IN THE INCOME TAX APPELLATE TRIBUNAL, „H" BENCH MUMBAI

BEFORE: SHRI AMIT SHUKLA, JUDICIAL MEMBER
&
MS. PADMAVATHY S, ACCOUNTANT MEMBER

ITA No.468/Mum/2022
(**Assessment Year: 2017-18**)

M/s. Tata Chemicals Ltd. 24, Homi Mody Street Bombay House Fort, Mumbai-400 001	Vs.	DCIT 2(3)1) Mumbai Room No.562, Aayakar Bhawan, M.K.Road Mumbai-400 020
PAN/GIR No.AAACT4059M		
(Appellant)	..	**(Respondent**)

Assessee by	Shri Nitesh Joshi & Shri Vanish Bhansali
Revenue by	Shri Alok Kumar & Shri K.C.Selvamani
Date of Hearing	**10/05/2023 & 09/10/2023 (clarification)**
Date of Pronouncement	**10/10/2023**

□□□□ / O R D E R

PER AMIT SHUKLA (J.M):

The aforesaid appeal has been filed by the assessee against final assessment order dated 28/01/2022 passed u/s. 143 (3) r.w.s. 144C (13) for the A.Y. 2017-18, in pursuance of direction given by the DRP vide order dated 28/12/2021.

2. In ground Nos. 1-4 assessee has challenged transfer pricing adjustment of Rs.15,23,15,220/- in respect of specified domestic transaction of inter-unit transfer of power from the eligible

undertaking u/s.80-IA of the Act to other manufacturing undertaking of the assessee which are non-eligible units. Besides this assessee has raised following two grounds also.

5. Unwarranted addition of Rs. 21.02 Cr. under the head "income from Business and Profession"

"The learned Assessing Officer at National e-assessment Centre, New Delhi ("AO") erred in taxing income under the head "income from Business and Profession" at Rs. 853.74 Cr, instead of Rs. 832.72. Cr., thereby levying additional tax on Rs. 21.02 Cr. In the "Computation Sheet" even when there are no such additions in the assessment order".

6. Levy of interest u/s 234B

The learned AO erred in levying interest u/s 2348 amounting to Rs. 0.52 Cr.

3. The brief facts qua the issue of adjustment on account of specified domestic transactions are that, the assessee company is engaged in the business of manufacturing and sale of inorganic chemicals, fertilizers and bio fuels. It operates inorganic chemical complex at Mithapur in Gujarat and a fertilizer complex at Babrala in Uttar Pradesh and Phosphatic fertilizers complex at Haldia in West Bengal. Assessee has reported Specified Domestic Transaction (SDT) with respect to sale of electricity from unit called Power Plant-TT-12) which has supplied 5,23,42,000 KWH units of electricity to the manufacturing unit of TCL at Mithapur at a transaction price of Rs.36,09,44,480/-. In TP study report assessee justified the arm" s length price by using CUP as the most appropriate method whereby the assessee stated that the

price charged by the eligible unit has been compared with the prices charged by Gujarat Electricity Board (GEB) to TCL at Mithapur for supply of electricity under similar comparable circumstances. It was stated that electricity generated by TT-12 power plant unit which is an eligible unit u/s.80-IA of TCL has been transferred to manufacturing unit of TCL at Mithapur at the same average rate of Rs.6.90/- per unit. The average rate charged by GEB in similar transaction of sale of electricity to consumers and also to Mithapur unit was Rs.6.90 per unit, therefore, it was reported that price charged by eligible unit was at arm" s length price (ALP).

4. The ld. TPO held that comparison to sale price charged by eligible unit of the assessee with that of GEB is erroneous considering the functions performed, assets employed and the risks assumed by the GEB which is totally different from eligible unit. In the case of GEB huge distribution costs are involved whereas in assessee" s case no such substantial costs are involved as it is only an inter unit transfer of power. The assessee has not considered any such costs for adjustment to bringing its comparability to the level of cost of production of the GEB and thus the CUP data and method used by assessee suffers from factual defects. In his show-cause notice he asked the assessee why the net tariff determined by Gujarat Electricity Regulatory Commission (GERC) being the power purchase cost to Gujarat Electricity Board as notified for F.Y.2016-17 for Rs.3.94 per KWH as available in the public domain should not be applied and why

the same should not be taken as comparable CUP and determine ALP. In response, it was submitted by the assessee that the Revenue from sale of electricity was recorded based on regulatory approved tariff rates. Such tariff rate is utilized by GEB for charging its end customers for consumption of electricity and therefore, it represents the „fair market value‟ of electricity supply to the end customers. The assessee also filed various documentary evidences and also made detailed submissions regarding the value of power generated and captively consumed by the assessee will be that value that should have been paid by the assessee if the power was bought from open market. Assessee also relied upon various judgments which have been quoted in the ld. TPO‟ s order. Reliance was also placed on the decision of **ITAT Ahmedabad Bench in the case of Gujarat Fluorochemicals Ltd. vs. DCIT (2018) 97 taxmann.com 10** which is also from the same jurisdiction. The Tribunal has held that for the purpose of determining the ALP of SDT of supply of electricity from eligible unit to non-eligible unit would be at the rate at which manufacturing unit of the assessee has been purchasing the electricity from State Electricity Board.

Reliance was also placed on the decision of **Hon‟ ble Bombay High Court in the case of CIT vs. Reliance Industries Ltd., reported in (2020) 421 ITR 686,** wherein Hon‟ ble High Court on similar issue and on similar lines held that valuation of electricity provided to another unit should be at the rate at which electricity distribution companies are allowed to supply electricity to the consumers.

5. However, TPO held that, the assessee has transferred / sold the power from its captive eligible unit to it" s another non-eligible unit and there is absolutely no distribution cost involved in its pricing. Whereas the comparable (GEB) is not only purchasing the power but also being a distribution company incurs huge distribution cost and transmission losses which are factored in the sales price set by them. This material difference of distribution cost makes the difference in price and therefore, the price at which GEB is selling to the customers cannot be accepted. After referring to the provisions of Section 92BA, 92F and Rule 10B (2), TPO held that where the claim of deduction u/s.80IA is made, the ALP for the purpose of specified domestic transactions is the price which would be applicable in the transactions between two persons other than the associated enterprises in uncontrolled conditions. The comparability of the specified domestic transaction has to be established in terms of the parameters contained in Rule 10B (2). Thereafter he analyzed the functions and assets of the distribution company and the company which are manufacturing electricity and after detail FAR analysis; he held that performance of distribution function is entirely different. In sum and substance, he held that the contention of the assessee cannot be accepted, because of difference in FAR between the power distribution entities and power generating units. He observed that, the power generating units, power transmitting units and power distribution entities can be segregated on the basis of functions that the entity does and therefore, assessee" s attempt to use the price charged by a distribution entity as a benchmark is not a valid comparison

as it fails the comparability test and FAR. He further held that the power purchase cost for the distributor includes the energy cost, the transmission cost and the sate load dispatch centre cost and this energy cost has various bifurcations of price and cost which are different from the unit which are simply generating electricity. He has dealt this issue in detail as to how the FAR of a distribution entity is entirely different and what are the cost factors and pricing mechanism of a distribution company as assessee has not submitted any FAR analysis in support of its contention. TPO has given his detailed analysis from pages 10-39 of his order.

6. One of the point raised by the TPO is that, u/s. 80IA, what is required to be seen is the quantum of deduction of the profits and gains by an undertaking or an enterprise from business referred to in Sub-Section (4) and therefore, object of the Section is to quantify the profits and gains derived by the undertaking which is engaged in the eligible activity of power generation. The SDT for which ALP is required to be determined is the supply of eligible power generation unit. Therefore, the choice of the tested party should be such, so as to arrive at the true profits of such eligible power generation unit ascertain the ALP of sale price to another unit. Hence, in such cases, power generating entity alone should be considered as tested party, as the FAR of the power generating unit has a direct impact in the quantum of SDT which should be given precedent over the FAR of the other party.

7. Further, TPO has referred to the *Explanation* to Section 80IA (8) which defines *"market value"* used in this sub-section in two manner; *firstly*, the price that such goods and services would

ordinarily fetch in the open market; and *secondly*, the ALP as defined in clause (ii) of section 92F if transfer of such goods is SDT under section 92BA. He held that, in so far as the price that such goods and services would ordinarily fetch in the open market means that the electricity generated by the eligible unit would ordinarily fetch in the open market if sold and not the rate in which non-eligible unit could procure the electricity in the open market and therefore, eligible unit alone has to be taken as tested party. He further held that the object of extending the application transfer pricing regulations to specified domestic transaction was to ensure that assessee do not inflate the profits to such transaction of the eligible units and the correct profits should be determined and therefore, the ALP has to be determined in terms of Clause (ii) to Explanation to Section 80-IA (8). TPO also referred to the „Safe Harbour Rules‟ notified by CBDT wherein it provides that the company engaged in the business of generation of power, the rates for the supply of electricity would be as per the tariff decided by the appropriate commission in accordance with the provisions of Electricity Act, 2003. He also referred to the contentions of the assessee that the difference in the trade level of the comparables are very important to determine the comparability and in the comparable transactions proposed by the department, the sale of power is not end consumer whereas the assessee has made sale to the end consumer and therefore, price on which end consumer gets the electricity is important. The rebuttal of the ld. TPO was that the retail price at which the power is sold to end customer includes profits on account of distribution function and therefore, cannot be considered for the purpose of determining the profit which power generating company not performing any distribution function. The main important thing which is to be seen is the supplier of the power in the transaction cannot be a distributor. He further reiterated that after the incorporation of the TP provisions, it is incumbent to determine the price as per the methods adopted for determination of ALP and not simply looking at the market value as provided in Sub-clause (i) of Explanation to Section 80IA (8). After detailed discussion and referring to the various case laws and distinguishing the case laws relied upon by the assessee, the ld. TPO proposed an adjustment of Rs. 15,49,32,320/- in the following manner:-

> *The power procurement rate for GEB is Rs.3 94/unit which is higher than the power exchange rates as discussed in above paras. It is also higher as compared to the power purchase cost to the MSEDCL of Rs.3.79 per unit in the state of Maharashtra. The assessee submitted its cost of production to be at Rs.3.03 per unit being Rs.2.83 towards production cost and 20 paise towards coal cost and depreciation and other expenses. Further even after considering the adjustment for return on capital pre tax of 24.05%, the cost works out to Rs.3.76 per unit where as procurement rate for GEB is Rs.3.94/unit which s being compared in this case. It may be noted that since the aforesaid price is the average price of procurement of electricity and since the source of procurement is hydel, thermal, solar as well as wind, the correct picture is not reflected. According to the assessee, if the hydel power rate only is considered, the average rate would be Rs.3.94/unit. However, considering the details as discussed above regarding the cost of production of the assessee, power purchase cost to the MSEDCL, return on capital pre tax of 24.05%, the profit element of the assessee company etc, the ALP of the power sold to the eligible*

units is treated to be at Rs.3.94/unit and adjustment is worked out as tabulated below

Electricity Units	*Actual Rate*	*INR*	*ALP*	*ALP INR*	*Adjustment*
5,23,42,000	*6.90*	*36,11,59,800*	*3.94*	*20,62,27,480*	*15,49,32,320*

Therefore an adjustment of Rs.15,49,32,320/- is proposed on this transaction. The adjustment has been proposed is in respect of the eligible units only. AO may accordingly compute the allowable deduction having regard to the above ALP adjustment.

8. The ld. DRP, first of all held that eligible unit is the one which is less complex functional-wise as it is producing power for captive utilization whereas non-eligible unit is manufacturing multiple chemicals and consuming power for the same therefore, eligible unit alone should be a tested party to which transfer pricing method can be applied in the most reliable manner. In so far as market value is concerned, the ld. DRP held that it is of the opinion that *sub-clause-(ii)* of *Explanation* to Section 80IA (8) would govern the market value which provides for determination of ALP of SDT u/s.92BA and all the transfer pricing provisions gets applicable. The ld. TPO had benchmarked the SDT by taking power procurement rate of GEB at Rs.3.94 per unit as determined by Gujarat Electricity Regulatory Commission (GERC) vide order No.5 of 2016 which assessee had objected that the said order is dealing with hydro power and the eligible unit in the instant case is producing thermal power. The ld. DRP held that arm" s length price should be worked out by taking unit rate at Rs.3.99/-, which was based on one case of M/s Torrent Power Ltd.

(TPL) which was power generation company in Ahemdabad, in whose case, Gujarat Electricity Regulatory Commission (GERC) has determined the tariff after considering aggregate revenue requirement after considering all the details and variable costs, fuel cost, O&M expenses, water charges, depreciation, interest on loan, interest on working capital, return on equity and income tax and derived at a tariff rate of Rs.3.99/- for the F.Y. 2016-17. Accordingly, the TP adjustment was reduced to Rs.15,23,15,220/-.

9. We have heard both the parties at length and also perused the relevant finding given in the impugned orders. Before us, the ld. DR referred to various observations made by the ld. TPO in its TP order and submitted that the captive power generating unit which is eligible for deduction u/s.80IA, not only is to be taken as a tested party but also the FAR analysis has to be done from power generating entities and not the distribution entities because distribution companies incurred various other costs of transmission loss and distribution cost apart from other administrative costs for such distribution. The price at which Distribution Company sells the power to the customers cannot be the price at which power generating units sells the electricity. In this case, the ld. DRP has taken M/s. Torrent Power Ltd. (TPL) which is an electricity generation unit in whose case per unit has been determined at Rs.3.99/- which is in accordance with Safe Harbour Rules and also specific external CUP in the case of electricity generation unit. Secondly, he submitted that wherever

transfer of goods and services falls under SDT, then market price has to be determined as per principles of ALP under transfer pricing mechanism as provide in clause (ii) of Explanation to section 80IA(8).

10. The case of the ld. Counsel for the assessee is that, what is required to be seen as to how much a non-eligible unit will have to pay the price for buying electricity. If it has bought electricity from GEB which has supplied the electricity @6.90 per unit, then if at the same price the eligible unit has supplied, then there is direct CUP. The purpose of Section 80IA(8) is to see whether the goods and services has been transferred at market value. The market value here in this case is at Rs.6.90 per unit. In support of his contention, he has filed 34 judgments of various Tribunals as well as the High Courts, and particularly the judgement of (i) **Hon‟ ble Chhattisgarh High Court in CIT vs. Godawari Power & Ispat Ltd (2014) 42 taxmann.com 551; (ii) PCIT vs. Gujarat Alkalies & Chemicals Ltd. reported in 395 ITR 247 (Guj),** wherein the Hon‟ ble Gujarat High Court specifically said that generation of power for captive consumption has to be computed considering the rate of power at each electricity board supplied power to its customers. He further referred to the decision of another Jurisdictional High Court in the case of **CIT vs. Reliance Industries Ltd., reported in 421 ITR 686 (Bom),** wherein the Hon‟ ble High Court held that, if assessee had set up a captive power generating unit and provided electricity to its another unit and claimed deduction under section 80-IA in respect

of profits arising out of such activity then the valuation of electricity provided to another unit should be at rate at which electricity distribution companies were allowed to supply electricity to consumers. Besides this, catena of decisions of the Co-ordinate Bench has also been filed wherein similar view has been taken.

11. The entire controversy germinates from the fact, as to whether the sale of electricity by eligible unit entitled for deduction u/s.80IA which has supplied 5,23,42,000 KWH units of electricity to the manufacturing unit of TCL at Mithapur at transaction price of Rs. 36,09,44,480/- at the rate of Rs. 6.90/- per unit is at market value or not. In so far as determining market value in terms of Section 80 IA (8), the premise of the ld. TPO is that, firstly, it is a specific domestic transaction u/s.92BA and therefore, the market value of the electricity supply has to be determined in terms of transfer pricing provisions so as to determine the correct market value and the profits of eligible unit as per ALP within the scope and ambit of Section 80IA (8). Secondly, the ld. TPO has held that since the eligible unit is captive power generation unit and therefore, the price at which it has sold the electricity should be benchmarked with the comparables who are generating electricity and supplying it to the State Electricity Board which here in this case is GEB.

Another point which has been raised by the ld. TPO is that, what is to be benchmarked is the profits of the eligible unit and therefore, eligible unit alone should be taken as a tested party and the FAR analysis has to be done of the eligible unit vis-à-vis the other units which are generating electricity. Lastly, he has given the detailed analysis as to why the price charged by the distribution companies cannot be compared with the assessee because it undertakes various functions, deploys various assets and assumes various risks and therefore, the price charged by the distribution company from the end customers cannot be the market value of the price on which assessee sold the price as power generation unit to another unit of the same assessee. Finally, the ld. DRP has given one comparable instance, of M/s. Torrent Power Ltd. (TPL) which was into generation of electricity in whose case, Gujarat Electricity Regulatory Commission (GERC) has determined the tariff for supply of electricity to State Electricity Board at Rs.3.99 per unit.

12. Whereas the case of the assessee is that the manufacturing unit has bought the electricity from the eligible unit at Rs.6.90 per unit which is the price from which it has procured electricity from GEB and therefore, the price charged by GEB is the market value of the transaction of sale of electricity. Section 80 IA provides that gross total income of an assessee includes any profits and gains derived by an undertaking or an enterprise from any business referred to in sub-section (4), then while computing the total income of the assessee, a deduction of an amount equal to 100% of the profits and gains derived from such business for ten consecutive assessment years. However, subsection (8) provides that where any goods or services held for the purposes of the eligible business are transferred to any other business carried on by the assessee, the consideration, if any, for such transfer of the

eligible business does not correspond to the market value of such goods or services as on the date of the transfer, then, for the purposes of the deduction, the profits and gains of such eligible business shall be computed as if the transfer had been made at the market value of such goods or services. The relevant specimen reads as under:-

> *8) Where any goods for services held for the purposes of the eligible business are transferred to any other business carried on by the assessee, or where any goods or services]held for the purposes of any other business carried on by the assessee are transferred to the eligible business and, in either case, the consideration, if any, for such transfer as recorded in the accounts of the eligible business does not correspond to the "market value of such goods "or services as on the date of the transfer, then, for the purposes of the deduction under this section, the profits and gains of such eligible business shall be computed as if the transfer, in either case, had been made at the "market value of such goods "or services" as on that date:*
>
> ***Provided** that where, in the opinion of the Assessing Officer, the computation of the profits and gains of the eligible business in the manner hereinbefore specified presents exceptional difficulties, the Assessing Officer may compute such profits and gains on such reasonable basis as he may deem fit.*
>
> ***Explanation- For the purposes of this sub-section, "market value", in relation to any goods or services, means-***
>
> ***(i)the price that such goods or services would ordinarily fetch in the open market; or***
> ***(ii) the arm's length price as defined in clause (ii) of section 92F, where the transfer of such goods or services is a specified domestic transaction referred to in section 92BA.***

13. Thus, the aforesaid provision provides that goods and services provided by the eligible business which is being transferred to other business carried on by the assessee has to correspond to the market value of such goods as on the date of the transfer. The Explanation provides the scope and the meaning of the „market value‟ in relation to any goods and services which has provided two manners to determine. The first ***is the price that such goods or services would ordinarily fetch in the open market*** and then the phrase ***"or"*** has been used. Secondly, ***the arm's length price as defined in clause (ii) of section 92F, where the transfer of such goods or services is a specified domestic transaction referred to section 92BA.*** Section 92BA incorporates the determination of ALP under transfer pricing provision of sections 92,92C, 92D and 92E. It provides that any transfer of goods or services referred to in sub-section (8) of Section 80IA is also covered under the specified domestic transaction. 92F sub-clause (ii) defines the arm‟ s length price, which means the price which is applied or proposed to be applied in a transaction between the persons other than associated enterprises in uncontrolled conditions. Thus, the second option for determining the market value is the mechanism of transfer pricing provision for determining the arm‟ s length price.

14. The entire case of the department is that, since it is SDT in term of Section 80I (8), therefore, the market value has to be in accordance with the determination of arm‟ s length price u/s.92C r.w.r. 10BA. In other words, once any transaction is hit by 80IA (8), then compulsorily, the market value has to be determined in accordance

with the arm" s length principle and not otherwise. If the TPO" s contention and the opinion is accepted, then under all the transactions which are covered u/s.80IA(8) would compulsorily be determined as per transfer pricing provision as all the transactions falling u/s.80IA(8) will be specified domestic transactions only. If that is the only opinion which is to be upheld, then, ostensibly the entire exercise of ld. TPO is justified, that is, the whole process of determining, who is the tested party, what should be the FAR analysis of the tested party vis-à-vis the comparables under uncontrolled transactions and whether particularly in this case the price charged by the distribution entity can be said to be arm" s length price or the comparable has to be from the entities which are generating power, which here in this case one comparable has been chosen i.e. M/s. Torrent Power Ltd. (TPL). In our opinion it will be too myopic view to give an interpretation that all the transaction covered u/s. 80IA(8) has to be compulsorily determined under transfer pricing provision, cannot be accepted. Because, the statute has clearly provided two options or two manner in which market value of the goods and services can be determined. The phrase **"or"** does not give mean that the second mechanism provided in *clause (ii) of Explanation* alone can be applied after introduction of SDT from 01.04.2013. The use of the word "or"

can be interpreted as, firstly, both manner are available with the assessee to demonstrate that market value of the goods and services has to be either by showing that the price of such goods and services is in consonance with the price available in the open market; or if assessee is not able to establish the price available in the open market, then the price of goods and services has to be established through arm‟ s length principle. Secondly, if the price of the transfer of goods and services is in consonance with the price available in the open market then the profits of the eligible business shown as per this price is eligible for deduction and in that case the second option may not be necessary.

15. Both the authorities, i.e., ld. TPO and ld. DRP have held that in case of 80IA (8), the market value has to be compulsory governed by *Explanation (ii)* to Section 80IA (8), because in 92BA provides that such transfer of goods and services referred in this sub-section falls within SDT and therefore, arm‟ s length price has to be determined as per Section 92F(ii). Further according to them *Explanation (i) & (ii)* have separate application because it is separated by word "or", but how they are separately applicable and under which circumstances has not been elaborated. If such an interpretation is to be accepted, then clause-(i) of the Explanation will become otios and redundant, because then the transfer of the goods and services falling u/s.80IA(8) has to be compulsorily be determined under arm‟ s length principle. Had it been so, then post introduction of SDT in Section 92BA w.e.f. 01/04/2013, then statute would have provided that for the purpose of Sub-section (8)

to Section 80IA, "market value" in relation to goods or services means the arm‟ s length price as defined in *clause (ii)* of Section 92F. If both the clauses exist then one has to see if the market value is discernable from the price for such goods would ordinarily fetch in the open market unless such price is not available, then there is an option for determining the market value as per the arm‟ s length price.

16. Here in this case what is required to be seen is, whether the market value in the price charged by the eligible unit for the sale of electricity to another unit can be benchmarked with the price on which GEB is supplying to the customers. From the records, it is seen that the manufacturing unit of the assessee also buys electricity from GEB at the same price of Rs.6.90/- per unit and the same price is being paid to the eligible unit also. The case of the department is that since assessee is generating electricity and supplying it to the manufacturing unit, therefore, functionally it is similar to entities which are generating electricity and not which are into distribution of electricity. What is required to be seen u/s. 80IA (8) is that, where any goods or services provided by the eligible business or transfer to any other business carried on by the assessee, the same should correspond to market value of such goods and services. The market value has to be seen qua the price in which such goods or services would ordinarily be fetched in the open market, i.e., whether in the open market the price of such goods and services are available or not? Here assessee is a captive service provider for generating electricity and to supply and distribute to the manufacturing unit which otherwise would have bought from the open market. The price has to be seen what the manufacturing unit is paying in the open market. This precisely has been dealt by the **Hon" ble Gujarat High Court** in the case of **PCIT vs. Gujarat Fluorochemicals Ltd.,** and also by the **Hon" ble Jurisdictional High Court in the case of CIT vs. Reliance Industries Ltd.**, wherein the Courts had held that if the assessee had set up a captive power generating unit and provided electricity

to its another unit and claimed deduction under section 80-IA in respect of profits arising out of such activity, then violation of electricity provided to another unit should be at the rate at which electricity distribution companies were allowed to supply electricity to the consumers. This judgment has been distinguished by ld. TPO / ld. DRP holding that these judgments relate to assessment years where SDT provisions were not applicable. We are not inclined to agree to such a view that these judgments have become redundant and Explanation (i) is no more applicable after the introduction of Clause (ii) w.e.f. 01/04/2013, because, the statute has not omitted clause (i). Thus, in our opinion these judgments still holds the field and once the market value of such price on which electricity is sold to another unit of the assessee, the same can be compared with the electricity distribution entities for supplying to the customers in the open market. Accordingly, there is no infirmity in the contention of the assessee that per unit electricity sold to the non-eligible unit at Rs.6.90 per unit is the market value.

17. The ld. DRP has taken M/s. Torrent Power Ltd. (TPL) which is the electricity generation entity supplying electricity to GEB. In that case Gujarat Electricity Regulatory Commission (GERC) has fixed tariff of Rs.3.99 per unit for supplying it to the GEB for F.Y.2016-17. First of all nothing has been brought on record whether, M/s. Torrent Power Ltd. (TPL) was supplying to other entities or industry or it was purely supplying to GEB. What is culled out is that, these power generating entities were manufacturing and supplying 100% to the GEB and the price is

influenced by GEB, although fixed by GERC, but if there is only one party to whom sale is made and the prices and other conditions are purely influenced by that entity, then it becomes a tainted transaction. The reason being, Section 92A dealing with the meaning of the associated enterprises stipulates that two enterprises shall be deemed to be associated enterprises if any time during the previous year, the goods or articles manufactured or processed of one enterprise are sold to other enterprise which is specified by the other enterprises and the prices and the conditions are influenced by the other enterprise. This has been specifically provided in 92A (2)(i) which reads as under:-

(i) The goods or articles manufactured or processed by one enterprise are sold to the other enterprise or to the persons specified by the other enterprise, and the prices and other conditions relating thereto are influenced by such other enterprise.

18. If M/s. Torrent Power Ltd. (TPL) is purely supplying to GEB and GEB is controlling the prices and other conditions, although determined by regulatory authority, then it falls in the category of aforesaid clause and any such price under the condition, where one entity, i.e. GEB is influencing the price, then it becomes an controlled transaction between two associated enterprises. In that scenario, the prices on which GEB purchased the electricity from M/s. Torrent Power Ltd. (TPL) cannot be considered as comparative price. Thus, the price fixed for purchasing the electricity by GEB from M/s. Torrent Power Ltd. (TPL) cannot be compared with the prices on which eligible unit of the assessee is selling it to the other. Thus, once only comparable as chosen by the ld. DRP fails, then same loses the comparability for determining the

ALP. In view of aforesaid discussion, we hold that the price on which eligible unit is selling the power, i.e., at Rs.6.90 per unit which is the price available in the open market and also the same manufacturing unit is purchasing it from GEB at the same price, then it can be said to be the market value of the price. Accordingly, addition / disallowance of deduction made by the ld. CIT (A) is deleted and the ground Nos. 1-4 raised by the assessee are allowed.

19. In ground No.5, assessee has challenged that Assessing Officer at National e-assessment Centre had erred in taxing income under the head „income from business and profession" at Rs.853.74 Crores instead of Rs.832.72 Crores thereby levying additional tax of Rs.21.02 Crores in the computation sheet when there is no such additions in the assessment order. Before us the ld. Counsel has submitted a chart pointing out the discrepancy in the computation sheet of the ld. AO. Accordingly, we direct the ld. AO to verify the facts and if there is such error, same should be rectified and relief should be given. Accordingly, this ground is allowed for statistical purposes.

20. Lastly, with regard to levy of interest u/s.234B, the ld. Counsel submitted that there is no short fall and in fact assessee has paid extra tax more than assessed income. On this issue also we direct the ld. AO to verify the payment of tax and to grant consequential relief in the computation of interest u/s.234B. Accordingly, appeal of the assessee is partly allowed for statistical purposes.

21. **In the result, appeal of the assessee is partly allowed for statistical purposes.**

Order pronounced on 10th October, 2023.

Sd/- Sd/-
(PADMAVATHY S) (AMIT SHUKLA) ACCOUNTANT MEMBER JUDICIAL MEMBER

Mumbai; Dated 10/10/2023
KARUNA, *sr.ps*

<u>Copy of the Order forwarded to</u> :

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai