IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH, KOLKATA

BEFORE SHRI RAJPAL YADAV, VICE-PRESIDENT AND
SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER

ITA Nos.2303 & 2304/Kol/2019
Assessment Years: 2014-15 & 2015-16

Assistant Commissioner of Income-tax, Central Circle-4(4), Kolkata.	Vs.	M/s. Electrosteel Casting Ltd. (PAN: AAACE4975B)
(Appellant)		(Respondent)

&

C.O. Nos. 24 & 25/Kol/2020
IN ITA Nos.2303 & 2304/Kol/2019
Assessment Years: 2014-15 & 2015-16

M/s. Electrosteel Casting Ltd.	Vs.	Assistant Commissioner of Income-tax, Central Circle-4(4), Kolkata.
(Cross Objector)		(Respondent)

Present for:
Department by - Shri Deba Kumar Sonowal & Shri Tushar Dhawal Singh, CIT
Assessee by - Shri S. K. Tulsiyan, Advocate & Ms. Puja Somani, CA

Date of Hearing : 17.03.2022
Date of Pronouncement : 17.05.2022

O R D E R

PER GIRISH AGRAWAL, ACCOUNTANT MEMBER:

Both these appeals by the revenue and the Cross Objection by the assessee are directed against the separate orders passed by the Ld. CIT(A)-22 Kolkata vide Appeal no. 46/CIT(A)-22/2014-15/17-18/Kol and 133/CIT(A)-22/2015-16/18-19/Kol dated 31.07.2019 for A.Ys. 2014-15 and 2015-16 against the separate assessment orders passed u/s 143(3) r.w.s. 144C of the Income-tax Act, 1961 (hereinafter referred to as 'the Act') passed by DCIT, Central Circle – 4(4), Kolkata, dated 29.01.2018 and ACIT, Central Circle-4(4), Kolkata dated 29.12.2018 respectively.

2. Shri Deba Kumar Sonowal and Tushar Dhawal Singh, CIT appeared for the revenue and Sri S. K. Tulsiyan, Advocate & Ms. Puja Somani, CA appeared for the assessee.

3. Revenue has taken as many as eleven grounds in both the appeals which are identical in nature except for variance in their amounts. From the perusal of grounds, we note that the broad issues involved in these two appeals relate to subsidy received by the assessee which has not been deducted from the written down value (WDV) of block of assets vide ground no.1. Issue relating to disallowance made u/s. 14A read with Rule 8D (2)(ii) & (iii) of the Income-tax Rules, 1962 (hereinafter referred to as the "Rules") vide ground nos. 2 and 3. Issue of Arms' Length Price (ALP) of fee for corporate guarantee vide ground nos. 4 to 7 and adjustment made by Transfer Pricing Officer (TPO) for Specified Domestic Transactions (SDTs) in respect of transfer of power from eligible unit to other manufacturing units vide ground nos. 8 to 11. In the Cross Objections filed by the assessee against the two appeals, grounds relating to claim of Education Cess on Income-tax and Surcharge thereof u/s. 37(1) of the Act as a deduction have been raised.

4. At the outset, ld. Counsel for the assessee submitted that all the grounds of appeal taken by the revenue in both the years are squarely covered by the decision of coordinate bench of ITAT, Kolkata in favour of assessee in its own case in the preceding years from AYs. 2003-04 to 2013-14 (eleven years). The two decisions of the coordination bench of ITAT, Kolkata which have been relied upon and referred by the Ld. Counsel for the assessee which are in the case of assessee itself are –

(i) IT(SS)A Nos. 47 to 53/Kol/2014, 256/Kol/2015, 66/Kol/2016, 54 to 60/Kol/2014, 313/Kol/2015 &

124/Kol/2016 for AYs. 2003-04 to 2011-12 (9 years) dated 25.11.2016 and

(ii) ITA Nos. 191 & 192/Kol/2018 for AYs. 2012-13 and 2013-14 dated 28.02.2019

4.1 For each of the grounds and the issues raised by the revenue, Ld. Counsel for the assessee submitted a synopsis in a concise tabulated form and reconciled each of the issue, in these two appeals, with the relevant facts and findings in the decisions of the coordinate bench of ITAT, Kolkata (*supra*) by placing their respective orders on record. On this submission, the Ld. CIT, DR placed reliance on the order of the AO and could not submit anything contrary to the facts and law, differentiating and distinguishing the decisions relied upon by the Ld. Counsel for the assessee in the case of the assessee itself. The ground wise concise tabulation done by the Ld. Counsel for the assessee is reproduced hereunder for ease of reference.

Ground No.	**Ground of Appeal taken by the Revenue**	**Submissions of the Assesse.**
1	Learned CIT(A) erred in holding that the subsidy received by the assessee cannot	This issue is covered by the judgment of the Hon'ble ITAT, Kolkata in assessee's own case in 1. IT(SS) Nos. 47 to 53/Kol./2014 & 256/Kol/2015 & 66/Kol/2016 and IT(SS) Nos. 54 to 60/Kol/2015 & 313/Kol/2015 & 124/Kol/2016 for AYs. 2003-04 to 2011-12 dated 25-11-2016

	be deducted from WDV of the Block of Assets as per explanation 10 to section 43(1) of the Act	reported in [2017] 53 ITR (Trib) 5 (ITAT[Kolk]) Refer page 38, para 66-68 of the order dated 25-11-2016 (copy enclosed) 2. I.T.A Nos.138, 139/Kol/2018 and I.T.A Nos.191 & 192/Kol/2018 dated 28-02-2019 reported in TS-132-ITAT-2019(Kol)-TP for AY 2012-13 and AY 2013-14. Refer page 12, para 10 of the order dated 28-02-2019 (copy enclosed)
2	Learned CIT(A) erred in holding that no disallowance can be made on account of interest expense u/s 14A of the Act read with Rule 8D(2)(ii)	On perusal of the Balance Sheet of FY 2013-14 (AY 2014-15), it can be seen that the assessee has sufficient own surplus funds of Rs.2447.24 crores to justify average investment in shares of Rs.978.18 crores (as per assessment order). On perusal of the Balance Sheet of FY 2015-16 (AY 2016-17), it can be seen that the assessee has sufficient own surplus funds of Rs.2504.79 crores to justify average investment in shares of Rs.1089.50 crores (as per assessment order). Thus, a positive presumption may be drawn that the investments generating exempt income were made from own funds of the assessee and hence no disallowance on account of interest can be made. Reliance is placed on the decision of Hon'ble Bombay High Court in the case of ***CIT Vs. Reliance Utilities and Power Ltd.*** [(2009) 313 ITR 340 (Bom)]. This issue is also covered by the judgment of the Hon'ble ITAT in assessee's own case in 1. IT(SS) Nos. 47 to 53/Kol./2014 & 256/Kol/2015 & 66/Kol/2016 and IT(SS) Nos. 54 to 60/Kol/2015 & 313/Kol/2015 & 124/Kol/2016 for AYs. 2003-04 to 2011-12 dated 25-11-2016. Refer page 77, para 140-143 of the order dated 25-11-2016 (copy enclosed) 2. I.T.A Nos.138, 139/Kol/2018 and I.T.A Nos.191 & 192/Kol/2018 dated 28-02-2019 for AY 2012-13 and AY 2013-14 Refer page 10, para 6-7 of the order dated 28-02-2019 (copy enclosed)
3	Learned CIT(A) erred in holding that disallowance can be made only in respect of those investments	The Hon'ble Income-Tax Appellate Tribunal, Kolkata in the case of ***REI Agro Ltd. v. Deputy CIT*** [2013] 144 ITD 141 (Kolkata) has held that it is only the investments which yields dividend during the previous year that has to be considered while adopting the average value of investments for the purpose of rule 8D(2)(ii) and (iii) of the Rules. The aforesaid view of the Tribunal has since been affirmed as correct by the Hon'ble Calcutta High Court in G. A. No. 3581 of 2013 in the appeal

	which yielded dividend income u/s 14A of the Act read with Rule 8D(iii)	against the order of the Tribunal in the case of REI Agro Ltd. v. Deputy CIT [2013] 144 ITD 141 (Kolkata). Also refer page 10, para 7 of assessee's own order dated 28-02-2019.
4-7	Learned CIT(A) erred in holding that the arm's length price of fee for corporate guarantee should be 0.5% p.a. instead of 3% p.a. as determined by TPO	This issue is covered by the judgment of the Hon'ble ITAT in assessee's own case in 1. IT(SS) Nos. 47 to 53/Kol./2014 & 256/Kol/2015 & 66/Kol/2016 and IT(SS) Nos. 54 to 60/Kol/2015 & 313/Kol/2015 & 124/Kol/2016 for AYs. 2003-04 to 2011-12 dated 25-11-2016 Refer page 49-50, para 84B, 84C and 84D of the order dated 25-11-2016 (copy enclosed) 2. I.T.A Nos.138, 139/Kol/2018 and I.T.A Nos.191 & 192/Kol/2018 dated 28-02-2019 for AY 2012-13 and AY 2013-14 Refer page 22, last para of the order dated 28-02-2019 (copy enclosed)
8-11	Learned CIT(A) erred in deleting the adjustment made by TPO for specified domestic transactions with respect to transfer of power from eligible units of the assessee to its other manufacturing units	This issue is covered by the judgment of the Hon'ble ITAT in assessee's own case in 1. IT(SS) Nos. 47 to 53/Kol./2014 & 256/Kol/2015 & 66/Kol/2016 and IT(SS) Nos. 54 to 60/Kol/2015 & 313/Kol/2015 & 124/Kol/2016 for AYs. 2003-04 to 2011-12 dated 25-11-2016 Refer page 27-28, para 46-49 of the order dated 25-11-2016 (copy enclosed) 2. I.T.A Nos.138, 139/Kol/2018 and I.T.A Nos.191 & 192/Kol/2018 dated 28-02-2019 for AY 2012-13 and AY 2013-14 Refer page 25, para 15-16 of the order dated 28-02-2019 (copy enclosed)

5. For each of the issues, relevant extracts from the two decisions referred above are reproduced hereunder for ease of reference.

6. In respect of ground no. 1 of appeal by the revenue, the Coordinate bench of the ITAT, Kolkata vide its order dated 25.11.2016 (*supra*) in para 66 to 68, has observed and held as under:

> *"66. As far as Gr. No. 5 raised by the revenue is concerned, we are of the view that the action of the AO was not justified in law. Provisions of Section*

43(1) and Expln.10 of the Act, which are relevant for the present issue reads thus:

"(1) "Actual cost" means the actual cost of the assets to the assessee, reduced by that portion of the cost thereof, if any, as has been met directly or indirectly by any other person or authority:

Explanation 10.- Where a portion of the cost of an asset acquired by the assessee has been met' directly or indirectly by the Central Government or a State Government or any authority established under any law or by any other person, in the form of a subsidy or grant or reimbursement (by whatever name called), then, so much of the cost as is relatable to such subsidy or grant or reimbursement shall not be included in the actual cost of the asset to the assessee:

Provided that where such subsidy or grant or reimbursement is of such nature that it cannot be directly relatable to the asset acquired, so much of the amount which bears to the total subsidy or reimbursement or grant the same proportion as such asset bears to all the assets in respect of or with reference to which the subsidy or grant or reimbursement is so received, shall not be included in the actual cost of the asset to the assessee."

67. From a plain reading of the above it is clear that a subsidy received from the Government may be reduced from the actual cost only if the subsidy is given to directly or indirectly meet the cost of the asset. However, in the instant case, the scheme nowhere specifies that the subsidy is to be used for the purpose of acquisition of affixed assets. The Subsidy is provided to extend financial assistance to entrepreneurs in setting up new units/expanding existing units in the backward areas. There appears no restriction imposed on the assessee to utilize the subsidy for acquisition of fixed assets only. The assessee is at a liberty to utilize the funds in any manner it likes. Merely because the amount of subsidy is subject to a maximum of a specified percentage of gross value of fixed assets as on the first date of commercial production/gross value of the additional fixed assets as on the first date of commercial production does not mean that the subsidy was given to finance the acquisition of fixed assets only. Under the given circumstances, the amount of subsidy is not deductible from the actual of the cost u/s 43(1) read with Explanation 10 of the Act.

68. The Hon'ble Supreme Court in case of CIT v . P. J. Chemicals Ltd. [210 ITR 830] has held that the expression "actual cost" needs to be interpreted liberally. The subsidy of the nature we ate concerned with, does not partake of the incidents which attract the conditions for their deductibility from "actual cost". The Government subsidy, it is not unreasonable to say, is an incentive not for the specific purpose of meeting a portion of the cost of the assets, though quantified as or geared to a percentage of such cost. If that be so, it does not partake of the character of a payment intended either directly or indirectly to meet the "actual cost" ". In the instant case too, the Scheme applicable to the assessee's case nowhere specifies that the subsidy was to be utilized for acquisition of fixed assets. The Scheme was brought about to encourage and induce the entrepreneurs to move to backward areas and establish industries there so that the region may

develop in promoting the welfare of the people living in that region. Thus, in the absence of any specification (in the Scheme) as to the utilization of the subsidy for the purpose of acquiring depreciable fixed assets, the said subsidy cannot be reduced from the actual cost of the fixed assets u/s. 43(1) read with Explanation 10. Following the aforesaid decision of the Supreme Court in case of P.J. Chemicals Ltd. the ITAT (Kolkata) in case of Birla Corporation Ltd. Vs. DCIT [69 SOT 217] held:

> *"'According to us, assessee as rightly not .reduced the amount of subsidy received from the actual cost/ WDV of the fixed assets while claiming depreciation. It is also a fact that revenue during scrutiny assessments of the assessee for A Y s 2002-03 to 2006-07 added the subsidy amount as revenue receipt but Tribunal has considered the receipt as 'capital', accepting the contention of the assessee. Even Hon'ble Supreme Court in the case of P.J Chemicals Ltd. (supra) has considered this issue and held that where Government subsidy is intended as an incentive to encourage entrepreneurs to move to backward areas and establish industries, the specified percentage of the fixed capital cost, which is the basis for determining the subsidy, being only a measure adopted under the scheme to quantify the financial aid, is not a payment, directly or indirectly, to meet any portion of the actual cost. Therefore, the said amount of subsidy cannot be deducted from the actual cost under sec. 43(1) for the purpose allowing depreciation."*

In light of the above decisions, we hold that tile amount of Rs.55,79,540/- disallowed on ground of excess depreciation claim, should be allowed, Thus Gr.No.5 raised by the Revenue is dismissed."

6.1 Subsequently, the Co-ordinate bench of ITAT, Kolkata vide its order dated 28.02.2019 (*supra*) in assessee's own case, has observed as under:

> *"10. DECISION:*
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> *1. I have carefully considered the submissions put forth by the ld. ARs of the appellant and the observations made by the ld. AO in the impugned order, I find that this issue has already been decided by Hon'ble ITAT, Kolkata in appellant's own case in I.T. (SS) No. 47 to 60/Kol/2014, 313 and 256/Kol/2015, 66 and 124/Kol/2016 dated 25.11.2016 wherein it was held as follows:*
>
> > *66. As far as ground No. 5 raised by the Revenue is concerned, we are of the view that the action of the Assessing Officer was not justified in law. Provisions of* section 43(1) *and Explanation 10 of the Act, which are relevant for the present issue reads thus:*

"(1) 'actual cost' means the actual cost of the assets to the assessee, reduced by that portion of the cost thereof, if any, as has been met directly or indirectly by any other person or authority :

Explanation 11.-Where a portion of the cost of an asset acquired by the assessee has been met directly or indirectly by the Central Government or a State Government or any authority established under any law or by any other person, in the form of a subsidy or grant or reimbursement (by whatever name called), then, so much of the cost as is relatable to such subsidy or grant or reimbursement shall not be included in the actual cost of the asset to the assessee;

Provided that where such subsidy or grant or reimbursement is of such nature that it cannot be directly relatable to the asset acquired, so much of the amount which bears to the total subsidy or reimbursement or grant the same proportion as such asset bears to all the assets in respect of or with reference to which the subsidy or grant or reimbursement is so received, shall not be included in the actual cost of the asset to the assessee."

67. From a plain reading of the above it is clear that a subsidy received from the Government may be reduced from the actual cost only if the subsidy is given to directly or indirectly meet the cost of the asset. However, in the instant case, the scheme nowhere specifies that the subsidy is to be used for the purpose of acquisition of fixed assets. The subsidy is provided to extend financial assistance to entrepreneurs in setting up new units/expanding existing units in the backward areas. There appears no restriction imposed on the assessee to utilise the subsidy for acquisition of fixed assets only. The assessee is at a liberty to utilise the funds in any manner it likes. Merely because the amount of subsidy is subject to a maximum of a specified percentage of gross value of fixed assets as on the first date of commercial production/gross value of the additional fixed assets as on the first date of commercial production does not mean that the subsidy was given to finance the acquisition of fixed assets only. Under the given circumstances, the amount of subsidy, is not deductible from the actual of the cost under section 43(1)*read with Explanation 10 of the Act.*

68. The Hon'ble Supreme Court in the case of CIT v. P. J. Chemicals Ltd. *[1994] 210 ITR 830 (SC) has held that the expression "actual cost" needs to be interpreted liberally. The subsidy of the nature we are concerned with, does not partake of the incidents which attract the conditions for their deductibility from "actual cost". The Government subsidy,it is not unreasonable to say, is an incentive not for the specific purpose of meeting a portion of the cost of the assets, though quantified as or geared to a percentage of such cost. If that be so, it does not partake of the character of a payment intended either directly or indirectly to meet the "actual cost". In the instant case too, the scheme applicable to the assessee's case nowhere specifies that the subsidy was to be utilized for acquisition of fixed assets. The scheme was brought about to encourage and induce the entrepreneurs to move to backward areas and establish industries there so that the region may develop in promoting the welfare of the people living in that region. Thus, in the absence of any specification (in the scheme) as to the utilization of the subsidy for the purpose of acquiring depreciable fixed assets, the said subsidy cannot be reduced from*

the actual cost of the fixed assets under section 43(1) *read with Explanation 10. Following the aforesaid decision of the Supreme Court in the case of* CIT v. P. J.Chemicals Ltd., the Income-Tax Appellate Tribunal (Kolkata*) in case of* Birla Corporation Ltd. v. Deputy CIT *[2015] 69 SOT 217 (Kolkata) held :*

"According to us, the assessee has rightly not reduced the amount of subsidy received from the actual cost/written down value of the fixed assets while claiming, depreciation. It is also a fact that Revenue during scrutiny assessments of the assessee for the assessment years 2002-03 to 2006-07 added the subsidy amount as revenue receipt but Tribunal has considered the receipt as 'capital', accepting the contention of the assessee. Even the Hon'ble Supreme Court in the case of CIT v. P. I Chemicals Ltd. *[1994] 210 ITR 830 (SC) has considered this issue and held that where Government subsidy is intended as an incentive to encourage entrepreneurs to move to backward areas and establish industries, the specified percentage of the fixed capital cost, which is the basis for determining the subsidy, being only a measure adopted under the scheme to quantify the financial aid, is not a payment, directly or indirectly, to meet any portion of the actual cost. Therefore, the said amount of subsidy cannot be deducted from the actual cost under* section 43(1) *for the purpose allowing depreciation."*

In light of the above decisions, we hold that the amount of Rs. 55,79,540 disallowed on ground of excess depreciation claim, should be allowed. Thus ground No.5 raised by the Revenue is dismissed."

is squarely covered in favour of the appellant-company by its own judgment have also perused the Industrial Scheme in terms of which the appellant-company received subsidy by way of sales tax remission from the State Government. It is noted that both the parties agree that the subsidy of Rs.14,78,39,227/- received by way of sales tax remission is in the nature of a capital receipt. According to the ld. AO therefore such capital subsidy was required to be reduced from the actual cost of capital asset in terms of Explanation 10 to Section 43(1) *of the Act. The ld. AO accordingly re-computed the WDV of the block of plant & machinery& depreciation thereon, after reducing the capital subsidy, and therefore disallowed the claim of excess depreciation claimed to the extent of Rs.3,16,92,148/-. In the oral & written submissions, the ld. ARs vehemently argued against such action of the ld. AO.*

2. Respectfully following the decision of the Hon'ble ITAT, Kolkata in appellant's own case, the Ld. AO's action of adjusting the capital subsidy of Rs.14,78,39,227/- from the "actual cost" of assets under Explanation 10 to Section 43(1) *is held to be unjustified in law. Accordingly the disallowance of excess claim of depreciation to the extent of Rs.3,16,92,148/- is directed to be deleted. Ground Nos.6 to 10 are therefore allowed."*

7. Ground nos. 2 and 3 of the appeals of the revenue are in respect of disallowance made on account of interest expenses u/s. 14A of the Act r.w.s. Rule 8D(2)(ii) and (iii) of the Rules. Per Ld. Counsel, this issue is also squarely covered in favour of the assessee by the decision of the

Coordinate Bench of ITAT, Kolkata in assessee's own case (*supra*) wherein the Tribunal vide para 140-143 of the order dated 25.11.2016 has held as under:

> *"140. We have considered the aforesaid submissions of the learned counsel for the Assessee and are of the view that in the light of the decisions referred to above, in computing the disallowance uls.l4A of the Act read with Rule 8D2(ii) & (iii) of the Rules, the AO while adopting the Average value of investments has to consider only those investments which yielded dividend income during the previous year. Similarly, in computing the disallowance uls.l4A of the Act read with' Rule 8D2(ii) & (iii) of the Rules, the AO while adopting the Average value of investments has to exclude the investments which are strategic investments.*
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> *141. The learned counsel for the Assessee filed before us a Chart wherein he has given the figures with regard to submissions in paragraph 138 & 139 above, viz., Investments of the Assessee (Rs.15,894.02 lakhs), Strategic investments (Rs.5990.06 Lakhs), investments which yielded dividend income during the previous year including Strategic investments (Rs.13,650.89 Lakhs) and investments in dividend yielding shares (excluding Strategic investments) (Rs.7,660.83 Lakhs).*
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> *142. Without prejudice to the above submissions, it was also submitted on behalf of the Assessee that the assessee had sufficient own funds if the overall funds position is taken. In this regard it was submitted by the learned counsel for the Assessee that where own funds are sufficient to cover the investments that have to be considered for the purpose of Sec.l4A disallowance, then a presumption has to be drawn that the investments were made out of own funds and not out of borrowed funds. The Assessee has filed the necessary charts in this regard showing own funds and investments. The learned counsel for the Assessee has placed strong reliance on the decision of the Hon'ble Bombay High Court in the case of CIT Vs. Reliance Utilities and Power Ltd. 313 ITR 340 (Bom) wherein proposition similar to the one canvass by the Assessee was accepted.*
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> *143. We are of the view the submission made with regard to availability of own funds in the light of overall funds position without insisting on direct nexus between investments and own funds would be the right approach as held by the Hon'ble Bombay High Court in the case of Reliance Utilities and Power Ltd. (supra). If the overall funds position i.e., if own funds are sufficient to cover the investments which are subject to consideration under Sec.14A of the Act, than a presumption has to be drawn that the own funds were used for making investments. We are of the view that it would be just and proper to restore the disallowance u/s.14A of the Act to the AO (for a fresh consideration in the light of the directions given in paragraph 140, 141 and 143 of this order and in the light of the figures given by the Assessee before the Tribunal. All other submissions do not require any elaboration and will stand addressed in the decisions given above. Thus Gr.No.4 is treated as allowed for statistical purpose."*

7.1 Subsequently, the coordinate bench of ITAT, Kolkata vide its order dated 28.02.2019 vide para 6 & 7 of the order in assessee's own case has observed as under:

> *"6. The Revenue's second argument seeks to revive* section 14A *r.w.r.8D(2)(ii) proportionate interest disallowance of Rs.2,00,34,065/-. The assessee's balance sheet reveals that its non-interest bearing funds read figures of Rs.1,70,302.44 lakhs as against its exempt income investments of Rs.15,894.02 lakhs and exempt income yielding investment of Rs.13,650.89 lakhs; respectively. Various judicial precedents, i.e.* CIT vs. Reliance Utilities *and Power Ltd. [313 ITR 340 (*Bom)], CIT vs. HDFC Bank Ltd. *[366 ITR 505 (Bom)] and CIT vs. Torrent Power Ltd. [363 ITR 474 (Guj.)] hold that impugned proportionate interest expenses disallowance does not apply in the case of non-interest bearing funds turning out to be more than exempt investments. We decline Revenue's instant second argument as well.*
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> *7.The Revenue's third argument qua the instant issue is that the CIT(A) erred in law and on facts in holding that only exempt income yielding investments have to be taken into consideration whilst computing administrative expenses disallowance u/s 14A r.w.r. 8D(2)(iii). Suffice to say, hon'ble jurisdictional high court's decision in REI Agro Ltd. case (supra) has already decided the very substantial question of law in assessee's favour. We therefore reject the Revenue's instant third argument as well."*

8. Ground nos. 4 to 7 of the appeals of the revenue are relating to issue of ALP determination for fee for corporate guarantee. It is submitted that this issue is also squarely covered in favour of the assessee by the decision of the Coordinate Bench of ITAT, Kolkata in assessee's own case (*supra*) wherein the Tribunal vide para 84B, 84C and 84D of the order dated 25.11.2016 has held as under:

> *"84(B). Having considered the rival submissions as well as relevant material on record, we agree with the plea of the Ld. AR that the arm's length guarantee commission adopted @ 2% by' the DRP cannot be sustained. Various benches of Tribunal in the following decisions have considered 0.5% as appropriate adjustment in facts identical to the case of the Assessee:*
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> *(1) Everes Kanto Cylinder Ltd. (ITA No. 7073/Mum/2012) dated 25 September 2014*
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> *(2) Everest Kanto Cylinder Limited (ITA. No.542/Mum/2012) dated 23 November 2012(Mumbai Tribunal)*

(3) Glenmark Pharmaceuticals Limited (ITA No. 5031/M/2012) dated 13 November 2013) (Mumbai Tribunal).

(4) M/s Godrej Household Products Ltd (ITA No. 7369/M/2010) (Mumbai Tribunal)

(5) Nimbus Communication Ltd (ITA No. 3664/M/2010) (Mumbai Tribunal) (dated 12 June 2013)

(6) Prolific Corporation Limited (ITA No. 237/Hyd/2014 dated 31 December 2014 (Mumbai Tribunal).

84(C). In the case of Everest Kanto Cylinder Ltd (supra), the Tribunal while considering an identical issue has held in para 9 as under.-

> *"9. Now, coming to the merit of the addition so made, we found that the issue has already been decided by the Tribunal in immediately preceding year in assessee's own case, wherein charging of 0.5% guarantee commission from AE was held to be quite near to 0.6%, where assessee has paid independently to the ICICI bank and charging of guarantee commission @ 0.5% from its AE was held to be at arm's length. The precise observation of the bench for the assessment year 2007-08 are as under:*
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> *"The universal application of rate of 3 percent for guarantee commission cannot be upheld in every case as it is largely dependent upon the terms and conditions, on which loan has been given, risk undertaken, relationship between the bank and the client, economic and business interest are some of the major factors which has to be taken into consideration." "... in this case, the assessee has itself charged 0 .5% guarantee commission from its AE, therefore, it is not a case of not charging of any kind of commission from its AE. The only point which has to be seen in this case is whether the same is at ALP or not. We have already come to a conclusion in the foregoing paras that the rate of 3 % by taking external comparable by the TPO, cannot be sustained in facts of the present case. We also find that in an independent transaction, the assessee has paid 0.6% guarantee commission to ICICI Bank India for its credit arrangement. This could be a very good parameter and a comparable for taking it as internal GUP and comparing the same with the transaction with the AE. The charging of 0.5% guarantee commission from the AE is quite near to 0.6%, where the assessee has paid independently to the ICICI Bank and charging of*

guarantee commission at the rate of 0.5% from its AE can be said to be at arms length. The difference of 0.1 % can be ignored as the rate of interest on which ICICI Bank, Bahrain Branch has given Joan to AE (i.e. subsidiary company) is at 5.5%, whereas the assessee is paying interest rate of more than 10% on its loan taken With ICICI Bank in India. Thus, such a minor difference can be on account of differential rate of interest. Thus, on these facts, we do not find any reason to uphold-any kind of upward adjustment in ALP in relation to charging of guarantee commission."

As the facts and circumstances of the case during the year under consideration are pari materia, respectfully following the decision of the Tribunal in assessee's own case, we direct the AO to compute arm's length price of transaction as per the direction given by the Tribunal in the above order for A.Y.2007-08"

84(D). Even the Assessee has paid 0.40% as Guarantee Commission to a Bank for similar services. The Safe Harbour rules prescribing 2% as the Guarantee Commission is not relevant as those rules are relevant only to an eligible Assessee who opts to be governed by those rules. Accordingly, following the decisions of the Tribunal referred to above, we direct the AO/TPO to adopt the 0.5% as guarantee commission charges in respect of the guarantee provided by the assessee for obtaining the loan by the AE, Gr. No. 3 raised by the Assessee is accordingly partly allowed."

8.1 Subsequently, the coordinate bench of ITAT, Kolkata vide its order dated 28.02.2019 at page 22 of the order in assessee's own case has observed as under:

"16. DECISION:

I have carefully considered the submissions of the appellant-company in the light of the adjustments made by the Ld, TPO/AO Before the ld. TPO, the appellant contended that the issuance of corporate guarantee was not an 'international transaction' and therefore no benchmarking exercise was required to be carried out by it in this regard. On examination of the transfer pricing order, it is noted that the Ld. TPO was not in agreement with the contention put forth' by the appellant. The Ld. TPO computed the ALP CG fee rate at 3% in respect of the corporate guarantees issued by the appellant. The Ld. TPO therefore proposed upward adjustment of Rs.5,32,43,578/-.

In the appellate proceedings, the Ld. ARs of the appellant reiterated the submissions which were made before the ld. TPO and contended that the corporate guarantee was not the nature of "international transaction" and therefore provisions of Chapter X were not applicable in this regard. Alternatively the Ld. ARs contended that the TPO erred in determining the ALP CG Fee at 3%. The Ld. ARs of the appellant submitted that the corporate guarantees should be benchmarked at 0.5%, for which it placed reliance on several judgments including the jurisdictional ITAT, Kolkata in its own case for AYs 2003-04 to 2011-12.

3. The Hon'ble ITAT, Kolkata in the appellant's own case in I.T. (SS) No. 47 to 60/Kol/2014, 313 and 256/Kol/2015, 66 and 124/Kol/2016 dated 25.11.2016 for AY 2003-04 to 2011-12 has held as follows:

[quote]

"83. The first and foremost submission of the learned counsel for the assessee was that the transaction of giving guarantee on a loan availed of by the associated enterprise cannot be regarded as an international transaction at all. At the time of hearing, the Bench expressed the view that this issue is no longer res integra and has been concluded by a decision of the Special Bench in the case of Instrumentarium Corporation Ltd., Finland v. Asst, DIT, International Taxation [2016] 49 ITR (Trib) 589 (Kolkata) [SB] ; [2016] 160 ITD 1 (SB) (Kol). Following the principle laid down in the aforesaid decision, we are of the view that the plea of the assessee in this regard cannot be sustained. The cases cited in support of his contention also do not require any consideration as the decision of the Special Bench was rendered much after those decisions.

84. As far as the rate of 2 per cent. of the loan for which the assessee stood as guarantor being added to the total income as adjustment to the arm's length price of the international transaction of furnishing guarantee is concerned, the learned authorized representative has submitted that the arm's length guarantee charges may be taken at 0.40 per cent which was the percentage of commission charged by the bank from the assessee for furnishing identical guarantee as was furnished by the assessee for a loan transaction by banks to its associated enterprise. In this regard our attention was drawn to the fact that IDBI Bank has charged a commission of 0.40 per cent. per annum as guarantee commission for similar facility extended to the assessee and that should be taken as a comparable case. Our attention was drawn to page 120 of the paper book II filed by the assessee in the appeal for the assessment year 2011-12.
84(A).On the other hand, the learned Departmental representative has relied upon the orders of the authorities below and submitted that the assessee has undertaken the risk by providing the guarantee for the loan obtained by the associated enterprise from the bank. Therefore, the differential rate adopted by the Transfer Pricing Officer is justified. 84(B). Having considered the rival submissions as well as relevant material on record, we agree with the plea of the learned authorised representative that the arm's length guarantee commission adopted at 2 per cent by the Dispute Resolution Panel cannot be sustained. Various Benches of the Tribunal in the following decisions have considered 0.5 per cent as appropriate adjustment in facts identical to the case of the assessee:

(1) Everest Kanto Cylinder Ltd. v. Asst. CIT (LTU) (ITA No.7073/Mum/2012), dated September 25, 2014 ;
(2) Everest Kanto Cylinder Ltd. v. Deputy CIT (LTU) (ITA. No. 542/Mum/2012 dated November 23, 2012) (Mumbai-Tribunal) ;

(3) Glenmark Pharmaceuticals Ltd. v. Addl. CIT (ITA No. 5031/M/2012) dated November 13, 2013) (Mumbai-Tribunal) ;
(4) Godrej Household Products Ltd. v. Addl. CIT (ITA No. 7369/M/2010) (Mumbai-Tribunal), dated November 22, 2013); and
(5) Asst. CIT v. Nimbus Communications Ltd. [2014] 30 ITR (Trib) 349 (Mum) (ITA No. 3664/M/2010) (Mumbai-Tribunal), dated June 12, 2011).
84(C). In the case of Everest Kanto Cylinder Ltd. (supra), the Tribunal while considering an identical issue has held in para 9 as under :

"9. Now, coming to the merit of the addition so made, we found that the issue has already been decided by the Tribunal in immediately preceding year in the assessee's own case, wherein charging of 0.5 per cent guarantee commission from associated enterprise was held to be quite near to 0.5 per cent., where the assessee has paid independently to the ICICI bank and charging of guarantee commission at 0.5 per cent. from its associated enterprise was held to be at arm's length. The precise observations of the Bench for the assessment year 2007-08 are as under:

'The universal application of rate of 3 per cent for guarantee commission cannot be upheld in every case as it is largely dependent upon the terms and conditions, on which loan has been given, risk undertaken, relationship between the bank and the client, economic and business interest are some of the major factors which has to be taken into consideration.... in this case, the assessee has itself charged 0.5 per cent guarantee commission from its associated enterprise, Therefore, it is, not a case of not charging of any kind of commission from its associated enterprise. The only point which has to be seen in this case is whether the same is at arm's length price or not. We have already come to a conclusion in the foregoing paras that the rate of 3 per cent by taking external comparable by the Transfer Pricing Officer, cannot be sustained in facts of the present case. We also find that in an independent transaction, the assessee has paid 0.6 per cent guarantee commission to ICICI Bank India for its credit arrangement. This could be a very good parameter and a comparable for taking it as internal CUP and comparing the same with the transaction with the associated enterprise. The charging of 0.5 per cent guarantee commission from the associated enterprise is quite near to 0.6 per cent., where the assessee has paid independently b the ICICI Bank and charging of guarantee commission at the rate of 0.5 per cent from its associated enterprise can be said to be at arm's length. The difference of 0.1 per cent can be ignored as the rate of interest on which ICICI Bank, Bahrain Branch has given loan to associated enterprise (i.e. subsidiary company) is at 5.5 per cent, whereas the assessee is paying interest rate of more than 10 per cent on its loan taken with ICICI bank of India. Thus, such a minor difference can be on account of differential rate of interest. Thus, on these facts, we do not find any reason to uphold any kind of upward adjustment in arm's length price in relation to charging of guarantee commission.'

As the facts and circumstances of the case during the year under consideration are parimateria, respectfully following the decision of the Tribunal in the assessee's own case we direct the Assessing Officer to compute arm's length price of transaction as per the direction given by the Tribunal in the above order for the assessment year 2007-08."

84(D). Even the assessee has paid 0,40 per cent. as guarantee commission to a bank for similar services. The Safe Harbour Rules prescribing 2 per cent. as the guarantee commission is not relevant as those rules are relevant only to an eligible assessee who opts to be governed by those rules. Accordingly, following the decisions of the Tribunal referred to above, we direct the Assessing Officer/TPO to adopt the 0.5 per cent. as guarantee commission charges in respect of the guarantee provided by the assessee for

obtaining the loan by the associated enterprise. Ground No. 3 raised by the assessee is accordingly partly allowed."

[Unquote]

4. In view of the above and respectfully following the judgments of the Hon'ble ITAT, Kolkata in appellant's own case, I hold that the ALP determined by the TPO in his order u/s 92CA(3) was excessive and the most appropriate CG fee rate in the facts & circumstances of the appellant's case is 0.5%. The Ld. AO/TPO is thus directed to compute the ALP of corporate g;-'tees at 0.5%. These grounds are therefore partly allowed."

14. It is sufficiently clear by now that the assessee's very arguments have been partly accepted through for benchmarking corporate guarantee transaction is issued @ 0.5% commission. We therefore adopt judicial consistency qua the instant issue as well to decline to Revenue's corresponding substantive ground in both of its appeals. Its former appeal ITA No.191/Kol/2018 fails accordingly.

9. Ground nos. 8 to 11 of the revenue's appeal are in respect of adjustment made by TPO for SDTs in respect of transfer of power from eligible unit to other manufacturing units. Ld. Counsel reiterated that this issue is also squarely covered in favour of the assessee by the decision of the Coordinate Bench of ITAT, Kolkata in assessee's own case (*supra*) wherein the Tribunal vide para 46 to 49 of the order dated 25.11.2016 has held as under:

"46. We have given a very careful consideration to the rival submissions. We have already seen that the Assessee manufactures Dr spun pipes, DI fittings, etc., at its factory at Khardah (West Bengal) CI spun pipes at its factory at Elavur (Tamil Nadu) and low ash metallurgical coke at its factory at Haldia (West Bengal). At Khardah and Haldia factory the Assessee also has its own power plant generating electricity from heat emitted from blast furnaces in the process of manufacturing of Dr Pipes at Khardah, where power generated is entirely consumed for own use (i.e., captive consumption), and sponge iron plant and coke oven plant at Haldia where the power generated is consumed for own use (captive consumption and surplus power generated is sold to the West Bengal State Electricity Board (WBSEB). It is not in dispute that the Assessee is entitled to claim deduction u/s.80IA of the Act on the profits derive by the Assessee from generation of power. Since the power generated is consumed by the Assessee for own use and not sold to a third party,. Sec.80IA(8) of the Act prescribes a method of determination of profits derived by the undertaking generating power. In such cases, the profits and gains of such eligible business has to be

computed as if the transfer had been made at the market value of such goods or services as on the relevant date. "Market Value" has been defined in Explanation to Sec.80IA(8) of the Act as the "the price that such goods or services would ordinarily fetch in the open market". In India the business of generation of electricity and its distribution is governed by the Indian Electricity Act, 2003. The electrical power system mainly consists of generation, transmission and distribution. For generation of (electrical power there are many Public Sector Undertakings and private owned generating stations (GS). The Electrical transmission system is mainly carried out by central government body PGCIL (Power grid corporation of" India limited). To facilitate this process, India is divided into 5 regions : Northern, Southern, Eastern, Western and North eastern region. Further within every state we have a SLDC (state load dispatch centre). The distribution system is carried out by many distribution companies (DISCOMS) and SEBs (State electricity board). There are two tariff systems, one for the consumer which they pay to the D1SCOMS and the other one is for the DISCOMS which they pay to the generating stations. The rate at which electricity can be supplied to a consumer by the distribution licensee and the rate at which the generating companies can sell electricity to the distribution licensee are governed respectively by Sections 61 and 62 of the Electricity Act 2003. There is tariff regulatory commission which fixes both the rates for sale and purchase of electricity by the distribution licensee. There is thus an in-built mechanism to ensure permissible profit both to the generating companies and the distribution licensees.

47. The Hon'ble Calcutta High Court in the case ITC Ltd. (supra) had to deal with similar issue of own consumption of power generated by an Assessee engaged in the business of paper manufacture. The question that was examined by the Hon'ble Court was as to what would be market value for the purpose of computation of deduction u/s.80IA of the Act in the context of Sec.80IA(8) of the Act. The Hon'bIe Calcutta High court held deduction u/s. 80IA had to be computed in such circumstances not on the basis of rates chargeable by distribution licensee from consumer and that the same can be Claimed only on the basis of rates fixed by tariff regulation commission for sale of electricity by generating companies to distribution licensees.

48. The submission of the learned counsel for the Assessee was that the decision of the Hon'ble Calcutta High Court is not applicable to the case of the Assessee as in the case before the Hon'ble Calcutta High Court, the undertaking that generated power was situate in the State of Andhra Pradesh where electricity generated could not be sold to anyone other than a distribution company or a Company which is engaged both in generation and distribution. In this regard an order of the Andhra Pradesh Electricity Regulatory Commission, Hyderabad in O.P.No.1075/2000 dated 20.6.2001 was filed before us. The said order deals with generation of non-conventional energy and it lays down in para-25 of its order that third party sales of power generated by non-conventional means cannot be made. In para-28 power generated by such generators have to be sold in public interest only to APTRANSCO at rates specified in the said paragraph. Our attention was drawn to Paragraph 4 of the West Bengal electricity Regulatory Commission (Open Access) Regulations, 2007, which lays down that a licensee or a generating company Of' a captive generating plant or a consumer or any person engaged in the business of supplying electricity to

the public under the Act (Electricity Act, 2003) shall be eligible for open access to the intra-state transmission lines or associated facilities of the STU or any Transmission licensee on payment of charges as may be specified by the Commission, for using the transmission system of the Transmission Licensee. It was submitted that power generators in West Bengal are free to trade in power on exchange or sell excess power to third parties. Therefore, the judgment of the Hon'ble Calcutta High Court in case of ITC Ltd., (supra) will not apply to the case of the Assessee.

49. It is clear from the rival contentions that determination price at which Power generated can be sold is subject to statutory control under the provisions of Sec.61 & 62 of The Electricity Act, 2003. The Hon'ble Calcutta High Court In its decision rendered in the case of ITC Ltd. (supra) has specifically observed that in the case before it electricity generated by the Assessee could not be sold to anyone other than a distribution company or a company which is engaged both in generation and distribution. No arguments were advanced before the Hon 'ble High Court nor did it dea1 with applicability of the proviso to Sec.80IA(8) of the Act. Sec.80IA(8) lays down that when article or thing manufactured is used by the Assessee himself for own consumption the profit of the undertaking manufacturing such article or thing has to be based on the market value in preference to the price as recorded by the Assessee in his books. Market value for the said purpose has been defined to mean the price that such goods or services would ordinarily fetch in the open market when price of power is subject to statutory controls one cannot ascertain the price such goods or services would ordinary fetch in the open market because in such circumstances it cannot be said that there is open market for the goods or services. We are of the view in the given circumstances, there are exceptional difficulties in computing the profits and gains of the eligible business by applying the main provisions of Sec. 80IA(8) of the Act and therefore the proviso to Sec. 80IA(8) of the Act would apply and the AO may compute such profits and gains on such reasonable basis as he may deem fit. In our view, interest of justice would be met by setting aside the order of the AO on this issue and directing the AO to determine the profits and gains of the undertaking generating power on a reasonable basis after affording the Assessee opportunity of being heard. The discretion given to the AO under the proviso to sec. 80IA(8) is not a subjective satisfaction but an objective one and therefore the reasonableness of the action of the AO should be justifiable. With these observations we allow the relevant ground of appeal of the revenue for statistical purposes."

9.1 Thereafter, the coordinate bench of ITAT, Kolkata vide its order dated 28.02.2019 at para 15 and 16 of the order in assessee's own case has observed as under:

"15. We continue to stay in Revenue's latter appeal ITA No.192/Kol/2018 for Assessment Year 2013-14. Its last substantive ground seeks to revive transfer adjustment of Rs.1,92,23,674/- relating to specified domestic transactions with respect to transfer of power from eligible units to manufacturing units. We notice herein as well that the very issue had arisen in preceding assessment years 2003-04 to 2011-12. Learned coordinate

bench(supra) decided that same in assessee's favour. The CIT(A) has taken note thereof in his detailed discussions as follows:

> *"14. Ground numbering 12, 17, 18, 19, & 20 relate to the action of the Ld.AO / TPO in making adjustments on account of Specified Domestic Transactions by an amount of Rs.1,92,23t674/-. The impugned matter has been dealt with by the Ld.AO in the TP order placed supra.*
>
> *15. In respect of this ground, during the course of the appeal, the appellant-company /Ld. A.Rs for the appellant-company have made the following submissions:*
>
> *Ground Nos. 12, 17, 18, 19, 20: Specified Domestic Transaction: Rs. 1,92,23,674/-*

5.1 The assessee-company has a power unit the output of which is captively consumed by its manufacturing units. During the year, the manufacturing units of the assessee had purchased power from State Electricity Board. Hence, the given transaction was taken as a comparable uncontrolled transaction against which the specified domestic transaction' was benchmarked and the purchase price in the comparable transaction was taken to be the Arm's Length Price.

5.2 Reliance in this regard was placed on the judgment of Calcutta High Court in case of Kanoria Chemicals & Industries Limited [ITA No. 58 of 2073] & Graphite India wherein purchase price from the Board was held to be the Arm's Length Price. The said transaction of sale of power was referred to the TPO for computation of the Arm's Length Price.

5.3 While arriving at the ALP, the TPO relied upon the judgment of the Calcutta High Court in case of ITC Ltd. wherein sale price of power made to distribution licensees was considered as the market value as opposed to price charged by the Board from the consumers (i.e. rate adopted by the assessee).

5.4 Relying on the sale data of power by independent Captive Power Plants to the distribution licensees the TPO arrived at an average rate of Rs. 3.23/unit. In doing so, he considered the rate of Rs. 2.53/unit i.e. the rate at which the power was sold to the Board. However, the given rate was again added to the rate of Rs. 3.23/unit to arrive at an even lower rate of 2.88/unit. Such an action of the TPO reflects his prejudiced mind which is clearly bad in law.

6.1 W.r.t the above, it is pertinent to note here that judgment of Calcutta High Court has been rendered on distinguishable facts. In the case before the High Court the eligible unit was situated in the State of Andhra Pradesh. The State had imposed restrictions on sale of power to outsiders/third parties. The power units thus could have sold power to only distribution licensees/power generators. Under such circumstances, the Hon'ble Calcutta High Court held that in view of such restriction, the price as applicable to sale to distribution companies shall apply.

6.2 However, in the State of West Bengal no such restrictions are imposed on the power units (separate note referring to various Sections of Electricity Act, 2003 & WBERC Regulations, 2007). The power generators are free to trade in power on the exchange or sell the excess power to third parties. Under the given circumstances the ratio of judgment of Calcutta High Court in ITC Ltd. shall not apply to the case of the assessee.

6.3 While analyzing the judgment of the Apex Court in case of ThiruArooran Sugars Ltd. Vs CIT the High Court observed that "the sugarcane grown at home would be deemed to have been sold to the sugar mill at the same rate at which the sugarcane was purchased by the sugar mill. That obviously is correct because if the sugarcane grown at home had not been sold to the sugar mill of the assessee itself, the sugarcane would have been sold in the open market. The rate of sale in the open market would be the same at which sugarcane was purchased by the sugar mill of the assessee."

Applying the above, it may be said that the rate at which the assessee (a consumer of power) purchases power from WBSEB may be taken to be the market value for determining the sale price for the power generated by the unit. Thus, the computation of eligible profits should be done with reference to the rate at which power was purchased by the assessee from the State Electricity Board.

6.4.1 Attention of your Goodself is also invited to the decision of ITAT(Kolkata) in its own case for AY 2006-07 to 2011-12 wherein the Bench dismissed the plea of Department to apply the sale price applicable to distribution licensees by following the decision of Calcutta High Court in case of ITC Ltd. At para 49 of the order it was observed that "It is clear from the rival contentions that determination price at which Power generated can be sold is subject to statutory control under the provisions of Section 61 & 62 of the Electricity Act, 2003. The Hon'ble Calcutta High Court in its decision rendered in the case of ITC Ltd. has specifically observed that in the case before it electricity generated by the assessee could not be sold to anyone other than a distribution company or a company which is engaged both in generation and distribution. No arguments were advanced before the Hon'ble High Court nor did it deal with applicability of the proviso to Section 80-IA(8) of the Act. Section 80-IA(8) lays down that when article or thing manufactured is used by the assessee himself for own consumption the profit of the undertaking manufacturing such article or thing has to be based on the market value in preference to the price as recorded by the Assessee in his books. Market Value for the said purpose has been defined to mean the price that such goods or services would ordinarily fetch in the open market. When price of power is subject to statutory controls one cannot ascertain the price such goods or services would ordinarily fetch in the open market because in such circumstances it cannot be said that there is an open market for the goods or services. There are exceptional difficulties in computing the profits and gains of the eligible business by applying the main provisions of section 80-IA(8) and therefore the proviso to section 80-IA(8) would apply and the Assessing Officer may compute such profits and gains on such reasonable basis as he may deem fit. The interests of justice would be met by setting aside the order of the Assessing Officer on the issue and directing the Assessing Officer to determine the profits and gains of the undertaking generating power on a reasonable basis after affording the assessee opportunity of being heard."

6.4.2 Following the above it is clear that the TPO clearly erred in applying the ratio laid out by Calcutta High Court in case of ITC Ltd. and applying the rate of sale of power to distribution licensees.

6.4.3 Coming to a market price applicable to the assessee's case, attention of your Goodself is invited to the Tariff orders issued by West Bengal Electricity Commission for FY 2012-13. A perusal of the same together with the bills issued by the State Electricity Board on the assessee shows that charges recovered from the assessee are at par/lower than rates prescribed in the Tariff order. Further certain fixed charges like Contract Demand charges, Electricity duty etc. were recovered from the assessee by the Board which have been added to the energy charges per unit to arrive at the Arm's

length price/effective rate per unit which in turn has been used to compute deduction u/s 80-IA.

6.4.4 Now since the aforesaid purchase transaction with the Board constitutes a comparable transaction wherein the energy rate per unit is at par/lower than rates notified in Tariff order, there appears no reason to disturb the quantum deduction claimed by the assessee. Thus it is prayed that the addition made by the AO be deleted.

16. DECISION:

1. I have carefully considered the submissions of the appellant-company in the light of the adjustments made by the Ld. TPO/ AO. The appellant-company operates a captive power plant ('CPP') and the power generated therein is consumed by the appellant-company itself. For the purposes of computing profits of the captive power unit, eligible for deduction under Section 80IA, the appellant-company has adopted the tariff rates at which it purchased electricity in the State of West Bengal to be 'open market value' in terms of Section 80IA(8) of the Income-tax Act, 1961. In the transfer pricing proceedings, the appellant explained that it had applied the internal Comparable Uncontrolled Price Method. It was submitted that the price/rate at which the appellant-company purchased the electricity was the most appropriate comparable rate to benchmark the rate at which the CPP had transferred power to the appellant-company. The Ld. TPO/AO were however not agreeable with the explanation & details put forth by the appellant. According to Ld. TPO/AO the internal CUP adopted by the appellant-company was not the most appropriate method. Instead the Ld. TPO/AO was of the view that the price at which Electricity Board sold power to distribution licensees was a better parameter to benchmark the specified domestic transaction; i.e. transfer of power by CPP Unit to other non-eligible units of the appellant-company. This manner & methodology adopted by the Ld. TPO/AO was following the principles laid down in judgment of the Hon'ble Calcutta High Court in the case of ITC Ltd (supra). The Ld. TPO/AO therefore computed ALP at Rs.2.88/unit.

2. In the appellate proceedings, the Ld. ARs of the appellant reiterated the submissions made before the Ld. TPO/AO. The ld. ARs pointed out the infirmities and deficiencies in the manner and methodology adopted by the ld. TPO/AO to benchmark the impugned transaction. The Ld. ARs of the appellant placed reliance on the decision rendered by the Hon'ble ITAT, Kolkata in their own case for AYs 2003-04 to 2011-12, wherein the Hon'ble ITAT had distinguished the judgment of the Calcutta High Court in the case of ITC Ltd (supra). The Tribunal held that this judgment was not applicable to the appellant's case. Relying on the decision of the Apex Court in case of ThiruArooran Sugars Ltd. Vs. CIT(supra); the ARs of the appellant-company therefore contended that open market value of power transferred by CPP to other non-eligible units would be the same at which power was purchased by such non-eligible units.

3. The Hon'ble ITAT, Kolkata in the appellant's own case in I.T. (SS) No.47 to 60/Kol/2014, 313 and 256/Kol/2015, 66 and 124/Kol/2016 25.11.2015 for AY 2003-04 to 2011-12 has held as follows:

46. We have given a very careful consideration to the rival submissions. We have already seen that the assessee manufactures DI spun pipes, D) fittings, etc., at its factory at Khardah (West Bengal) CI spun pipes at its factory- at Elavur (Tamil Nadu) and low ash metallurgical coke at its factory at Haldia (West Bengal). At Khardah and Haldia factory the assessee also has its own power plant generating electricity from heat emitted .from blast furnaces in the process of manufacturing of DI Pipes at

Khardah, where power generated is entirely consumed for own use (i.e., captive consumption), and sponge iron plant and coke oven plant at Haldia where the power generated is consumed for own use (captive consumption and surplus power generated is sold to the West Bengal State Electricity Board (WBSEB), It is not in dispute that the assessee is entitled to claim deduction under section 80-IA of the Act on the profits derived by the assessee from generation of power, Since the power generated is consumed by the assessee for own use and not sold to a third party, section 80-IA(8) of the Act prescribes a method of determination of profits derived by the undertaking generating power. In such cases/ the profits and gains of such eligible business has to be computed as if the transfer had been made at the market value of such goods or services as on the relevant date. 'Market value" has been defined in the Explanation to section 80-IA(B) of the Act as the "the price that such goods or services would ordinarily fetch in the open market". In India the business of generation of electricity and its distribution is governed by the Indian Electricity Act, 2003. The electrical power system mainly consists of generation, transmission and distribution. For generation of electrical power there are many public sector undertakings and private owned generating stations (GS). The Electrical transmission system is mainly carried out by Central Government body PGCIL (Power Grid Corporation of India Limited). To facilitate this process, India is divided into 5 regions : Northern, Southern, Eastern, Western and North Eastern region. Further within every State we have a SLDC (State load dispatch centre). The distribution system is carried out by many distribution companies (DISCOMS) and SEBs (State Electricity Board). There are two tariff systems, one for the consumer which they pay to the DISCOMS and the other one is for the DISCOMS which they pay to the generating stations. The rate at which electricity can be supplied to a consumer by the distribution licensee and the rate at which the generating companies can sell electricity to the distribution licensee are governed respectively by sections 61 and 62 of the Electricity Act, 2003. There is tariff regulatory commission which fixes both the rates for sale and purchase of electricity by the distribution licensee. There is thus an in-built mechanism to ensure permissible profit both to the generating companies and the distribution licensees.

47. The Hon'ble Calcutta High Court in the case ITC Ltd. (supra) had to deal with similar issue of own consumption of power generated by an assessee engaged in the business of paper manufacture. The question that was examined by the Hon'ble court was as to what would be market value for the purpose of computation of deduction under section 80-IA of the Act in the context of section 80-IA(8) of the Act. The Hon'ble Calcutta High Court held deduction under section 80-IA had to be computed in such circumstances not on the basis of rates chargeable by distribution licensee from consumer and that the same can be claimed only on the basis of rates fixed by tariff regulation commission for sale of electricity by generating companies to distribution licensees.

48. The submission of the learned counsel for the assessee was that the decision of the Hon'ble Calcutta High Court is not applicable to the case of the assessee as in the case before the Hon'ble Calcutta High Court, the undertaking that generated power was situated in the State of Andhra Pradesh where electricity generated could not be sold to anyone other than a distribution company or a company which is engaged both in generation and distribution. In this regard an order of the Andhra Pradesh Electricity Regulatory Commission, Hyderabad in O. P, No, 1075/2000, dated June 20,2001 was filed before us, The said order deals with generation of non-conventional energy and it lays down in paragraph 25 of its order that third party sales of power generated by non-conventional means cannot be made. In paragraph 28 power generated by such generators have to be sold in public interest only to APTRANSCO at rates specified in

the said paragraph, Our attention was drawn to paragraph 4 of the West Bengal Electricity Regulatory Commission (Open Access) Regulations, 2007, which lays down that a licensee or a generating company or a captive generating plant or a consumer or any person engaged in the business of supplying electricity to the public under the Act (Electricity Act, 2003) shall be eligible for open access to the intra-state transmission lines or associated facilities of the STU or any transmission licensee on payment of charges, as may be specified by the commission, for using the transmission system of the transmission licensee. It was submitted that power generators in West Bengal are free to trade in power on exchange or sell excess power to third parties. Therefore, the judgment of the Hon'ble Calcutta High Court in the case of ITC Ltd. (supra) will not apply to the case of the assessee.

[Unquote]

4. In view of the above and the judgment of the Hon'ble ITAT, Kolkata in appellant's own case, I therefore hold that the ALP determined by the Ld. TPO in his order u/s 92CA(3) in terms of the principles laid down by the Hon'ble Calcutta High Court in the case of ITC Ltd. (supra) was unjustified. Following the judgment of the Supreme Court in the case of ThiruArooran Sugars Ltd. Vs. CIT (supra); I am of the considered view that the tariff rates at which the non-eligible units procured power from Electricity Board was the most appropriate and internal comparable rate to benchmark the transfer of power by appellant's CPP to other non-eligible units. The benchmarking exercise conducted by the appellant is found to the appropriate and reasonable and hence no further transfer pricing adjustment is warranted on this count. The ld. AO/TPO erred in making the downward adjustment with respect to eligible profits u/s 80IA by Rs.1,92,23,674/- and the same is hereby directed to be deleted. These grounds are therefore allowed."

16. We adopt learned coordinate bench's discussion mutatis mutandis to uphold the CIT(A)'s findings deleting the impugned transfer pricing adjustments pertaining to specified domestic transactions in the absence of any distinction on facts or law pin-pointed at revenue's behest. It fails in both of its cross-appeals ITA No.191 & 192/Kol/2018."

10. We have perused the material placed on record and have gone through the orders of the Co-ordinate bench (*supra*) in the case of assessee itself which squarely covers the issues involved in the present two appeals before us. Nothing is brought on record to controvert to discussions made and findings given by the Co-ordinate Bench in the case of assessee itself (*supra*) and that there being no change in the fact pattern and the applicable law, we adopt the judicial consistency from the decisions cited *supra*, qua the instant issues in the present appeals to uphold the findings given by Ld. CIT(A). Accordingly, we dismiss both the appeals of the revenue.

11. Coming to assessee's Cross Objections against the two appeals (*supra*) of the Revenue, the grounds in Cross Objections relate to claim of deduction of education cess u/s 37(1) of the Act, on the income-tax and surcharge, paid by the assessee.

11.1 In the course of hearing, Ld. Counsel for the assessee has not pressed the grounds in the said cross objections in the light of recent amendment brought on the statute by the Finance Act, 2022 and the decision of the Co-ordiante Bench of ITAT Kolkata which is against the assessee. Accordingly, the two cross objections of the assessee are dismissed as not pressed.

12. In the result, both, the appeal of the revenue and the cross objections of the assessee are dismissed.

Order pronounced in the open court on 17.05.2022.

Sd/-	**Sd/-**
(RAJPAL YADAV)	**(GIRISH AGRAWAL)**
VICE-PRESIDENT	**ACCOUNTANT MEMBER**

Kolkata, Dated: 17.05.2022

JD. Sr. P.S.

Copy to:

1. The Appellant: ACIT, Central Circle-4(4), Kolkata.
2. Respondent : M/s. Electrosteel Castings Ltd., 19, Camac Street, 5th floor, Kolkata-700 017.
3. The CIT(A)-22 Kolkata
4. The CIT , Kolkata.
5. The DR ITAT, Kolkata.

//True Copy//

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata