



TAX ALERT

7 DECEMBER 2023

Supreme Court allows 'market value' of electricity based on rate at which power is sold by SEB to industrial consumers

FACTS OF THE CASE

- Jindal Steel & Power Limited¹ ('the assessee')(AY 2001-02), being the lead case in a batch of appeals before Hon'ble SC, is engaged in the business of generation of electricity, manufacture of sponge iron, M.S. Ingots etc. The assessee had set up two captive power generating units in Raigarh, Chhattisgarh to provide uninterrupted power supply to its industrial undertakings.
- For the purpose of computing market value of inter-unit transfer of power from power plants to the industrial units of the assessee, the assessee adopted a rate of **Rs. 3.72/ unit** based on the rate at which electricity was supplied to the industrial units of the assessee by State Electricity Board ('SEB').
- The Ld. AO rejected the method adopted by the assessee based on the contention that rate adopted by the assessee does not reflect the true market value. Thereafter, the Ld. AO adopted a rate of **Rs. 2.32/unit** based on the rate at which surplus power is sold by assessee to the SEB.
- The action of the Ld. AO was upheld by the Ld. CIT (Appeals). On further appeal, Hon'ble Delhi Tribunal granting the relief to the assessee held that that the price at which electricity was supplied by the assessee to the SEB could not be equated with the market value as understood for the purpose of Sec. 80-IA (8) of the Act. The said order was subsequently upheld by the Hon'ble Punjab & Haryana High Court (HC). Being aggrieved, Department filed SLP before the Hon'ble Supreme Court (SC).

¹ CIT –vs.- Jindal Steel & Power Ltd (Civil Appeal No. 13771 of 2015 dated 06-12-2023)



ISSUE BEFORE THE HON'BLE SUPREME COURT

- The issue before the Hon'ble SC is with regard to the quantum of profits and gains of the eligible business of the assessee and the resultant deduction u/s Sec. 80-IA of the Act i.e., whether the 'market value' of power is to be computed based on rate of sale of power by SEB to industrial consumers or the rate at which surplus power is sold by assessee's power plant to the SEB.

DECISION OF THE HON'BLE SUPREME COURT

The Hon'ble SC has decided the issue in favour of assessee based on the following observations:

- Referring to the provisions of the **Electricity (Supply) Act, 1948**, the Hon'ble SC observed that if any person who produces electricity has surplus electricity, he may dispose of such surplus electricity by entering into an arrangement with the SEB for supply of such surplus electricity by him and purchase thereof by the SEB based on tariff determined by SEB. The assessee could not supply the same to any third party consumer.
- Referring to the various definitions of the 'open market', Hon'ble SC concluded that the expression "market value" in relation to any goods as defined by the explanation below the proviso to Sec. 80-IA(8) 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.
- The price for supply of electricity by the assessee to the SEB @ Rs. 2.32 per unit is a contracted price and there was no room for any negotiation on the part of the

assessee. Therefore, it was held that determination of tariff between the assessee and SEB cannot be said to be an exercise between a buyer and a seller in a competitive environment or in ordinary course of trade i.e., in the open market.

- Distinguished the decision of **CIT vs. ITC Ltd. [(2015) 64 Taxman.com 214]** (on facts) relied upon by Revenue by stating that in that case, there was no surplus electricity supplied to SEB and thus there was no contract. On the other hand, Hon'ble HC had observed 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 61 and 62 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.
- Rejected the reliance placed by Revenue on the provisions of Sec. 80A(6) [which defines market value as price of goods sold by eligible unit in the open market subject to statutory or regulatory restrictions] stating that it was inserted in the statute with effect from 01-04-2009 whereas the issue in the present case pertains to AY 2001-02.
- Therefore, the Hon'ble SC upheld the order of the Hon'ble ITAT & Hon'ble HC and held that the sale rate of power by SEB to the industrial consumers should be taken as the 'market value' for computing the deduction u/s 80-IA of the Act.

CONCLUSION

- The computation of 'market value' for transfer of power by Captive Power Plants to the manufacturing units should be computed by considering the rate at which the SEB supplies power to the industrial consumers in the open market and not by comparing it with the rate of power when sold by the Assessee to the SEB.



COMMENTS

- This is a much awaited landmark decision which have settled the dispute of determination of transfer price of power of captive power generating unit.
- The decision would provide support in case of pending appellate proceedings for various assesseees who have computed 'market value of power' based on the rate at which power is supplied by SEB to industrial consumers.
- The Hon'ble SC settles the issue regarding adoption of sale price of power by assessee's Captive Power Plants to SEB as it is held that such rate cannot be adopted since tariff between the assessee and SEB cannot be said to be an exercise between a buyer and a seller in a competitive environment.
- Over the years, revenue has been consistently adopting rates of sale of power by generating company to distribution company which are generally regulated. In such cases, assesseees would find support from this decision which lays down the principle that contracted/ regulated price which is not subject to negotiation should not be considered as 'market value' for transfer of power.
- The Hon'ble SC has categorically stated that the facts in the case of ITC Ltd. are not applicable to facts of the present case.
- The Hon'ble SC has not deliberated on the applicability of provisions of Sec. 80A(6) since the said section is applicable w.e.f 01-04-2009 and the case in hand is for AY 2001-02. Incidentally, the Hon'ble SC has dismissed some appeals that are relating to AY 2011-12 & AY 2012-13, i.e., the years in which the provisions of Sec. 80A(6) are applicable.
- The issues (lead case) being related to the pre-SDT era, the Hon'ble SC has categorically not discussed about the transfer pricing provisions. However, a view may be taken that the principle emanating from the decision that the price at which

power is sold by SEB to industrial consumers represents 'market value' in terms of Sec. 80-IA(8) and the same should be considered to be as arm's length price even in the Transfer Pricing era.



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