is the fair market value as far as sale to AP Transco, hence, the same rate may be applied for the sale of cement and sugar division also. Respectfully following the decision of ITAT in appellant's case, the AO is directed to adopt the rate as finalized by the appellate tribunal of the APREC."*

*13. We have heard the parties and perused the materials on record. Both the counsels stated before us that this particular issue has also been dealt by the ITAT in assessee's own case for AY 2007-08. On going through the order of the Tribunal in ITA No. 931 & 1051/Hyd/2011, dtd. 10/02/2012, it is observed that the Bench while deciding the issue held as under:*

> *"30. In view of the above order of the Tribunal, we are inclined to hold that the power tariff rate should be considered at Rs. 2.67 per unit instead of Rs. 3.48 per unit as decided by the Tribunal in the case of Shri Balaji Bio-Mass Power Project Ltd. (supra). Accordingly, we allow the ground taken by the Revenue. However, in the event of tariff rate reached finality by the judgement of higher judicial forum, the Assessing Officer is directed to consider the same and decide accordingly."*

*14. Since the facts and issue involved in this appeal is materially, same, following the said decision of the Tribunal, though we uphold the power tariff rate at Rs. 2.69 per unit as adopted by AO instead of Rs. 3.48 per unit as adopted by assessee, but, at the same time, we direct that in the event the tariff rate gets revised either by virtue of judgment of Hon'ble Supreme Court or any other judicial forum, AO should consider the same and decide accordingly.*

*15. In the result, department's appeal is partly allowed."*

In view of the decision of Tribunal mentioned supra, the ground nos. 1 to 4 with regard to allowing deduction u/s. 80 IA are decided in favour of the appellant.

The ground nos. 5 to 7 are pertaining to sec. 80IA claim on steam generated and transferred to sugar unit are statistically allowed. The A.O. is to

quantify and calculate the value of steam generated and transferred to sugar unit which is eligible for deduction u/s. 80IA.

The ground nos. 8 & 9 are regarding power charges raised in respect of Sugar and Cement Divisions. The A.O. is directed to adopt the tariff fixed by Appellate Tribunal of the APERC, in line with the tribunal's directions in the earlier years. While doing so, the A.O. is also directed to follow the directions given in para 14 of the Tribunal order in ITA No.346/Hyd/2015 for AY 2010-11.

4. This tribunal's co-ordinate bench orders in Assessment Years 2012-13 and 2016-17 involving Revenue's appeals in ITA 1283/Hyd/2017 and 1598/Hyd/2019 dt.9.4.2021 has already upheld the CIT(A)'s identical action by adopting judicial consistency thereby holding the assessee's power plant is eligible for 80IA deduction. The Revenue is fair enough in not pin pointing any exception except mentioning tribunal's above cited order (supra) in earlier assessment years. We thus see no reason to adopt a different approach in the impugned assessment year. The CIT(A)'s lower appellate findings stand affirmed therefore.

5. This Revenue's appeal is dismissed.

*Order pronounced in the open court on 23rd July, 2021.*

Sd/- Sd/-

**(L.P. SAHU)** **(S.S. GODARA)**
Accountant Member Judicial Member

Hyderabad, Dt. 23.07.2021.

* Reddy gp

Copy to :

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| 4. | CIT(Appeals)-2, Hyderabad. |
| 5. | DR, ITAT, Hyderabad. |
| 6. | Guard File. |

By Order

Sr. Pvt. Secretary, ITAT, Hyderabad.