

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "I-1" NEW DELHI**

BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER

&

Dr. B.R.R. KUMAR, ACCOUNTANT MEMBER

I.T.A. No.567/DEL/2019
Assessment Year 2013-14

Nectar Lifesciences Ltd., SCO 38-39, Sector-9D, Chandigarh.	v.	ACIT, Circle-18(1), New Delhi.
TAN/PAN: AABCS6468G		
(Appellant)		(Respondent)

Appellant by:	Shri Yogesh Monga, CA		
Respondent by:	Ms. Meera Srivastava, CIT-DR		
Date of hearing:	27	07	2021
Date of pronouncement:	13	09	2021

ORDER

PER AMIT SHUKLA, JM:

The aforesaid appeal has been filed by the assessee against the assessment order dated 29.11.2018 passed u/s.143(3) r.w.s. 144C(1) for the Assessment Year 2014-15 in pursuance of the directions given by the Id. Dispute Resolution Panel vide order dated 20.09.2018. In the grounds of appeal, the assessee has challenged the addition On Transfer Pricing Adjustment at Rs.33,36,66,839/-. The grounds of appeal reads as under:

1.1 The assessment order passed by the Ld. AO in pursuance to the directions issued by the Hon'ble Dispute Resolution Panel ("DRP") is a vitiated order as the Hon'ble DRP erred both on facts and in law in confirming additions made by the Ld. AO/Ld. Transfer Pricing Officer ("TPO") to the Appellant's income by issuing an order without appreciation of facts and law.

1.2 The Ld. AO erred on facts by considering power plants of the

assessee as **“Biomass Gasifier Power Plants”** instead of **“Biomass Steam Power Plants”**. This has been clarified vide our letter dated 02.02.2017 and Chartered Engineer Certificate. The raw materials and operational working of both power plants are altogether different.

2. Power Unit

The Ld. AO/TPO erred on facts and in law in determining the arm's length price (“ALP”) of the Assessee's Specified Domestic transactions pertaining to transfer of power units from eligible to non-eligible units at Rs. 4.609545/ unit as against Rs. 6.72/ unit and in doing so have grossly

2.1 erred in taking unit rate of Rs. 4.609545 (average of Rs. 6.40/ unit, tariff fixed by Punjab State Electricity Regulatory Commission for **Biomass Gasifier Power Plants** and Rs. 2.81909/ unit, the average rate of power traded at Indian Energy Exchange), despite that fact that the assessee had **Biomass Steam based Power plants** and also the assessee could not have sold power units on Indian Energy Exchange due to statutory or regulatory restrictions and there was no evidence of actual delivery/supply of power traded at energy exchange by husk based power plant companies based in Punjab or anywhere in India.

2.2 erred in ignoring provisions of Income Tax Act and various ITAT/ High Court judgments regarding “Market Value” in relation to any goods or services being sold or supplied, which states that either sale price of electricity board or purchase price of electricity boards should be taken as a market value in the case of Captive Power Plants.

3. STEAM

The Ld. AO/TPO erred on facts and in law in determining the arm's length price (“ALP”) of the Assessee's Specified Domestic transactions pertaining to transfer of steam from eligible to non-eligible units at “Nil” as against Rs. 2160/ MT and in doing so have grossly

3.1 *erred in treating assessee's power plant as Biomass Gasifier Power Plant, in which no steam is generated, instead of Biomass Steam Power Plants and therefore failed to understand the operations of Husk based power plants in which total expenditure is incurred first on generation of steam and thereafter part of steam is used for generation of electricity units and majority of steam is transferred to manufacturing processes of Pharma units of the assessee.*

3.2 *erred in ignoring number of ITAT/ High Court/ Supreme Court judgments which have held that steam is a form of power eligible for deduction u/s 80-IA of the Income Tax Act 1961. Had the steam cost being NIL, there would have been no need of any judgment on this issue.*

3.3 *erred in ignoring audit certificates of Senior Chartered Engineer (approved by Income Tax Deptt.) (Page 164 to 166) , Cost Accountant (appointed by Central Govt, to conduct Cost audit of the company) (Page 167) and Chartered Accountant (appointed by Shareholders of the Company) (Page 168 - 171). All these authorities can't be wrong in calculating actual cost of steam.*

4. *That the Ld. AO/TPO erred on facts and in law in making addition of adjustment of transfer pricing of Rs. 33,36,66,839/- and in doing so have grossly.*

4.1. *erred in not restricting the addition under chapter VI-A to Rs. 31,87,41,278/-.*

4.2. *erred in not considering revenue of Rs. 20,05,82,507/- (4,35,14,600 units @Rs.4.609545) allowed by TPO in his order."*

3. The facts in brief are that the assessee-company is engaged in the business of manufacturing and delivery of high quality pharmaceutical products and research in health sector. The production of its pharmaceuticals products requires high volume of electricity and power steam for heating, cooling, controlling and

humidity and chemical reactions. It has set up two electricity power plant OF 6 MW each in Dera Bassi (Punjab) for fulfilling the captive consumption needs of the assessee-company. The said plants generate both electricity and steam aiding in the manufacturing process. Since, the assessee has entered into specific domestic transaction within the meaning of Section 92BA with its associated enterprises; the Assessing Officer referred the matter to the TPO for determining the Arms' Length Price. The TPO after examining the transfer pricing adjustment and after analyzing all the specific domestic transactions with the AE, has proceeded to benchmark the power from eligible unit to non eligible unit specifically supply of electricity and steam from eligible unit to non-eligible unit. As per the TP study report, the assessee had shown transfer of power from eligible unit to non eligible unit at Rs.17,66,97,024/-. The TPO noted that transfer of the electricity power from eligible unit to non eligible unit, the average sales price as per Indian Energy Exchange (IEX) by taking it as external CUP comes to Rs.2.81909 per unit, whereas assessee has shown Rs. 6.72 per unit. The TPO was of the view that benchmarking of the sale of electricity per unit cannot be done with the sale price fixed by State Electricity Board as benchmarked by the Assessee, because State Electricity Board purchases electricity on a much lesser price and sale price is much higher because of various fixed heads and expenses, therefore, it was not a right CUP.

4. TPO called upon information u/s. 133(6) from Indian Energy Exchange and after incorporating the day to day of energy rate of power trade by IEX, held that average rate of power traded by IEX for the Financial Year 2013-14 was Rs. 2.81909 per unit and

whereas the assessee had shown sale rate at Rs. 6.72 per unit which is not correct. Accordingly, he made the adjustment of Rs.918,35,605/- after observing as under:

7.20 Assessee's submission has been considered by the TPO, The assessee has compared sale of Punjab State Power Corporation with assessee's sale rate. It may be mentioned that both have different functions and cannot be compared. Punjab State Power Corporation is a trader whereas the assessee is a producer, therefore, functionally they are different. Sale price of Punjab State Power Corporation, Trader, cannot be compared with assessee, manufacturer.

7.21 As far as assessee's contention that power generated by Bio Gasifier plants are not traded at IEX is concerned, it may be mentioned that IEX has not specified nature of power generator. It is rate of power and specifically based on fuel. Power was traded at IEX for Punjab region at Rs. 281909, therefore, it can be taken as a rate for determining average sale rate.

7.22 The assessee submitted that Punjab State Electricity Regulatory Commission has fixed tariff of Rs.6.52 per unit; for Biogas Gasifier Power Projects. Contention of assessee is considered, it was found that Net Applicable Tariff Rate upon adjusting for Accelerated Depreciation benefit rate fixed by PSERC was Rs.6.40 per unit, it is further seen that this was generic tariff for RE technologies for F.Y. - 2013-14. There are various other variable factors which have to be considered while deciding final tariff, these factors are- Plant Load Factor and number of operating days for Non-fossil fuel based Co-generation: fuel cost and return on equity. Since PSERC has not fixed tariff for assessee's unit, therefore, it cannot be presumed that these factors have been considered while deciding tariff of Rs.6.40 per unit. Under these circumstances solely Generic Tariff cannot be taken as base for determining CUP. However it can be taken as a base to some extent. Therefore, the rates of power traded at IEX and generic rates

decided by PSERC can be taken as base for comparability under CUP. With above discussion average of generic tariff mid power traded at IEX is taken as comparable price. Thus Rs. 4.609545 per unit is taken as comparable price for calculating ALP under CUP.

7.23 With this remark, external CLP is applied in this case taking assessee as the tested party and arm's Length Rate is applied at Rs.4.609545 per Kwh.

Adjustment as per ALP:-

Name of power generating unit	Captive consumption by assessee			Value considering Alp of Rs.4,609545 Per unit	Difference between value shown by assessee and ALP
	Units consumed	Notional value shown by assessee (in Rs.)	Rate per unit (Notional) (in Rs.)		
New Power Plant	26294200	173397024	6.72	12,12,04,298	5,54,92,726
Old Power Plant	17220400	115721088	6.72	7,93,78,209	3,63,42,879
					9,18,35,605

On the basis of above discussion, an adjustment of Rs.9,18,35,605/- is hereby made to the purchase price of power by the non-eligible units from captive power plants.

(Adjustment Rs.9,18,35,605/-)"

5. Similarly, with regard to benchmarking of transfer of steam captive power plant to non eligible unit, TPO noted that as per Form 3CEB, the assessee has transferred steam valuing Rs.68,44,75,920/- from exempt units/ power generating units to non exempt units for manufacturing of bulk drugs. The TPO required the assessee to furnish the cost of generation of steam produced; and in response the assessee filed certificate of cost accountant and submitted

that cost of generating of one power unit comes to Rs. 5.10 per unit. However, the Id. Assessing Officer rejected the assessee's contention and made the adjustment of Rs.68,44,75,920/- after observing as under:

“8.2 Assesses-s submission have been examined. Cost Certificate submitted by the assessee have also been examined. The cost certificate is regarding arriving at cost of power generated. It may be mentioned that production of steam is not the objective of the assessee. The assessee has installed Bio gasifier turbine to produce electricity. Total steam produced was 446636 MT out of f which transmission loss was 43500 MT and net quantity was 103136 MT. The Cost Accountant has worked out pricing based on (his quantity. It may be mentioned that the entire steam was utilized to run turbine for power generation based on capacity of power plant. Therefore, the costing is for power generation and for plain use of steam. Therefore, the cost certificate submitted by the assessee do not serve (he purpose. Steam produced is utilized for power generation. The 'unutilized part of steam may have been used by the assessee for other purposes but obviously it does not have any cost. Entire cost has been utilized for generation of power. Before proceeding further it is important that process of power generation is understood:-

Raw water is generated from grounds and collected in a storage lank and after the treatment i.e. removing all the salts, carbonates, bicarbonates by the mythology using inn- exchange, extract all the minerals from water and feed to the boiler via De-aerator. These salts arc removed from water to avoid the boiler and steam turbine from scaling.

In De-aerator, steam is given to remove the dissolved oxygen in water for further polishing the water.

After the De-aerator, this water feed to the boiler with the help of boiler feed pump and simultaneously Bin mass fuel is feed to boiler in boiler furnace and Burning of biomass fuel continuously for heating the boiler and generate the steam @ 67 kg/cm², 485 deg e.

This steam goes to steam turbine and run the turbine (a), 8200 rpm & rotate the alternator @ 1500 rpm by using the reduction gear box.

This alternator generate the 11 KV and supply to process plant and then step down the 11 KV to 440 V with the help of transformer and run the motors, fans other equipments.

On the other side, the steam left in steam turbine comes out the from turbine @ 6 kg/cm², 250 deg e which is supplied to Process plant for heating and cooling purpose.

Partial steam inside the turbine having very low pressure and goes to condenser which pressure is 0.1 kg/cm² @ 50 deg e and condense it with the help of cooling tower water and again feed to the De-aerator for reuse for boiler.

8.3 *On examining the process of power generation it can be seen that the Gasifier were not installed for steam production but for power generation. The unutilized part is only used for other purpose, as such entire cost is for power generation and being bye-product steam do not have any cost.*

8.4 *It may be mentioned that no where, in the TP report (he assessors has given CUP details of steam. Even during lire IT audit the assesses submitted detail of steam pricing, but it was for power generation and not for entire steam. Therefore, the MAM applied by the assesses is rejected and Cost Plus Method is applied to benchmark the transaction. The assessee has failed to submit cost of the steam produced. However, on functional analysis of activity regarding production of steam i t was found that the steam was produced as a result of burning of fuel in boiler. This steam is used for*

generation of electricity. Thus the cost of electricity absorbs entire cost of production of steam. Thus the resultant cost of excess steam is NIL.

8.5 *It may be mentioned that steam is only a bye product of the process of manufacturing power and it bears no cost. In case it was not utilized the same would have been wasted. The cost of steam is thus NIL. Since cost of steam is already considered while generating power therefore, the resultant cost is NIL. therefore no mark up has to be added for transferring the same to the non-exempt unit. In such eventuality arm's length price of steam is taken at NIL, resulting in adjustment of Rs.68,44,75,920/-.*

[Adjustment Rs.68,44,75,920/-]"

5.1 Accordingly, he worked out the adjustment of Rs.77,63,11,525/-. Since the assessee has claimed deduction u/s.80IA amounting to Rs.33,36,66,839/- from these units and accordingly he restricted the adjustment of Rs.33,36,66,839/-.

6. Before the DRP a very exhaustive submissions along with detailed analysis was filed. However, the ld. DRP confirmed the adjustment made by the TPO.

7. We have heard both the parties and also perused the relevant finding given in the impugned orders. The assessee-company is having two Biomass steam turbine based captive power plants of 6.00 MW each situated in Dera Bassi (Punjab) which are generating electricity units & steam for distributing the same to the manufacturing processes of various pharmaceutical and phyto-chemical products situated within the same premises in Derabassi (Punjab). The power plants

have started generating power & steam w.e.f June 2007 & Jan 2013, respectively. Since assessee was generating electricity and steam from its eligible unit on which it has claimed deduction u/s.80IA which is not in dispute, because the conditions laid down in Section 80-IA(4)(iv) of the Income Tax Act was fully applicable. In so far as eligible unit which was generating electricity unit, the details of electricity unit generated and distributed to manufacturing process of pharma and another products was as under:

Details of Electricity units generated and distributed to Manufacturing process

Month	Total Generation of Electricity Units	Auxiliary Consumption	Units transferred to Manufacturing Processes	Rate/ Unit	Revenue
<i>Apr-13</i>	<i>4,796,500</i>	<i>872,000</i>	<i>3,924,500</i>	<i>6.72</i>	<i>26,372,640</i>
<i>May-13</i>	<i>5,046,700</i>	<i>939,300</i>	<i>4,107,400</i>	<i>6.72</i>	<i>27,601,728</i>
<i>Jun-13</i>	<i>5,005,800</i>	<i>944,600</i>	<i>4,061,200</i>	<i>6.72</i>	<i>27,291,264</i>
<i>Jul-13</i>	<i>5,277,000</i>	<i>952,200</i>	<i>4,324,800</i>	<i>6.72</i>	<i>29,062,656</i>
<i>Aug-13</i>	<i>5,481,200</i>	<i>1,021,500</i>	<i>4,459,700</i>	<i>6.72</i>	<i>29,969,184</i>
<i>Sep-13</i>	<i>5,149,600</i>	<i>959,000</i>	<i>4,190,600</i>	<i>6.72</i>	<i>28,160,832</i>
<i>Oct-13</i>	<i>5,256,500</i>	<i>1,004,100</i>	<i>4,252,400</i>	<i>6.72</i>	<i>28,576,128</i>
<i>Nov-13</i>	<i>3,127,900</i>	<i>618,900</i>	<i>2,509,000</i>	<i>6.72</i>	<i>16,860,480</i>
<i>Dec-13</i>	<i>4,107,800</i>	<i>909,000</i>	<i>3,198,800</i>	<i>6.72</i>	<i>21,495,936</i>
<i>Jan-14</i>	<i>2,579,000</i>	<i>606,200</i>	<i>1,972,800</i>	<i>6.72</i>	<i>13,257,216</i>
<i>Feb-14</i>	<i>3,609,500</i>	<i>827,300</i>	<i>2,782,200</i>	<i>6.72</i>	<i>18,696,384</i>
<i>Mar-14</i>	<i>4,672,300</i>	<i>941,100</i>	<i>3,731,200</i>	<i>6.72</i>	<i>25,073,664</i>
Total	54,109,800	10,595,200	43,514,600		292,418,112

8. In the Transfer Pricing Study Report, the assessee has used CUP method, by taking rate fixed by Punjab State Electricity Regulatory Commission Electricity and per unit rate charged by Punjab State Power Corporation Limited for

FY 2013-14 for Biomass based Power Projects to arrive at Arms' Length Price by taking power rates as under:

S. No.	Particulars	Rate
1	Average Electricity unit rate fixed by Punjab State Electricity Regulatory Commission for FY 2013-14 for Biomass based Power Projects	Rs. 6.24
2	Average Electricity unit rate actually paid by the assessee company during FY 2013-14 (Rs. 32,400,489 paid for 4,281,392 units)	Rs. 7.57
3	Electricity unit rate charged by Punjab State Power Corporation Limited (PSPCL) for FY 2013-14 from industrial consumers in Punjab	Rs. 7.15

9. Before us, it has been contended that the TPO has erroneously taken the rates available at Indian Energy Exchange which cannot be held to be applicable in the case of the assessee, because in Financial Year 2013-14, no Biomass based power plant of Punjab was traded in Indian Energy Exchange, and therefore, no actual delivery of electricity units has taken place. Other distinguishing feature was highlighted by the ld. counsel in the following manner:

Requirements of Indian Energy Exchange	Applicability on Nectar
The object clause of the company should contain "Pursuing business of facilitating sale and purchase of Electricity Contracts and Renewable Energy Certificates Contracts or any other contracts traded on the platform of Indian Energy Exchange	There is no such object clause mentioned in the Memorandum and Article of Nectar.

For a company to be eligible to trade on the platform of Indian Energy Exchange, there should be approval from Central Electricity Regulatory Commission (CERC), which is a regulatory authority for all the electricity distributors and suppliers.	Nectar doesn't possess any such approval from CERC.
The company should be a grid-connected entity for affecting delivery of electricity as cleared and settled by the Indian Energy Exchange.	Nectar doesn't have grid connectivity for affecting delivery of electricity.

10. It has been further submitted that for the purpose of calculating the profitability of Power Plants, company has considered electricity unit rate of Rs. 6.72, which is less than sale unit rate of Rs. 7.15 as charged by Punjab State Power Corporation Limited from industrial undertakings in Punjab; and unit rate of Rs. 7.57 actually paid by the company to Punjab State Power Corporation Limited. The company had taken average per unit rate of Rs.6.24 fixed by Punjab State Electricity Commission and unit sale rate of Rs.7.15 charged by Punjab State Power Corporation Limited, i.e. Rs 6.72 per unit. Therefore, electricity unit rate of Rs. 6.72 is to be treated as Arm's Length Price. Thus, most of the methods in the case of the assessee could have been either CUP or resale price method wherein the rate of Rs.6.24 per unit which was the purchase rate fixed by Punjab State Electricity Regulatory Commission would have been taken otherwise the CUP method is to be applied which is not even disputed by the authorities below. Here, in this case, the assessee has taken average electricity unit rate fixed by Punjab State Electricity

Regulatory for Assessment Year 2014-15 for Biomass based power plant and based on such rate, selling rate per unit was at Arms' Length.

11. Regarding adjustment in selling of steam from the eligible unit, it was submitted that Steam is the essential and most vital for Pharma & phyto-chemical manufacturing units, is used in different type of the processes for heating up and cooling of raw materials/chemicals to create some reactions and finally to convert it to finished product. Steam is required mainly used in 3 Solvent recovery plants, 2 Phyto chemical plants, 8 Oral drug manufacturing plants and utilities as detailed below: -

i). Solvent Recovery Plants: -

The company is having 3 solvent recovery plants. The residual waste solvents from the Oral manufacturing plants are being further processed in these solvent recovery plants so that they can be used further for manufacturing process. The waste solvents from the main manufacturing plants are collected and then fed to the distillation columns and heated with the help of steam up to the boiling point of the particular solvent. With the help of steam the extra water present in the solvents gets evaporated and residual concentrated good solvent is being collected and sent to the main manufacturing plant for manufacturing of finished goods.

ii). Phyto-Chemical Plant: -

The raw material i.e. Crude Mentha Oils (CMO) is purchased from the farmers which contains impurities. This impure raw material is being sent to manufacturing plant for removing impurities and for its further processing. With the help of the steam, the Crude Mentha Oil is heated in distillation columns up to its boiling point, so as to remove the impurities. After removing CMO's impurities, it is further heated with the help of steam on different boiling points for manufacturing / extracting of various finished goods.

iii). Oral Plants: -

The company is having 8 oral manufacturing plants in Derabassi. Different finished products are being manufactured in different oral plants. In all the plants, the raw material is being poured into vessels and then with the help of steam the material is being heated up to its boiling point. Once the material reaches its boiling point, other materials are added in that vessel so as to make the chemical reaction and manufacture finished goods.

iv). Utilities: -

Like heating is a part of manufacturing process, cooling is the next step in that manufacturing process. Once the chemical reaction took place, we need chilled water for cooling effect which is generated with the help of Vapor Absorption Machine (VAM) which is operated through steam.

12. During the year under review, power plants have generated and transferred steam to generate electricity units and to manufacturing processes of various pharmaceutical and phyto-chemical products as per details below:

Month	Total Steam Generated (MT)	Steam used for Generation of Electricity Units (MT)	Steam transferred to Manufacturing Processes (MT)	Rate/ MT	Revenue
Apr-13	37,890	12,967	24,923	2,160	53,833,680
May-13	40,039	13,147	26,892	2,160	58,086,720
Jun-13	38,912	13,022	25,890	2,160	55,922,400
Jul-13	40,520	12,330	28,190	2,160	60,890,400
Aug-13	41,512	12,648	28,864	2,160	62,346,240
Sep-13	39,785	13,448	26,337	2,160	56,887,920
Oct-13	40,269	13,611	26,658	2,160	57,581,280
Nov-13	29,464	5,931	23,533	2,160	50,831,280
Dec-13	34,791	9,036	25,755	2,160	55,630,800
Jan-14	25,182	3,281	21,901	2,160	47,306,160
Feb-14	31,623	8,580	23,043	2,160	49,772,880
Mar-14	46,649	11,748	34,901	2,160	75,386,160
Total	446,636	129,749	316,887	25,920	684,475,920

13. The assessee-company had justified the CUP method to arrive at ALP in the following manner:

- 129,749 MT of steam has been used for generation of 54,109,800 electricity units, i.e. 1 MT of steam generates about 417.03 electricity units. Hence various steam transfer rates are calculated as under:

S. No.	Particulars	Rate/ MT
1.	On the basis of average electricity unit rate fixed by Punjab State Electricity Regulatory Commission for FY 2013-14 for Biomass based Power Projects. (Rs.6.24 Af 417.03 Units)	Rs. 2,602.27
2.	On the basis of average electricity unit rate actually paid by the assessee company during FY 2013-14. (Rs.7.57 X 417.03)	Rs. 3,156.92
3.	On the basis of electricity unit rate charged by Punjab State Power Corporation Limited (PSPCL) for FY 2013-14. (Rs.7.15 A417.03)	Rs. 2,981.76

For the purpose of calculating the profitability of Power Plants, company has considered steam rate of Rs. 2,160/ MT which is less than all the three rates above. Therefore Steam rate of Rs. 2,160/ MT can be treated as Arm's Length Price.

14. It was further submitted that even if the cost plus method is taken into consideration then one hand is to be borne in mind that the steam is not a commercial commodity and was not brought to the market for sale and purchase. Since, it is not tradable commodity, therefore, it cannot be purchased and hence market price cannot be determined as an alternative CPM was being used by calculating the transfer rate per MT for steam to manufacturing process. Relying upon the decision of Co-ordinate Bench in the case of **DCIT vs. KR Pulp & Papers Ltd. in ITA No.1920/Del/2013 order dated 13.01.2016** wherein it was held that the formula of cost of steam should be adopted in the ratio of energy consumed. Accordingly, the assessee had furnished report of Shri R.D. Sharma, Senior Chartered Engineer approved by Income Tax Department and banks whose report can be summarized:-

Total rice husk consumption is 112,786,868 Kgs (Rs. 562,003,635/-). One ton rice husk has generated 3.96 MT of steam as per the following accepted formula: -

$$\text{Steam Generation /Ton of fuel} = \frac{(\text{Efficiency} \times \text{Gross Calorific Value of Fuel})}{(\text{Enthalpy of Steam} - \text{Enthalpy of feed water}) \times 100} =$$

$$\frac{78 \times 3200}{(746 - 115) \times 100} = 3.96$$

$$(746 - 115) \times 100$$

Steam generation from 112,786,868 Kgs of Husk = $112,786,868 \times 3.96 = 446,635,997$
Kgs i.e. 446,636 MT

The basis for working of steam and units is based on the following factors:

S.	Factors	Kcal / Kgs Generated
1.	1 Kg Steam to turbine @ 67Kg/cm ² , 485 deg.e	746 Kcal (Enthalpy of Steam Generation) as per properties of steam
2.	1 Kg of Extraction Steam @ 6Kg/cm ² , 250 deg. C	567 Kcal (Enthalpy of Steam Extraction) as per properties of steam
3.	1 Kgs of Condenser Steam	50 Kcal (Enthalpy of Steam Condensing) as per properties of steam

Steam from boiler sent to turbine at 100%, which is having the following allocation

Steam to turbine @ 67Kg/cm ² , 485 deg.e = $446,636 \times 746$	333,190,456 MKcal
Less: Friction, Exhaust, Radiation and Convention losses (30.1635%)	100,502,024 MKcal
(A)	232,688,432 MKcal
Extraction Steam @ 6Kg/cm ² , 250 deg. C = $316,887 \times 567$	179,674,929 MKcal
(B)	179,674,929 MKcal
Condenser (129,749 X 50)	6,487,450 MKcal
(C)	6,487,450 MKcal
Total Energy consumed in power generation (A- B -C)	46,526,053 MKcal
As per formula of steam 1 Kcal/Kg = $.001163 \times 1000 \times 46,526,053$	54,109,800 Units
Less: Auxiliary Consumption (19.58%)	10,595,200 Units
(E)	10,595,200 Units
Units transferred to Pharma units	43,514,600 Units
(D-E)	43,514,600 Units

From the above working, total steam energy generated in turbines was 232,688,432 MKcal, out of which 46,526,053 MKcal steam (20%) has been used for generating electricity units and balance (80%) steam was used for generating steam for transferring to manufacturing processes.

On the basis of above calculations, the power plant profitability is bifurcated into steam and electricity units as per details below: -

<i>Particulars</i>	<i>Steam</i>	<i>Power</i>	<i>Total</i>
<i>Energy Consumed</i>	<i>185,862,379</i>	<i>46,526,053</i>	<i>232,688,432</i>
	<i>MKcal</i>	<i>MKcal</i>	<i>MKcal</i>
<i>%age</i>	<i>80%</i>	<i>20%</i>	<i>100%</i>
<i>Revenue</i>	684,475,920	292,418,112	976,894,032
<i>Carbon Credit</i>	-	5,285,280	5,285,280
<i>Total Revenue</i>	<i>684,475,920</i>	<i>297,703,392</i>	<i>982,179,312</i>
<i>Raw Material Consumed</i>	449,602,908	112,400,727	562,003,635
<i>Other Manufacturing Expenses</i>	7,664,305	1,916,076	9,580,381
<i>Personnel Expenses</i>	19,783,977	4,945,994	24,729,971
<i>Depreciation</i>	52,868,651	13,217,163	66,085,814
<i>Total Expenses</i>	<i>529,919,841</i>	<i>132,479,960</i>	<i>662,399,801</i>
<i>No. of Units to Manufacturing Units</i>	<i>316,887,000</i>	<i>43,514,600</i>	
<i>Cost/Unit</i>	<i>1.6723/ Kg</i>	<i>3.0445/ Unit</i>	

The computation of Arm's Length Price is as under: -

<i>Particulars</i>	<i>Rate/ MT</i>
<i>Cost of Steam generation</i>	<i>Rs. 1,672.30</i>
	<i>Rs. 2,160.00</i>
<i>Steam unit rate taken for the purpose of captive power plant profitability</i>	
<i>Profit Ratio</i>	<i>22.58%</i>

15. Thus, it was submitted that transfer pricing of Rs.2,160/- per MT is to be treated as Arms' Length Price also for the reason that normally profitability of steam generating units in private sector is between 25% to 35% and there has been held so in the case of **DCIT vs. Vishal Fabrics Pvt. Ltd. in ITA No.125/Ahd/2015 (ITAT Ahd)**.

16. On the other hand, ld. CIT-DR referred to various analysis and observations of the Assessing Officer and the DRP, he submitted that similar arguments were raised before the authorities below. It has been dealt by the TPO and has been rejected under cogent ground.

DECISION

17. After considering the aforesaid submissions and the facts and material discussed in the impugned order, we find that the Transfer Pricing Adjustment of the specified domestic transaction has been with regard to sale of electricity units to the other unit for manufacturing process of pharma and phyto-chemical products.

18. In so far as sale of electricity unit from eligible unit to other manufacturing units, it is seen that, assessee had sold the electricity @ 6.72 per unit. Ld. TPO has rejected the assessee's method of benchmarking at the said rate by holding that average sale rate as per Indian Energy Exchange is much lower, i.e., 2.81909 per unit as against sale made by the assessee of Rs.6.72 per unit. He has incorporated the detail obtained by him u/s. 133(6) from IEX which gives the average price of power trade in the exchange. From the submissions made before us as well as before the authorities below, the assessee's main contention has been that the rates of IEX cannot be applied, because, *firstly*, there was no trade of Biomass based power plant in Punjab; and *secondly*, there was no actual delivery of electricity unit in this year. The other reason given has been highlighted in paragraph 9.

19. Here, in this case, what needs to be benchmarked for is, whether the sale of electricity unit rate by the eligible unit to its non eligible unit is as per the market rate or not i.e., whether it is an Arms' Length Price. The external CUP has

been adopted by taking the rate of charged by Punjab State Power Corporation Ltd. which has been charging sale unit rate of Rs. 7.15 from industrial undertaking in Punjab. Another reason to justify this CUP was that Assessee Company itself has paid for its own consumption at unit rate at Rs.7.57 per unit to Punjab State Power Corporation. To justify the sale rate to its other unit, the assessee-company has taken average per unit rate of Rs.6.24 fixed by Punjab State Electricity Commission and unit sale rate of Rs. 7.15 charged by Punjab Stated Corporation Ltd. Thus, it was stated that if these two rates are compared, then the assessee's sale rate of Rs.6.72 per unit is definitely at Arm's Length. What is also required to be seen here is, whether in the open market what is the rate of power or electricity is available to the consumer. If in open market the power is available to a customer from State Electricity Board at the rate charged by it then it is to be reckoned as market rate. Before us, following judicial pronouncements have been cited wherein sale rate or purchase rate of State Electricity Board has been accepted on market rate.

a. High Court of Chhattisgarh in the case of Commissioner of Income Tax Raipur v/s M/s Godawari Power & Ispat Ltd. Raipur [2014] 42 taxmann.com 551 (Chhattisgarh) vide para 31 of its order held as under: -

"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."

b. High Court of Calcutta in the case of Commissioner of Income Tax Kolkata - III v/s ITC Ltd. [2015] 64 taxman.com 214 held as under: -

Benefit under section 80-IA cannot be denied to assessee, merely because power generated by its power undertaking was consumed at home or by other business of assessee and was not sold to outsiders.

Assessee's power generating unit could not as such claim any benefit under section 80-IA computed on basis of rates chargeable by distribution licensee from consumer and such benefit could only be claimed on basis of rates fixed by Tariff Regulation Commission for sale of electricity by generating companies.

c. Supreme Court of India in the case of ITC Limited v/s Commissioner of Income Tax Kolkata - III [2016] 74 taxman.com 244, has held as under

SLP granted against High Court's ruling that assessee's power generating unit could not as such claim any benefit under section 80-IA computed on basis of rates chargeable by distribution licensee from consumer and such benefit

could only be claimed on basis of rates fixed by Tariff Regulation Commission for sale of electricity by generating companies.

d. High Court of Delhi in the case of Commissioner of Income Tax v/s Orient Abrasive Ltd. [2014] 271 CTR 626.

20. Once there was a direct internal CUP, i.e., the assessee company had purchased electricity from Punjab State Power Corporation at Rs.7.57, then it represents the market rate on which any industry undertaking or consumer is getting the electricity. Thus, we do not find any reason as to why such market rate or CUP should be rejected. Nowhere, it has been brought by the TPO as to why the average trading rate in Indian Energy Exchange should be applied as external CUP. Accordingly, we hold that the sale of electricity @ 6.72 per unit is at Arms' Length and no adjustment is required in this segment/unit.

21. In so far as adjustment in the transfer of steam, it is an undisputed fact that steam has been used for generation of electricity unit and for manufacturing process purely for captive consumption by the assessee, and therefore, it is fully eligible for deduction u/s.80IA. In the transfer pricing study report, the assessee had justified the price of transfer; firstly, by taking CUP in the manner specified hereinabove in paragraph 13.

22. Thereafter, the cost plus method was adopted and also the ld. TPO has required the assessee to furnish the cost of the steam produced. In response, the assessee has filed a report from approved senior chartered engineer who has given his report and the details of working. The ld. TPO without any cogent material or any expert report has rejected the working. Even if the cost plus method is adopted as held by the TPO, then how can he take the cost of steam at Nil and held that it is biomass which is byproduct therefore there is no cost. Such an observation of the TPO is *de hors* any proper reasoning because from a bare perusal of the calculation as given in the report as incorporated above in paragraph 14, we find that formula has been given as to how one ton rice husk has generated 3.96 MT of steam and also the basis for working of steam based on various factors including the steam from boiler sent to turbine at 100%. It has been demonstrated before the authorities below that the total steam generated in turbines was 232,688,432 M Kcal, out of which 46,526,053 M Kcal steam (20%) has been used for generating electricity units and balance (80%) steam was used for generating steam for transferring to manufacturing processes. Thus, there was a clearly cost for steam generation as per the report approved by chartered engineer and the steam unit taken for the purpose of captive power plant in profit ratio has been shown at 22.58%, and therefore, the transfer pricing of Rs. 2,160/- per MT was taken at Arms' Length Price. The TPO has erroneously treated the assessee's

power plant as Biomass Gasifier Power Plant in which no steam is generated, instead of Biomass Steam Power Plants has wrongly come to conclusion that the cost of Steam generation is “Nil” as against Rs. 2160/ MT. Ld. TPO has failed to understand the operational working of Husk based power plants in which total expenditure is incurred first on generation of steam and thereafter part of steam is used for generation of electricity units and majority of steam is transferred to manufacturing processes of Pharma units of the assessee.

23. In any case, steam is a form of power eligible for deduction u/s.80IA and same cannot be denied by taking its steam cost at Nil. Further. He has grossly erred in ignoring the audited certificate by Senior Chartered Engineer who is an approved valuer by Income Tax Department and the Cost Accountant appointed by the Central Government without any accounts report, without any agency or expert. Accordingly, for this unit also, we hold that no transfer pricing adjustment is required.

25. In the result, the additions, made by the Assessing Officer are directed to be deleted and consequently, the appeal of the assessee is allowed.

Order pronounced in the open Court on 13th September, 2021.

Sd/-

[Dr. B.R.R. KUMAR]

ACCOUNTANT MEMBER

DATED: 13th September, 2021

PKK:

Sd/-

[AMIT SHUKLA]

JUDICIAL MEMBER