* **THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment reserved on : 03.10.2008
% Judgment delivered on : 21.11.2008

ITA 1187/2005

COMMISSIONER OF INCOME TAX DELHI-IV,
NEW DELHI ..... **Revenue**

-versus-

M/S DCM SRIRAM CONSOLIDATED LTD ..... **Respondent**

Advocates who appeared in this case:

For the Revenue : Ms Prem Lata Bansal
For the Respondent : Mr M.S.Syali, Sr.Advocate with Mr V.P.Gupta, Mr Aseem Mowar and Mr Basant Kumar, Advocates

CORAM :-

HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MR JUSTICE RAJIV SHAKDHER

1. Whether the Reporters of local papers may be allowed to see the judgment ?
2. To be referred to Reporters or not ?
3. Whether the judgment should be reported in the Digest ?

RAJIV SHAKDHER, J

1. The Revenue has preferred the present appeal under Section 260A of the Income Tax Act, 1961 (hereinafter referred to as "the Act") against the judgment of the Income Tax Appellate Tribunal (hereinafter referred to as the "Tribunal") dated 02.05.2005 passed in ITA No. 1400/Del/2001, in respect of, assessment year 1997-98.

1.1 In the appeal the Revenue has raised two issues which impact the computation of Minimum Alternate Taxation (hereinafter referred to as MAT) under Section 115JA of the Act. These being :-

1. Whether provision for bad and doubtful debts amounting to Rs 1.01 crores was to be added back to the net profit while computing book profit under Section 115JA of the Act in view of Explanation (c) to Section 115JA(2)?
2. Whether Income Tax Appellate Tribunal was correct in law in reducing the amount of Rs 41.88 crores allegedly claimed by the assessee as profit from business of generation of power while computing book profit under Section 115JA of the Act?

1.2 As far as the first issue is concerned, the same is no longer *res integra* as it is covered by the judgment of this Court in ***Commissioner of Income Tax v. Eicher Ltd; 287 ITR 170 (Del)***, as well as, that of the Supreme Court in the case of ***Commissioner of Income Tax-IV, Delhi vs M/s HCL Comnet Systems & Services Ltd ; Civil Appeal No 5800 of 2008 vide judgment dated 23.09.2008.*** In respect of the second issue, we have framed a question of law, by our order dated 03.10.2008. The question of law framed by us is as follows:-

> "Whether the Income Tax Appellate Tribunal was correct in law in allowing the assessee's claim of alleged profits derived by the assessee from the business of generation of power while computing the book profits under Section 115JA of the Income Tax Act, 1961, particularly when the electricity power generated was entirely for captive consumption?"

1.3 In order to answer the question framed by us, it would be helpful if we were to note the factual background, in which, the issue has arisen for consideration before us:-

1.4 The assessee has four divisions namely Shriram Fertilisers and Chemicals, Shriram Cement Works, Shriram Alkalies and Chemicals and the textile division. In addition, the assessee also has four industrial undertakings which are engaged in captive power generation [hereinafter referred to as 'CPP(s)']. Three out of the four CPPs are situated at Kota, which generate power equivalent 10 MW, 30MW and 35MW respectively. The fourth CPP, at Bharuch, which is situate in the State of Gujarat, generates 18 MW power. For the purposes of setting up CPPs the assessee has taken requisite permission from the Rajasthan State Electricity Board (hereinafter referred to as 'RSEB'), as well as, the Gujarat State Electricity Board (hereinafter referred to as 'GSEB'). These permissions have been referred to by the authorities below. A reference in this regard has been made to the orders issued by the RSEB dated 23.4.1967, 18.6.1982 and 16.21993 and the orders of GSEB dated 22.11.1995 as modified by its letter dated 31.1.1996.

1.5 It is in this background that on 29.11.1997 the assessee had filed a return declaring a loss of Rs 43,31,74,077/-. It is important to bring to the fore at this stage that, in a note attached to the return the assessee had disclosed the profit and loss derived from each of the CPPs, and also, indicated the formula adopted for

computation of the profit derived from the respective CPPs. Briefly, the method for computation of profit and loss indicated in the note appended to the return was-the rate per unit as charged by the respective State Electricity Board for transfer of power, reduced by 7%, on account of absence of transmission and distribution losses (wheeling charges). From the figure obtained by applying the reconfigured rate per unit, deduction was made towards specific expenses, as well as, common expenses attributable to each CPP so as to arrive at the figure of profit/loss of each CPP. In the note appended to the return of the assessee the break up of total profit in the sum of Rs41,88,50,862/- is detailed out in the following manner:-

Captive Power Plant	Units generated		Profit derived
Kota	35 MW		18,41,17,747/-
	30 MW		19,26,70,899/-
	10 MW		7,70,25,351/-
Bharuch	18 MW	(-)	3,49,63,135/-
Total profit from generation of power			**41,88,50,862/-**

1.6 The assessee, however, for the purposes of provisions of Section 115JA of the Act based on its books of accounts, disclosed income in the sum of Rs 86,33,382/-. By an intimation dated 07.07.1998, the Revenue processed the return filed by the assessee under the provisions of Section 143(1)(a) of the Act. On 30.3.1999, the assessee filed revised return declaring a loss of Rs 39,36,71,056/-. Interestingly

though, for the purposes of Section 115JA of the Act, the assessee continued to show its income as Rs 86,33,382/-. The case of the assessee was taken up by the Assessing Officer for scrutiny. A notice under Section 143(2) of the Act was issued. During the course of scrutiny, the Assessing Officer raised a query with regard to the deduction of a sum of Rs 41,88,50,862/- from book profit by the assessee while, computing tax under Section 115JA of the Act. In response to the query of the Assessing Officer, the assessee informed that the said amount has been reduced from the book profit as this amount was profit derived from CPPs set up by the assessee with the permission of the RSEB and the GSEB.

2 The deduction from book profit was justified by taking resort to explanation (iv) to Section 115JA of the Act. The relevant portion reads as follows:-

> "Section 115JA. (1) Notwithstanding anything contained in any other provisions of this Act, where in the case of an assessee, being a company, the total income, as computed under this Act in respect of any previous year relevant to the assessment year commencing on or after the 1st day of April, 1997 but before the 1st day of April, 2001 (hereafter in this section referred to as the relevant previous year) is less than thirty per cent of its book profit, the total income of such assessee chargeable to tax for the relevant previous year shall be deemed to be an amount equal to thirty per cent of such book profit.
>
> (2) XXXXXXX
>
> Explanation.--- For the purposes of this section, "book profit" means the net profit as shown in the profit and loss account for the relevant previous year prepared under sub-section(2), as increased by—
>
> (a) XXXXXXX
> (b) XXXXXXXX
>
> (c) XXXXXXXX

(d) XXXXXXXX

If any amount referred to in clauses (a) to (f) is debited to the profit and loss account, and as reduced by.—

(i) XXXXXXXXXX
(ii) XXXXXXXXXX
(iii) XXXXXXXXXX
(iv)The amount of profits derived by an industrial undertaking from the business of generation or generation and distribution of power; or……….."

3 The Assessing Officer after a detailed discussion, vide order dated 24.3.2000 rejected the claim of the assessee and added back the deduction claimed, by the assessee, from book profit, broadly on the following grounds:-

(i) the Memorandum and Articles of Association did not permit the assessee to engage in the business of generation of power;

(ii) the permission granted by the State Electricity Boards prohibited sale of energy so generated or supply of energy free of cost to others;

(iii) the sanction given by RSEB was only for setting up of turbo generator and not for parallel generation and;

(iv) lastly, the assessee was in the business of manufacturing fertilizer, for which purpose, it had received a subsidy as the urea manufactured was a controlled and consequently, a licensed item being, subject to the

Retention Price Scheme of Government of India which, mandated that since, sale price and the distribution of urea was fully controlled the manufacturer would be allowed a subsidy in a manner which permitted him to earn a return of 12% on his net worth after taking into account the cost of raw material and capital employed, which included both the fixed and variable cost. From this it was concluded that as the assessee had received a subsidy from the Government of India for manufacture of urea and, as was, apparent from the balance sheet and profit and loss account filed by the assessee, the CPPs, were a part of the fertilizer, cement, and caustic soda plants. The CPPs were included in the aforesaid plants and thus, it could not be said that the income derived from the said plants, keeping in view the subsidy received by the assessee under the Retention Price Scheme, was in any way, income derived from generation of power and;

(v) lastly, the assessee is not in the business of generation of power and that the assessee is not deriving any income from business of generation of power. A distinction was drawn between an industrial undertaking generating power and one which was in the business of generating power. The assessee's case was likened to an undertaking which is generating power but is not in the business of generating power, and hence, not deriving income from generation of power.

4. The assessee being aggrieved, preferred an appeal to the Commissioner of Income Tax (Appeals) [hereinafter referred to as 'CIT(A)']. By an order dated 21.1.2001 the CIT(A) allowed the appeal of the assessee with respect to the said issue. After a detailed discussion the CIT(A) summed up his reasons in paragraph 41 of his order. The conclusion arrived at, is as follows:-

> "….. (i) the appellant is a company.
>
> (ii) The company has generation of power as a main object vide clause (7).
>
> (iii) The CPPs are separate licensed industrial undertakings.
>
> (iv) Each of the 4 CPPs have separate accounts and administrative structure. The accounts are audited annually and then incorporated in the consolidated accounts of company. The separate audited accounts are filed with the return of income.
>
> (v) The desegregation of accounts and profits is sanctified by the Supreme Court decisions in 'TISCO's case 48 ITR 123, The Textile Machinery case 107 ITR 195, Orient Paper case 176 ITR 110, Cellulose Products case 192 ITR 155 which referred to in extension in body of the order.
>
> (vi) The decision relied on by the A.O. relate to relief provision contained under chapter VI-A, whereas, the present case pertains to a taxing provision analogous to the TISCO and other Supreme Court cases referred to above. …….."

4.1 As regards computation of profit/loss, in respect of, the CPPs the CIT(A) noted that the issue of quantification had been looked into by the Assessing Officer. In this regard CIT(A) noted the points covered in the assessee's letter dated 26.02.2000. A

note was also made by the CIT(A) of a letter dated 23.03.2000 issued by the assessee wherein, it had given detailed explanation, in respect of, points raised by the Assessing Officer with regard to the computation of profits of said CPPs. Finally, in paragraph 44 of his order, the CIT(A) categorically returned a finding of fact that the Assessing Officer was wrong in stating that he had **not** gone into the issue of computation of profits at the time of conducting the assessment proceedings. The CIT(A) noted that the matter was queried and answered. The CIT(A) further noted that since the Assessing Officer in his letter dated 18.02.2000 had specifically stated that he had no opportunity of looking into the computation of profits derived from generation of power his comments were sought vide remand report dated 05.01.2001. The CIT(A) observed that the Assessing Officer in the remand report only offered general comments and said nothing which would indicate as to why that the computation filed by the assessee which was duly authenticated by the auditors ought to be rejected.

4.2 It is in these circumstances, that the CIT(A) came to the conclusion that he was satisfied that the computation certified by the auditors had been made on a proper basis, and that, at any rate allowing any further opportunity to the Assessing Officer would be a travesty of the law of limitation and, more importantly, result in reopening of the assessment by the back door through the mode of re-examination of the computation.

5. Aggrieved by the order of the CIT(A), the Revenue preferred an appeal to the Tribunal. The Tribunal sustained the finding returned by the CIT(A) in totality. The Tribunal in brief observed as follows:-

(i) that the assessee had, in note No.16 appended to the return, given the details with regard to the CPPs and the basis for arriving at the total profit of Rs 41,88,50,862/-. It further noted that the profit figure was computed on the basis of transfer of power by the CPPs to the urea, caustic soda, cement and PVC plants at market prices, and the rate as charged by State Electricity Board as reduced by 7% due to absence of transmission and distribution losses. Specific expenses relating to the CPPs and a part of common expenses were also deducted by the assessee in computing the profit from business of generation of power aggregating to Rs 41,88,50,862/-, which were, in turn deducted from book profits under Section 115JA of the Act. It further noted that, as indicated by CIT(A), the quantification of profits from generation of power had been made by the assessee on the basis of audited accounts;

(ii) contrary to what the Assessing Officer held, one of the objects was, as was, evident upon reading Clause 7 of the Memorandum of Association, to empower the assessee to "generate, develop and accumulate electrical power and to transmit, distribute and supply such power and to carry on

business of a general electric power supply company, ……………… ……..". This finding was in line with finding of CIT(A);

(iii) that the Assessing Officer had in detail considered the background in which, as also the, the nature of permission granted by the State Electricity Boards to the assessee. The Tribunal noted the fact that the assessee company was duly authorized by the concerned Electricity Board to generate electricity, to that extent, it was engaged in the **business** of generation of electricity. It further observed that not only was such an activity recognized by the Government, but also, the assessee company was allowed to sell electricity as and when, so required. In view of these facts, the Tribunal concluded that the Assessing Officer was not justified in holding that the profits from power generation used in the manufacturing activities of the assessee were not eligible for deduction. The business of generation of electricity was itself an independent business and therefore the claim of the assessee was fully justified;

(iv) that in the event the assessee had not used electricity generated by the CPPs which was transferred to its urea, cement and caustic and PVC plants at a price which was 7% lower than the rates charged by the State Electricity Board, it would have been compelled to buy the same from

the State Electricity Boards at higher rates, in which situation, the profit arrived by the CPPs which is, the difference between the sale price charged by the CPPs to assessee's company less the cost of generation of electricity, would not have been excluded from the book profit for the purposes of Section 115JA of the Income Tax Act, but extra cost would have been incurred on account of difference between the rates charged by the State Electricity Boards and the rates adopted by the assessee for computation of profits;

(v) the business of generation of power by the assessee was carried out through fully independent units which were identifiable industrial undertakings and, therefore, profits earned from these undertakings would qualify for determination of book profits for the purposes of Section 115JA of the Income Tax Act. In this case it was possible to ascertain the profits from generation and supply of power by the CPPs to other units of the assessee and this method has been examined by the auditors. It concurred with the view of the CIT(A) that the term 'business' appearing in Clause (iv) of the explanation to Section 115JA cannot be given the meaning ascribed to it by the Assessing Officer, which is that, the assessee was in the business of deriving income from a fertilizer plant as, the main business of the assessee was to manufacture urea and hence, any income derived from the fertilizer plant was not

income derived from business of generation of power. The Tribunal observed in the context of Clause (iv) of the explanation to Section 115JA, that the profit ought to be derived by an industrial undertaking from business of generation and distribution of power. In the case of assessee which had independent CPP it could not be said that it was not carrying on the business of generation and distribution of power. The assessee was, according to the Tribunal, carrying on this business in an organized manner and on a regular basis for which it had a fully set up independent infrastructure and the affairs of such business were independently maintained. In sum and substance, according to the Tribunal, all attributes of business were found present in the case of assessee. It also noted that accounts of such business were prepared and maintained and were also subjected to audit. In view of these findings it held that the CIT(A) was justified in concluding that the assessee was deriving profits from the business of generation of power. Therefore, the amount of such profit was required to be reduced while working out book profits under Section 115JA of the Act . It noted in view of the fact that the Revenue was unable to point out any defect in the method adopted by the assessee in working out the profit, it had no difficulty in upholding the findings of the CIT(A) in totality.

6. The Revenue being aggrieved by the impugned judgment of the Tribunal has preferred, as stated above, the present appeal before us. The basic thrust of the Revenue's submission before us is that the deduction available under Explanation (iv) to Section 115JA of the Act is available, with respect to, those assessees who are in the business of generation of power or in the business of distribution and generation of power. In other words, no adjustments to book profits is available in respect of CPPs where, the main line of business is different from generation of power or generation and distribution of power. This submission is buttressed with an argument to the effect, that since no person can engage in business with himself, it cannot result in a profit and loss, and hence, there can be consequently no adjustment of books profits as envisaged under Explanation (iv) to Section 115JA of the Act. To support the said submission various factors, as pointed out by the Assessing Officer, have been brought to our notice including the reference to the Memorandum of Association, the letters of sanction issued by RSEB and GSEB, as also, the fact that the price computed by the assessee was a notional amount which resulted in notional profit and not a real profit. It was also submitted that, since no method for computation has been provided either in the Act or in the Rules, therefore the deduction ought not to be made available to the assessee. The judgment of the Supreme Court in the case of ***Tata Iron & Steel Ltd.*** v. ***State of Bihar 48 ITR 123(SC)*** was sought to be distinguished and reliance was placed on the earlier

judgment of Supreme Court in the case of ***Kikabhai Premchand*** v. ***CIT (1953) 24 ITR 506.***

6.1 As against this, the learned counsel for the assessee relied upon the orders passed by the CIT(A) and the Tribunal. It was submitted on behalf of the assessee that both the CIT(A) and the Tribunal had returned a finding of fact which ought not to be interfered with except in the event the same was found to be perverse. It was submitted that none of the findings returned by the CIT(A) and the Tribunal have been challenged by the Revenue before this court on the ground of perversity. Heavy reliance has been placed on behalf of assessee on the judgment of the Supreme Court in the case of ***Tata Iron & Steel Ltd (supra).***

7. Having heard the learned counsel for the parties and perused the record placed before us, the issue which requires our determination is whether on a plain reading of the provisions of Explanation (iv) to Section 115JA of the Act, the assessee would be entitled to reduce the book profits to the extent of profit derived from its CPPs, while computing MAT under Section 115JA of the Act. The entire objection of the Revenue to this claim of the assessee is pivoted on the submission that the assessee cannot derive profit from transfer of power from its CPPs to its other units for the following reasons:-

(i) firstly, there is no sale, inasmuch as, the transfer of power is not to a third party and consequently, no profits could have been earned by the assessee;

(ii) secondly, in any event, the generation of power by CPPs would not constitute business within the meaning of Explanation (iv) to Section 115JA of the Act as the main line of activity of the assessee is not the business of generation of power, an expression which finds mention in Explanation (iv) to Section 115JA of the Act and;

(iii) lastly, there is no mechanism for computing the sale price, and consequently, the profit which would be derived on transfer of energy from assessee's CPPs to its other units.

8. According to us the fallacy in the argument is self evident, inasmuch as, the counsel for the Revenue has proceeded on the basis that the words and expressions used in Explanation (iv) to Section 115JA are to be confined to a situation which involves a commercial transaction with an outsider. According to us if the words and expression used in the said explanation (iv) are given their plain meaning then the claim of the assessee has to be accepted.

8.1 To answer the first contention as to whether there could be sale of power and resultant derivation of profits in a situation as the present one, one has to look no further than to the judgment of the Supreme Court in ***Tata Iron & Steel Ltd. (supra).***

In the said case ***Tata Iron & Steel Ltd*** had taken on lease certain iron ore mines. The extracted iron ore was used for making iron and steel in its factory at Jamshedpur. Shorn of details, there was an imposition of cess on Tata Iron & Steel Ltd under Sections 5 & 6 of Bengal Cess Act, 1880, in respect of, iron ore extracted from its mines, which was, utilized for manufacture of iron, as stated above, in its own factory at Jamshedpur. Tata Iron & Steel Ltd objected to the levy of cess on the ground that it had not sold the ore and, therefore, it could not be treated as having 'made any profit from the mines' within the meaning of the provisions of the Bengal Cess Act, 1880. This issue was debated right upto the Supreme Court. The Supreme Court in its judgment noted that the question raised for decision before it was whether the appellants before it, which included, Tata Iron &Steel Company Ltd derived annual **net** profit from the mines when the ore was not sold as such, but was utilized for production of finished products which were finally sold by the appellants in the said case.

8.2 In answering the said question the appellants in the said case, who were represented by the then Attorney General submitted before the Supreme Court that, in order that a person may derive "profit" from a mine, the mine must be worked and the ore extracted, but even that by itself is insufficient, the extraction of the ore involves expenditure and "profits" could be said to be derived from the mine only when the extracted ore is sold and the amount realized by the sale of the ore is in excess of the cost of extracting the ore. A sale of the ore is thus an essential

ingredient or a sine qua non for the emergence of a profit on which alone the cess is levied. Where, however, the ore extracted is not sold but is used by the owner in the production of other finished products there is no question of the owner of the ore realizing a "profit" from the mine. The business of winning the ore and of converting the ore won into a finished product is not by any means to be conceived of as made up of two distinct businesses conducted by the Appellants in the said case, but only as a single integrated undertaking for the production of steel and steel products. Unless one could postulate first that the business of winning the ore was a separate business from that of converting the ore won into steel, and, secondly, could notionally treat the won ore as having been sold by the first business to the second, it would not be possible to conceive of any profit being derived from the working of the mine. It was submitted that there was no factual basis for the first postulate, viz., that there were two separate businesses and, secondly, even assuming that it was possible to separate the two activities in the course of which goods produced in one business were consumed in the other, still no "profit" can in law result by such use because "profits" could accrue only by the sale of the product and the consumption by the same individual of his own goods could not result in a "profit" because a person cannot sell to himself or trade with himself.

8.3 The Learned Attorney General on behalf of the Appellant's in the said case relied upon the principles laid down by the ***House of Lords in New York Life Insurance Company*** v. ***Styles: (1889) 2 Tax Cas. 460*** that no one can make a profit

out of himself. He also referred to an extract from the judgment of Rowlatt J. in ***Thomas*** v. ***Richard Evans & Co Ltd: (1926)11 Tax Cas. 790*** which reads as follows:-

> "It is true to say a person cannot make a profit court of himself, if what is meant is that he may provide himself with something at a lesser cost than that at which he could buy it, or if he does something for himself instead of employing somebody to do it. He saves money in those circumstances, but he does not make a profit."

8.4 The Attorney General also referred to ***Ostime*** v. ***Pontypridd and Rhondda Joint Water Board: (1946) 28 Tax Cas. 261*** and to the speech of Viscount Simon of the House of Lords :

> "The identity of the source with the recipient prevents any question of profits arising."

8.5 The Attorney General then invited the court's attention to the judgment of its own court in the case of ***Kikabhai Premchand (supra)*** and submitted that the principles enunciated in the case referred to above had been accepted by the Supreme Court. In the context of the said submission the Supreme Court, firstly, observed as follows:

> "It is not necessary to examine the scope of the maxim that a person cannot make a profit out of himself or ascertain whether the principle is subject to any exceptions. **It might here be pointed out that it has been held by the House of Lords in Sharkey v. Wernher that the general proposition that no one could trade with himself and make in its true sense or meaning taxable profits by dealing with himself is not universally true and that there are situations in which a man**

could be said to make a profit out of the consumption of his own goods. However as the principle underlying the decision of this court is Kikabhai Premchand's case runs counter to the decision of the House of Lords in Sharkey v. Wernher vide Commissioner of Income Tax vs. Bai Shirinbhai K.Kooka we are bound to proceed on the basis that on facts similar to those in Kikabhai's case the principle applies and negatives the idea of a taxable profit emerging."

8.6 It then proceeded to examine the decision in Kikabhai's case. Its observations with regard to the same are as follows:

"……….It is, therefore, necessary to examine precise scope of the decision in Kikabhai's case. The case arose under the Indian Income-Tax Act and the question related to the computation of the income and profits of a bullion merchant. The assessee had, during the accounting year, withdrawn some bullion from his stock-in-trade and transferred it to a trust which he had created. The assessee valued the bullion withdrawn at the price at which he had brought it, so that no profit was shown to have resulted to him by reason whose contention was that the bullion withdrawn had to be valued at the market price of the commodity on the day of the transfer. This court accepting the contention of the assessee, allowed his appeal and the ratio of this decision is to be found in the following passage in the judgment of Bose J., who spoke for the majority:

"….we are of opinion that it is wholly unreal and artificial to separate the business from its owner and treat them as if they were separate entities trading with each other and then by means of a fictional sale introduce a fictional profit which in truth and in fact is non-existent. Cut away the fictions and you reach the position that the man is supposed to be selling to himself and thereby making a profit out of himself which on the face of it is not only absurd but against all canons of mercantile and income-tax law………"

This was slightly expanded in the illustration given of a trader in rice withdrawing rice from his stock-in-trade for the purpose of consumption by his family. The learned Judge added that if the trader in rice transferred some stock to a private godown "what he chooses to do with the rice in his godown is no concern of the income-tax department provided always that he does not sell it or otherwise make a profit out of it. He can consume it, or give it away, or just let it rot…..

> How can he be said to have made an income personally or his business a profit because he uses ten bags out of his godown for a feast for the marriage of his daughter?"
>
> **It would be seen from the above that the stock withdrawn was not the subject of any commercial transaction but was, so to speak, lost to the business. But that is not the position here. Though the mined ore was not itself the subject of a sale, it was converted into a commodity which was the subject of a sale………"**

9. After analyzing the true scope and the effect of the principles established in Kikabhai's case it came to the conclusion that as long as there is no dissipation of the intermediary or in the sense of consumption like in the example given by Bose J. (as he then was) in Kikabhai's case where an agriculturist's stock-in-trade is consumed by his own family, the profit from mining operation and the winning of the mineral is imbedded in the profit realized from the sale of the end product. It rejected the submission made on behalf of Tata Iron and Steel Ltd that the 'profit' was not 'real' or was 'notional' based on the rationale that whenever there is a sale of the final product, which earns profit it would be the sum total or an aggregate or the resultant profit from different lines of activity. The court observed that arithmetically the total represents the resultant aggregation of different items of activities, and that, they failed to see how it could be said that the profit, from each item, which results in that total, is 'notional' and not an 'actual' or 'real profit'. The court concluded that it was possible to break up profits which are attributable to each or any of the several operations or activities the sum total of which form an integrated business or operations. In other words, it was of the view that it was possible to apportion profits

to different activities by disintegrating ultimate profits realized from the integrated business operations comprising of several activities. In enunciating this principle it observed as follows:-

> "In the way in which we have approached the problem there could be no question involved of any departure from the principle that a man cannot trade with himself. In fact, the principle of dichotomy is brought in by the learned Attorney-General by first disintegrating the business of the appellant into two – first, as a mine owner winning the ore and later by a steel manufacturing company consuming the won ore and then posing the question as to whether the transfer of the ore from the mining section to the manufacturing one could in law involve a sale of the product so as to yield a "profit". It would be apparent that if one proceeded on the basis of treating the businesses as to single and integrated one, as the learned Attorney-General desired us to do, as one unbroken chain from the start of the mining operation to the sale of the finished steel or steel products by the company, no question of a person trading with himself would arise, but the very different one as to whether there could be a disintegration of the profits of an integrated business, between the component constituents which go to make it up. ***Undoubtedly, in order to ascertain the profits from the mine there would have to be a disintegration of the gross profits which finally emerge from the sale of the finished steel or steel products. What we desire to point out is that this involves no disintegration of the business affording scope for the contention based upon the principle that a person cannot trade with himself, but the one far removed from it, viz., whether when a profit has been made as a conjoint result of different but integrated operations, the profits so desired could be broken up so as to permit the attribution of specific amounts of profit to each or any of the several operation or activities***."

9.1 The court also made a reference to the fact that profits from sale of end product which are brought to tax can be divided into broad groups. The first would comprise those where the entirety of the profit is liable to tax, i.e. without the elimination of income, profits, etc., derived at any earlier intermediate stage. The other group

would comprise of those in which there is either non-liability or a specific exemption of the "income, profits and gains" accruing up to a defined stage. The court held that in the latter case the principle of apportionment resting on the disintegration of the ultimate profit would apply.

10. Based on the ratio of the Supreme Court in Tata Iron and Steel Ltd it is clear that in arriving at an amount that is to be deducted from book profits – which is really to the benefit of the assessee as it reduces the amount of tax which it is liable to pay under the provisions of Section 115JA of the Act, the principle of apportionment of profits resting on disintegration of ultimate profits realized by the assessee by sale of the final product by the assessee has to be applied. In applying that principle it is not necessary as was observed by the Supreme Court to depart from the principle no one could trade with himself – even though it pointedly noticed that House of Lords in Sharkey v. Wernher has opined that there was neither a general proposition that no man could trade with himself and make in its true sense or meaning taxable profits by dealing with himself nor was it universally true, and that, there are situations in which a man could be said to make a profit out of the consumption of his own goods. Since the earlier decision of House of Lords had found favour with the Supreme Court in Kikabhai Premchand (supra), the Supreme Court in Tata Iron & Steel Ltd (supra) decided the case by applying the principle of disintegration of ultimate profits realized on sale of final product.

11. When looked at from this angle it is quite clear that the profit derived by the assessee on transfer of energy from its CPPs to its other units was "embedded" in the ultimate profit earned on sale of its final products. The assessee by taking resort to Explanation (iv) to Section 115JA has sought to apportion, and consequently, reduce that part of the profit which is derived from transfer of energy from its CPPs in arriving at book profits amenable to tax under Section 115JA of the Act.

11.1 The aforesaid principle as evolved by the Supreme Court in the case of Tata Iron & Steel Ltd (supra) has been applied by it in a later decision entitled ***Textile Machinery Corporation Ltd.*** v. ***CIT, West Bengal :107 ITR 195(SC)*** as also, by a Division Bench of this Court in ***CIT*** v. ***Orissa Cement Ltd :254 ITR 412 (Del).***

12. In view of the ratio of the judgments of the Supreme Court referred to above, i.e., ***Tata Iron & Steel Ltd (supra)***, ***Textile Machinery Corporation Ltd (supra)***, as well as, that of the Division Bench of this Court in ***Orissa Cement (supra)*** it is quite evident that assessee's CPPs can as a matter of principle derive profits which is in point of fact embedded in the ultimate profit earned on the sale of the final product.

13. This brings us to the second contention as to whether the assessee is in the business of generation of power. Based on the findings returned both by the CIT(A), as well as, the Tribunal, it cannot be said that the assessee is not engaged in the business. As rightly held by the Tribunal, the assessee had been authorised by the State Electricity Boards to generate electricity. The generation of electricity has been

undertaken by the assessee by setting up a fully independent and identifiable industrial undertaking. These undertakings have separate and independent infrastructures, which are, managed independently and whose accounts are prepared and maintained separately and subjected to audit. The term "business" which prefixes generation of power in Clause (iv) of the Explanation to Section 115JA is not limited to one which is prosecuted only by engaging with an outside third party. The meaning of the word 'business' as defined in Section 2(b) of the Act includes any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture. The definition of 'business', which is inclusive, clearly brings within its ambit the activity undertaken by the assessee, which is, captive generation of power for its own purposes. The approach of the CIT(A) and, consequently the Tribunal, both in law and on facts cannot be faulted with. We are of the opinion that the Assessing Officer clearly erred in holding that, since the main business of assessee is of manufacture and sale of urea it could not be said to be in the business of generation of power in terms of Explanation (iv) to Section 115JA of the Act.

14. In view of the discussion above, we hold that the assessee is entitled to reduce from its book profits, the profits derived from its CPPs, in determining tax payable for the purposes of Section 115JA of the Act.

15. We also concur with the line of reasoning adopted both by the CIT(A), as well as, the Tribunal as regards computation of sale price and consequent profits in terms of Explanation (iv) of Section 115JA of the Act. Since the CIT(A) has categorically recorded in paragraph 42 to 44 the facts with regard to computation and, particular, in paragraph 44 of its judgment that despite being given an opportunity by the Commissioner, nothing had been brought on record by the Assessing Officer, which could persuade them to disagree with the computation filed by the assessee, which had been authenticated by the assessee's auditors, it would be neither fair nor would it be in the interest of justice if we were to remand the matter as requested by the Revenue, at this stage, for the purposes of computation of profits in terms of Explanation (iv) under Section 115JA of the Act.

16. For the reasons given above, we answer the question posed, in favour of the assessee and against the Revenue. In the result, the appeal is dismissed. The parties shall bear their own costs.

RAJIV SHAKDHER, J

BADAR DURREZ AHMED, J

November 21, 2008
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