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

BEFORE SHRI SAKTIJIT DEY (JUDICIAL MEMBER)
AND
SHRI S. RIFAUR RAHMAN (ACCOUNTANT MEMBER)

I.T.A. No.6073/Mum/2019 - Assessment year 2013-14
I.T.A. No.6074/Mum/2019 - Assessment year 2014-15

Jayant Agro Organics Limited 701, Tower A, Peninsula Business Park, Senapati Bapat Marg, Lower Parel (W), Mumbai-400 013 PAN : AAACJ7581Q	vs	Addl. CIT (TP)-2(2), Mumbai
APPELLANT		**RESPONDENT**

Appellant by	Shri Madhur Agarwal / Shri Siddhant Banwat, AR
Respondent by	Shri Brajendra Kumar (DR)

Date of hearing	04-08-2021
Date of pronouncement	14-09-2021

O R D E R

Per : Saktijit Dey (JM) :

Captioned appeals by the assessee arise out of a common order of learned Commissioner of Income Tax (Appeals)-56, Mumbai pertaining to assessment years 2013-14 and 2014-15.

ITA No.6073/Mum/2019 – Assessment year 2013-14

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2. In ground 1 assessee has challenged the addition of Rs.30,94,162/- made on account of transfer pricing adjustment in respect of a specified domestic transaction with the Associated Enterprise (AE).

3. Briefly the facts are, the assessee, a resident company, is engaged in the activity of manufacturing and exporting of castor oil and its derivatives. The assessee is also engaged in generation of power through windmill. For the assessment year under dispute, assessee had filed its return of income on 30-11-2013 declaring total income of Rs.14,37,11,390/-. Since, during the year under consideration, the assessee entered into certain specified domestic transactions with associated enterprise (related party), a reference was made to the Transfer Pricing Officer (TPO) under section 92CA of the Income Tax Act, 1961. On perusing the report furnished by the assessee in form 3CED, the TPO noticed that the assessee had purchased castor cakes/meals worth Rs.21,32,09,594/- from one of its AEs viz. Ihesedu Agro Chem Pvt Ltd (IAPL). Further, he found that some products were also purchased by the assessee from independent third parties. The castor meals/cakes so purchased have been resold to buyers locally as well as outside India. From the details furnished, the TPO found that in respect of resale of castor meals/cakes purchased from AE, assessee had shown gross margin of 5.99%. Whereas, in respect of resale of castor meals purchased from independent third parties, the assessee has shown negative gross margin of (6.97%). On verifying the transfer pricing study report, he found that the assessee had benchmarked the transaction with AE by applying resale price method (RPM) based on internal comparables. The TPO observed, since castor meal is a by-product generated in the process of manufacturing castor oil, the assessee also produces caster meal. For benchmarking purpose under RPM, the assessee has

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considered the average sale price of castor meal generated by it as well as procured from the AE for determining gross profit margin by reducing the cost of castor meals purchased and produced by it respectively. The TPO, however, was not satisfied with the benchmarking of the assessee. He observed, when similar transaction relating to purchase of castor meal from independent third parties are available, comparable uncontrolled price (CUP) method would be most appropriate. After calling for necessary details relating to purchase of castor meal from the AE as well as independent third parties, the TPO noticed while the purchase price of castor meal from AE varied between Rs.4,500 per M.T. to Rs.5,343/- per M.T, working to average price of Rs.4,821/- per M.T, the purchase cost from third parties varied between Rs.4,025/- per M.T. to Rs.5,732/- per M.T. working out to an average price of Rs.5,485/- per M.T. However, according to the TPO, on verifying the date-wise comparison of the purchase price paid to the AE and third parties he found that the average price paid to AE for the month of April is more than the price paid to independent third parties, working out to a difference of Rs.30,94,162/-. Thus, he ultimately treated such difference as the adjustment to be made to the price paid to the AE for purchase of castor meal. Assessee challenged the aforesaid adjustment before learned Commissioner (Appeals). However, learned Commissioner (Appeals) sustained the adjustment made by the TPO.

4. Learned Counsel for the assessee submitted, the assessee had purchased castor meal both, from AE and non AEs and sold to third parties. He submitted, since the transaction with the AE relates to purchase of a product for resale, RPM is the most appropriate method. He submitted, the fact that the average purchase price paid to AE is less than the average purchase price paid to non AE

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has not been disputed by the TPO. Further, he submitted, the gross profit margin shown by the assessee under RPM has also not been disputed. He submitted, the gross profit margin in respect of resale of castor meal purchased from AE is much more than the gross profit margin of similar transaction relating to non AE. Thus, he submitted, there is no justifiable reason for rejecting RPM.

5. Without prejudice, he submitted, even under CUP method also if the average purchase price paid to AE is compared with the average price paid to non AE, the transaction would be at arm's length. He submitted, though, the TPO while applying CUP has referred to date-wise comparison to work out difference, however, no such date-wise data relating to non AE transaction is available on record. In this context, he drew our attention to page 146 of the paper book to demonstrate that date-wise price of non AE transaction, is not available. Thus, he submitted, the TPO himself has taken the average price of non AE transaction to compare with the date-wise price of AE transaction. Further, drawing our attention to the calculation of average purchase price and average sale price at page 146 of the paper book, he submitted, there is huge difference in the quantity of purchase between AE and non AEs. He submitted, while the assessee had purchased huge quantities from AE, the purchase from non AE is substantially lower. Therefore, in such circumstances, CUP method cannot be the most appropriate method. Without prejudice, he submitted, even if CUP is applied, the average price paid both, to the AE and non AE has to be compared and in such case, the transaction would be at arm's length.

6. The learned departmental representative strongly relied upon the observations of the assessing officer and learned Commissioner (Appeals).

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7. We have considered rival submissions and perused materials on record. Undisputedly, the specified domestic transaction under dispute in the present appeal relates to purchase of castor meal from one of the AEs. There is no dispute that the assessee had purchased castor meal from both AE and non AE for resale. Thus, it is a simple case of purchase and sale of a particular product without any value addition. A reference to rule 10B(1)(b) would indicate that where the transaction with the AE relates to purchase of a product or service for resale to an unrelated party, RPM would be the most appropriate method. The mode and manner of computing the arm's length price (ALP) under RPM has also been provided in the aforesaid provision. It is a fact on record that the assessee has sold the castor meal purchased from the AE as it is, without making any value addition or variation to the product. It is also observed, the assessee had purchased similar product from non AEs for resale. In the TP study report, the assessee has demonstrated the arm's length nature of transaction with the AE by comparing the gross profit margin from sale of product purchased from AE shown at 5.99% as against sale of similar products purchased from non AE at GP margin of (-) 6.97%. It is observed, the average purchase price from AE is Rs.4,821/- per M.T. as against the average purchase price of Rs.5,485/- per M.T. from non AEs.

8. These facts have not been disputed by the departmental authorities. In such factual position, when the assessee has established that the transaction with the AE is at arm's length under RPM, there is no reason to discard assessee's benchmarking without any genuine and valid reason. Thus, in our considered opinion, the departmental authorities have grossly erred in rejecting RPM followed by the assessee for benchmarking the specified domestic transaction with AE. More so, when the departmental authorities have not found any

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deficiency or error in the gross profit margin computed by the assessee in respect of both, AE and non AE transactions. Thus we hold that benchmarking by the assessee under RPM has to be accepted.

9. Even assuming that CUP would be the most appropriate method to benchmark the transaction, the facts on record clearly reveal that the average purchase price of castor meal from AE works out to Rs.4,821/- per M.T as against the average purchase price from unrelated parties working out to Rs.5,485/- per M.T. The aforesaid factual position has not been disputed by the TPO. What the TPO has done to reject the assessee's claim is, he has ventured into date-wise comparison of purchase price of AE and non AE transactions. Even, while doing so, the TPO was very much conscious that except the month of April, the purchase price paid to the AE is less than the purchase price paid to non AEs. Therefore, he has conveniently restricted himself to the month of April where the purchase price paid to AE is slightly more than the purchase price paid to non AEs, while, ignoring the figures for the rest of the year as it would not have worked out to his liking. Thus, if the average purchase price of AE and non AE transactions are considered even under CUP, the transaction with AE would be at arm's length. Though, the TPO claimed to have worked out the difference between the price paid to AE and non AE, purportedly, based on a date-wise comparison; however, factually it is not so. As demonstrated before us by learned counsel for the assessee, though date-wise price of AE transaction is available; however, no such date-wise price in respect of non AE transaction for the month of April is available. The per MT price of non AE transaction compared with date-wise AE transaction in reality is the average price of non AE transaction for the month of April. This fact is clearly discernible from the working note showing calculation of

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average purchase price and average sale price as placed at page 146 of the paper book. Thus, the aforesaid facts make it abundantly clear that the working of price difference made by the TPO is flawed, as he has compared date-wise price of AE transaction with average price of non AE transaction for the month of April 2012. Thus, it is very much clear that the TPO has adopted a purely selective approach for determining the ALP of the specified domestic transaction. Thus, in our considered opinion, even applying CUP method also assessee's transaction with AE has to be considered to be at arm's length. Accordingly, we delete the adjustment. This ground is allowed.

10. In grounds 2 and 3, assessee has challenged transfer pricing adjustment of Rs.41,37,879/- in respect of specified domestic transaction relating to transfer of electricity to other units.

11. Briefly the facts are, the assessee has set up a unit for generation of electricity through windmill. The said electricity generation unit is of the capacity at 1.6 mega watt and is eligible for deduction under section 80IA of the Act. The assessee has entered into an agreement with Gujarat Energy Transmission Corporation Ltd (GETCO) for sale of the electricity generated from the 80IA unit. As per the terms of the agreement with GETCO, the electricity generated is transferred to GETCO sub-station. Corresponding credit of the electricity units generated by the 80IA unit is granted against electricity consumed by assessee's other two manufacturing units as billed on monthly basis by the distribution company after deducting 4% towards transmission loss. The TPO found that the assessee has benchmarked the transaction relating to transfer of electricity to other two units by using CUP as the most appropriate method. While doing so, the assessee has compared the price charged to the non eligible units with the

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price charge by GETCO to the assessee for supply of electricity. The TPO, however, was not convinced with the benchmarking of the assessee. He issued a show cause notice to the assessee to explain as to why the rate given by the distribution company in the region for purchase of power from power producers should not be adopted for benchmarking the transaction. In reply, it was submitted by the assessee that the transaction with the AE has been benchmarked by adopting other specified method as provided under rule 10AB since no other option was provided in the agreement with GETCO other than giving credit for the units against its own electricity consumption. The TPO; however, did not find assessee's submission acceptable. Relying upon a decision of Hon'ble Calcutta High Court in case of CIT vs ITC Ltd (ITA 426 of 2006), the TPO held that the rate at which distribution companies are supplying electricity cannot be taken for comparison. For such purpose, the TPO sought information from a third party, viz. Dakshin Gujarat Vij Co. Ltd regarding the rate at which, the distribution company is purchasing power from power producers. On verifying the information received, he found that as against the per unit rate of Rs.6.42 adopted by the assessee, the purchase rate per unit as per third party is Rs.4.71. Thus adopting such rate/price, he determined the ALP of the transaction at Rs.1,13,99,580/- as against the price of transaction reported by the assessee at Rs.1,55,37,459/-. Thus, the differential amount of R.41,37,879/- was proposed towards adjustment. Though, the assessee contested the aforesaid adjustment before learned Commissioner (Appeals); however, relying upon the decision of the Hon'ble Calcutta High Court (supra), he confirmed the addition.

12. The learned counsel for the assessee submitted, now it has been fairly well settled by a catena of decisions of different High Courts that the rate at which the

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electricity company sells to the customers should be taken as CUP. He submitted, except the decision of the Hon'ble Calcutta High Court referred to by the departmental authorities which is against the assessee, all other decisions including the decision of the Hon'ble Bombay High Court in case of CIT vs Reliance Industries Ltd (2020) 421 ITR 686 (Bom) has held that the rate at which the distribution company sells the electricity to the customer has to be adopted as the price at which the transaction between eligible and non eligible unit has taken place. In support of such contention, learned counsel relied upon the following decisions:-

1. Reliance Infrastructure Ltd vs Addl.CIT (2011) 9 taxmann.com 186
2. Principal CIT vs Gujarat Alkalies & Chemicals Ltd (2017) 88 taxmann.com 722
3. CIT vs Shah Alloys Ltd (2017) 84 taxmann.com 256
4. ACIT vs Pragati Glass Works (P) Ltd ITA No.1646 of 2010
5. CIT vs Alembic Ltd ITA No.471 of 2009
6. Addl.CIT v. Reliance Industries Ltd ITA No.4361/Mum/2012
7. CIT Raipur vs Godawari Power & Ispat Ltd (2014) 42 taxmann.com (Chattisgarh)
8. CIT vs Kanoria Chemiclas & Industries Ltd (2013) 35 taxmann.com 566 (Cal)
9. West Coast Paper Mills Ltd vs Addl.CIT (2014) 52 taxmann.com 268
10. Shri Velayudhaswamy Spinning Mills (P) Ltd vs Deputy CIT (2012) 19 taxmann.com 28)
11. Sri Matha Spinning Mills (P) Ltd vs Deputy CIT (2013) 31 taxmann.com 13

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12. Eveready Spinning Mills (P) Ltd vs Assistant CIT (2012) 17 taxmann.com 254 (Chennai)
13. Gujarat Flourohemicals Ltd vs Dy.CIT (2018 97 taxmann.com 10
14. Prabhu Spinning Mills (P) Ltd vs Dy.CIT (2013) 33 taxmann.com 398
15. Addl.CIT vs Jindal Steel & Power Ltd (2007) 16 SOT 509 (Del)

13. The learned departmental representative, strongly relying upon the observations of the Assessing Officer and TPO, submitted that the addition made should be confirmed.

14. We have considered rival submissions in the light of decisions relied upon and perused the materials on record. The dispute lies within a narrow compass. The core issue which requires to be decided is, what should be the price for transfer of electricity from the eligible unit to non eligible units of the assessee. While the assessee has adopted the rate at which the distribution company of the government sells to customers, the departmental authorities relying upon a decision of the Hon'ble Calcutta High Court cited (supra), have applied the rate at which the distribution company purchases electricity from other electricity producers. In our view, the issue is no more *res integra* because of the decision of the Hon'ble jurisdictional High Court in case of Reliance Industries Ltd (supra). The Hon'ble High Court, while dealing with an issue of identical nature, though relating to non TP dispute, has held as under:-

> *"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 **avtrwrr** 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.*

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Obviously, therefore die 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 rever 8/4/20: 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) ai independent reasons for confirming the same. In such order CIT (Appeals) had placed reliance on an earli judgment of the Tribunal in case of Reliance Infrastructure Ltd. v. Addl. CIT [2011] 9 laxmann.com 1J (Mum. - Trib.). Learned counsel for the assessee had placed on record a copy of the judgment of the Tribun in case of Reliance Infrastructure limited. In such judgment an identical issue came up for consideration. Tl 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 No.4 of the revenue."*

7. Counsel for the assessee pointed out that the judgment of the Tribunal in case of Reliance Infrastructure Ltd. (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 CIT v. Godawari Power & Ispat Ltd. [2014] 42 taxmann.com 551/223 Taxman 234, 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*

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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."

10. *Gujarat High Court in case of Pr. CIT v. Gujarat Alkalies & Chemicals Ltd. [2017] 395 ITR 247/88 taxmann.com 722 also had occasion to examine such an issue. It referred to earlier order in case ofAsstt. CIT v. Pragati Glass Works (P.) Ltd. [Tax Appeal No. 1646 of 2010, dated 30-1-2012] in which following observations were made:—*

"7. To our mind, Tribunal has committed no error. Assessing Officer and CIT (Appeals) while adopting j Rs. 4.51 per unit as the value of electricity generated by eligible unit of assessee and supplied through its I non eligible unit only worked out cost of such electricity generation. In fact CIT (Appeals) in terms 1 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 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 [1] 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 CIT v. ITC Ltd [2016] 236 Taxman 612/[20J5] 64 taxmann.com 214 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."*

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15. Notably, while deciding the issue the Hon'ble jurisdictional High Court took note of the decision of the Hon'ble Calcutta High Court in case of CIT vs ITC Ltd (supra). However, noticing that the issue has already been examined by the Hon'ble jurisdictional High Court held in the aforesaid manner. The view as expressed by the Hon'ble jurisdictional High Court has also been reiterated/expressed in a plethora of decisions cited before us by the learned counsel for the assessee. At this point, we must observe, the learned Commissioner (Appeals) as well as the learned departmental representative have attempted to distinguish the decisions cited by learned counsel for the assessee by arguing that those decisions have not been rendered in the context of transfer pricing provisions. We find the aforesaid argument of the revenue unacceptable. This is so because, both, the assessing officer and the learned Commissioner (Appeals) have decided the issue against the assessee following a decision of the Hon'ble Calcutta High Court in case of CIT vs ITC Ltd (supra) which was also rendered in the context of non TP provisions. Therefore, what we have to bear in mind is the principle laid down in the decisions. Thus, respectfully following the decision of the Hon'ble jurisdictional High Court (supra) and other decisions cited before us by the learned counsel for the assessee, we hold that the TP adjustment made in respect of the specified domestic transaction relating to transfer of electricity is unsustainable. Accordingly, we delete the addition. These grounds are allowed.

16. Ground 4 being a general ground, is not required to be adjudicated upon.

17. Resultantly, appeal is allowed.

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18. The issue raised in grounds 1 and 2 is identical to the issue raised in grounds 2 and 3 of ITA No.6073/Mum/2019. Following our detailed discussion and decision therein, we delete the addition. These grounds are allowed.

19. Ground 3 being a general ground, is dismissed.

20. Appeal is allowed.

21. In the result, both the appeals are allowed.

Order pronounced on 14/09/2021

Sd/- sd/-

(S. RIFAUR RAHMAN)	(SAKTIJIT DEY)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Mumbai, Dt : 14/09/2021

Pavanan

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4. The CIT(A)
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By Order

Asstt. Registrar, ITAT, Mumbai

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