IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.1056 OF 2016

Commissioner of Income Tax-LTU … Appellant

V/s.

M/s Reliance Industries Ltd. … Respondent

Mr.Tejveer Singh for the Appellant.
Mr.Jehangir Mistri, Senior Counsel with Mr.P.C.Tripathi with Mr. Amit Mathur i/by Mr.Raj Darak for the Respondent.

CORAM : AKIL KURESHI AND
M.S.SANKLECHA, JJ.
DATE : JANUARY 30, 2019.

P.C.:-

1. The appeal is filed by the revenue to challenge the judgment of the Income Tax Appellate Tribunal. Following questions are raised for our consideration:-

> "(a) Whether on the facts and in circumstances of case as well as in law, Tribunal was right in deleting addition made to tune of Rs.3,39,95,000/- on account of payment made by assessee to S. K. Gupta and his group of companies ignoring the facts of the case, including the incapacity of Shri S.K.Gupta to render such services, as

also the spontaneous statement given by him at the time of search?
(b) Whether ITAT was correct in holding a divergent view in the assessee's case when the co-ordinate bench at Delhi, under the same fact, upheld the disallowance in the case of Link Engineers Pvt. Ltd.?
(c) Whether, on the facts and in the circumstances of the case and in law, the ld. Tribunal was right in upholding the decision of the ld.CIT(A) who had deleted the addition made by the then AO by restricting the deduction u/s 80IA at Rs.48,76,82,681/- as against Rs.131,43,30,575/- claimed by the assessee?"

2. Question Nos.1 and 2 are elements of the same issue and relate to the addition of Rs.3.39 crores (rounded off) made by the Assessing Officer by disallowing expenditure of the said sum incurred by the respondent-assessee in form of payments to one Shri S.K. Gupta. The Assessing Officer on the basis of statement of said Shri Gupta recorded during search operations held that the said person had not rendered any service to the assessee-company so as to receive such payments. CIT (Appeals) however deleted the addition inter-alia on the grounds that Shri S.K.Gupta had retracted the statement recorded during search, that the assessee-company had pointed out range of services provided by Shri Gupta and that the Assessing Officer had no other material

to disallow the expenditure. The Tribunal in further appeal by the revenue confirmed the view of the CIT (Appeals) independently coming to the conclusion that the Assessing Officer was not justified in making the addition. It was noted that Shri Gupta retracted his statements within a short time by filing an affidavit. Subsequently, his further statement was recorded in which he also reiterated the stand taken in affidavit. The Tribunal also referred to the decision in case of the **DCIT Vs. M/s Link Engineers Private Limited**[1] in whose case also a similar issue of genuineness of payment to Shri S.K. Gupta had come up for consideration. The Tribunal noted that in such a case also the Tribunal had held in favour of the assessee.

3. Having heard learned counsel for the parties and having perused documents on record, we notice that the entire issue is based on the appreciation of materials on record. CIT (Appeals) and the Tribunal concurrently held that there was sufficient evidence justifying the payment to Shri S.K.Gupta, a Consultant and that the Assessing Officer other than relying upon the

1 (ITA No.968 & 2248/Del/2011)

retracted statements of Shri Gupta recorded in search, had no independent material to make the additions. No question of law arises.

4. Question (c) pertains to the dispute between the department and the assessee regarding the rate at which the electricity generated by one unit of the assessee-company and provided to the another be valued. The assessee contended that such valuation should be at the rate at which the electricity distribution companies are allowed to supply electricity to the consumers. The revenue on the other hand argues that the appropriate rate should be the rate at which the electricity is purchased by the distribution companies from the electricity generating companies.

5. This controversy arose in the background of the fact that the assessee had set up a captive power generating unit and claimed deduction under Section 80IA of the Income Tax Act, 1961 ("the Act" for short) in respect of the profits arising out of such activity. Obviously, therefore the attempt on the part of the

assessee was to claim larger profit under the unit which was eligible for such deduction as against this, attempt of the revenue would be see that the ineligible unit shows greater profit.

6. The Tribunal in the impugned judgment extracted extensively from the order of CIT (Appeals) and independent reasons for confirming the same. In such order CIT (Appeals) had placed reliance on an earlier judgment of the Tribunal in case of **Reliance Infrastructure Limited Vs. Addl. CIT, Range 1(1)**[1]. Learned counsel for the assessee had placed on record a copy of the judgment of the Tribunal in case of Reliance Infrastructure limited. In such judgment an identical issue came up for consideration. The Tribunal by detailed judgment had held and observed as under:-

> "44. In the given facts and circumstances of the case, we are of the view that the profits of the business of generation of power worked out by the Assessee on the basis of the price that it paid to TPC for purchase of power continues to be the best basis even after the order of MERC and therefore the same has to be accepted as was done in the past and as approved by the ITAT in Assesssee's case. We therefore dismiss ground

1 ITA No.4631/MUM/2009 (A.Y.2006-07)

No.4 of the revenue."

7. Counsel for the assessee pointed out that the judgment of the Tribunal in case of **Reliance Infrastructure limited(supra)** was carried in appeal by the revenue before the High Court in Income Tax Appeal No.2180 of 2011, such appeal was dismissed making following observations:-

> "6. As far as question (d), namely, the claim relating to purchase price from Tata Power Company is concerned and that was for the deduction under Section 80IA, the ITAT in paragraph 21 onwards has noted the factual findings and also referred to the order of the Maharashtra Electricity Regulatory Authority (for short "MERC"). Paragraph 36 set outs as to how the claim arose. The claim has been considered in the light of Section 80IA and particularly proviso and explanation thereto. The Tribunal eventually held that till the Assessment Year 2005-2006, the Revenue considered the rate at which the power was purchased by the Assessee from Tata Power Company as market value. There is nothing brought on record as to how the rate determined by the MERC is the true market value. The Assessee gave explanation that the rates determined by the MERC do not reflect the correct market rate. The finding is that the mode of computation and deduction under Section 80IA requires no deviation from the past. The findings of fact and to be found in paragraphs 42 to 50 also reflect that the very issue came up for consideration for the Assessment Year 2003-2004. For the reasons assigned by the ITAT and finding

> that the attempt is to seek reappreciation and reappraisal of the factual data that we come to a conclusion that even question (d) as framed is not a substantial question of law."

8. Thus, the issue at hand had been examined by this Court on earlier occasion and the view of the Tribunal under similar circumstances was approved.

9. Additionally, we also notice that similar issue came up for consideration before Chhattisgarh High Court in case of **Commissioner of Income-tax, Raipur Vs. Godawari Power & Ispat Limited**[1], in which the Court held and observed as under:

> "31. The market value of the power supplied to the Steel-Division should be computed considering the rate of power to a consumer in the open market and it should not be compared with the rate of power when it is sold to a supplier as this is not the rate for which a consumer or the Steel-Division could have purchased power in the open market. The rate of power to a supplier is not the market rate to a consumer in the open market.
> 32. In our opinion, the AO committed an illegality in computing the market value by taking into account the rate charged to a supplier: it should have been compared with the market value of power supplied to a consumer."

1 (2014) 42 taxmann.com 551 (Chhattisgarh)

10. Gujarat High Court in case of **Principal Commissioner of Income-Tax Vs. Gujarat Alkalies and Chemicals Ltd.**[1] also had occasion to examine such an issue. It referred to earlier order in case of **Asst. CIT Vs. Pragati Glass Works Pvt. Ltd.**[2] in which following observations were made:-

> "7. To our mind, Tribunal has committed no error. Assessing Officer and CIT(Appeals) while adopting Rs.4.51 per unit as the value of electricity generated by eligible unit of assessee and supplied through its non eligible unit only worked out cost of such electricity generation. In fact CIT(Appeals) in terms recorded that Rs.4.51 was computed as the reasonable value of the electricity generated by eligible unit of assessee. This amount included Rs.4.17 per unit which was the cost of electricity generation and Rs.0.34 per unit which was duty paid by the assessee to GEB for such power generation. Thus the sum of Rs.4.51 per unit only represented the cost of electricity generation to the assessee. In Section 80IA(8) of the Act what is required to be ascertained is the market value of the goods transferred by the eligible business, when such transfer is by eligible business to another non eligible business of the same assessee and the consideration recorded in the accounts of the eligible business does not correspond to market value of such goods. Term "Market Value" is further explained in explanation to said sub-section to mean in relation to any goods or services, price that such goods or services will ordinarily fetch in the open market. To our mind sum of Rs.4.51 per unit

1 (2017) 395 ITR 247 (Guj)
2 Tax Appeal No.1646 of 2010 (order dated January 30, 2012)

> of electricity only represented cost of electricity generation to the assessee and not the market value thereof. It is not in dispute that the GEB charged Rs. 5 per unit for supplying electricity to other industries including non eligible unit of the assessee itself. Tribunal therefore, while adopting the said base figure and excluding excise duty therefrom to work out Rs. 4.90 as the market value of the electricity generated by the assessee, to our mind, committed no error. It can be easily seen that if the assessee were to supply such electricity or was allowed to do so in the open market, surely it would not fetch Rs. 4.51 per unit but Rs. 5 per unit as was being charged by GEB. Since the excise duty component thereof would not be retained by the assessee, Tribunal reduced the said figure by the nature of excise duty and came to the figure of Rs. 4.90 to ascertain the market value of electricity generated by the eligible unit and supplied to non eligible business of the assessee. No error was committed by the Tribunal. No question of law therefore, arises. Tax Appeal is dismissed."

11. Judgment of Calcutta High Court in case of **Commissioner of Income-tax, Kolkata - III Vs. ITC Ltd.**[1] was also brought to our notice in which the said High Court has taken a different stand. However, since the issue has already been examined by this Court earlier and in view of the decisions of the Chhattisgarh and Gujarat High Court, we see no reason to entertain this question.

1 (2016) 236 Taxman 612

12. In the result, Income Tax Appeal is dismissed.

(M.S.SANKLECHA,J.) **(AKIL KURESHI,J.)**