

आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ 'A' अहमदाबाद ।

**IN THE INCOME TAX APPELLATE TRIBUNAL
“A” BENCH, AHMEDABAD**

**BEFORE SHRI RAJPAL YADAV, JUDICIAL MEMBER
& PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. Nos. 1779 & 1925/Ahd/2014
(निर्धारण वर्ष / Assessment Year : 2009-10)

Mono Steel (India) Ltd., C/o. Vijaykumar & Co., Nr. Sakshar Bazar, Danipath, Bhavnagar-364001	बनाम/ Vs.	The Jt. Commissioner of Income Tax, Range-4, Ahmedabad
The DCIT(OSD)-I, Cir-4, Ahmedabad, Navjivan Trust Bldg., Off. Ashram Road, Ahmedabad	&	Mono Steel (India) Ltd., C/o. Vijaykumar & Co., Nr. Sakshar Bazar, Danipath, Bhavnagar-364001
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AADCM3137C		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

अपीलार्थी ओर से /Appellant by :	Shri Harsh Bhuta, A.R.
प्रत्यर्थी की ओर से / Respondent by :	Shri Saurabh Singh, Sr. D.R.

सुनवाई की तारीख / Date of Hearing	17/05/2018
घोषणा की तारीख /Date of Pronouncement	30/ 05/2018

आदेश/ORDER

PER PRADIP KUMAR KEDIA - AM:

The captioned cross appeals have been filed by the assessee and Revenue against the order of the CIT(A)-VIII, Ahmedabad, dated 31.03.2014 arising in the assessment order dated 28.12.2011 passed by

the Assessing Officer (AO) u/s.143(3) of the Income Tax Act, 1961; (the Act) concerning assessment year 2009-10.

ITA No. 1779/Ahd/2014

2. We shall first take assessee's appeal in ITA No.1779/Ahd/2014 for adjudication.

3. The solitary issue that arises in the appeal of the assessee for adjudication is allowability of commission expenses of Rs.1,20,00,000/- paid to its sister concern M/s. A. M. Ispat Ltd. The assessee has impugned the action of the CIT(A) in not granting relief towards aforesaid concerned payment as business expenditure.

4. Briefly stated, the relevant facts concerning the issue are that the assessee is a domestic company and engaged as manufacturer of iron and steel and has also a separate undertaking producing and distributing power as a captive power plant where the power so generated is mainly consumed by the iron and steel unit of the company. The combined turnover of the assessee stands at Rs.211.58crores on which the assessee has declared a net profit of Rs.17.25crores. During the financial year relevant to assessment year 2009-10, the assessee has paid an aggregate commission of Rs.1,35,25,031/- to certain parties including the sister concern of the assessee M/s. A. M. Ispat Ltd. as against Rs.2,54,496/- in assessment year 2008-09 in the Sponge Iron Plant account. This apart, the assessee has claimed deduction u/s.80IA(4) of the Act treating itself as a power producer. This is the second year of claim of deduction u/s.80IA(4).

5. The return filed by the assessee was subjected to scrutiny assessment. The AO in the course of assessment proceedings questioned the genuineness of the commission payment to M/s. A. M. Ispat Ltd. amounting to Rs.1,20,00,000/-. Similarly, the AO reduced the eligible u/s.80IA(4) deduction claimed by the assessee by Rs.40,17,406/- on the ground that apportionment of expenses between Sponge Iron Plant and power plant unit is not correctly done. The AO accordingly revised the apportionment of expenditure and increased the expenses to be apportioned to 80IA unit (power plant) by Rs.40,17,406/- and thus reduced the net profit arising from 80IA unit for eligible deduction.

6. As regards the commission expenses claimed by the assessee as business expenditure, the AO observed that no such commission has been paid to the sister concern in the preceding year. The assessee as well as the recipient of the commission are closely associated companies where commission has been accounted for at the end of the financial year through a single entry instead of periodic accounting against as per month-wise purchases of iron ore allegedly made with the help of the commission agents. The AO also worked out the commission payment at Rs.1,17,57,634/- calculated @Rs.100/- per Metric Ton (M.T.) on purchases claimed to be made with the help of the commission agent. The AO further observed that the beneficiary of the commission M/s. A. M. Ispat Ltd. has declared its income of Rs.19.78lacs only after taking account the commission payment of Rs.1.20crores. It was thus alleged that the commission payment was made to the sister concern with an objective to nullify the losses of M/s. A. M. Ispat Ltd. The AO next observed that the assessee has not claimed traveling and telephone expenses to support any efforts made by it for procurement of iron ore for the assessee company on which it purportedly earned commission income. The AO also relied upon the

outcome of inquiries made u/s.133(6) of the Act and alleged that the suppliers have denied to have any dealing with M/s. A. M. Ispat Ltd. as a middleman. The AO also noted that during the assessment year, the assessee has purchased iron ore worth Rs.46.30crores (1,17,576 M.T.) as against purchases worth Rs.57.73 crores (1,38,749M.T.) in the preceding assessment year 2008-09. It was further observed that in the preceding assessment year no commission on procurement of iron ore was paid and therefore such commission during the year is uncalled for and unwarranted. On these broad grounds, the AO thus came to the conclusion that procurement of iron ore by the assessee company through M/s. A. M. Ispat Ltd. is not proved. He accordingly held that payment of commission to be not genuine and accordingly denied the claim on this account as business expenditure.

7. Aggrieved, the assessee filed appeal before the CIT(A) without any success.

8. Further aggrieved, the assessee preferred the appeal before the Tribunal.

9. At the time of hearing, the learned AR for the assessee at the outset submitted that the assessee has obtained the services of M/s. A. M. Ispat Ltd. for procurement of iron ore from various parties located in Bellary, Hospet etc. of the State of Karnataka which were suffering from serious problems and unrest and therefore the raw material was not easily accessible. The learned AR next submitted that a meager payment of Rs.100/- per M.T. on procurement of iron ore was made in terms of written agreement. All supplies were obtained from new suppliers. The learned AR thereafter pointed out that the sister concern is also engaged in similar line of activity and is thus adequately experienced and accomplished to obtain such supplies from

their resources for the assessee. The learned AR submitted that the supplies so obtained with the help of the commission agent has enabled it to operate the Sponge Iron Plant uninterruptedly which has saved the assessee from considerable burden on account of fixed expenses cost as well as the operating costs. The learned AR also pointed out that the assessee has deducted TDS on the commission payment and the sister concern has duly accounted for the aforesaid commission payment in its books and offered the same for taxation. The Revenue has duly accepted the receipt of commission as income in the hands of the commission recipient. The learned AR reiterated that it is common knowledge that there was a pervasive difficulty in supply of iron ore at the relevant time due to mounting disturbances. The learned AR next submitted that the AO himself has pointed out that the supply during the year is lesser (1,17,576 M.T.) as compared to the corresponding supply (1,38,749 M.T.) during the preceding year. The learned AR submitted that this was on account of the existing disturbances. The learned AR also pointed out that instead of making efforts for supply of its own and spending considerable amount towards costs of salary and other incidental costs required for continuous follow up, the assessee has obtained the services of the other agency to ensure regular supply in the difficult circumstances. The learned AR vociferously contended that the suppliers of the iron ore during the year are different from that of earlier years. Adverting to concern of AO on the non reply pursuant to the notices u/s.133(6) or non admission of services by the commission agent from some of the suppliers, the learned AR submitted that such outcome of inquiry is quite plausible. The learned AR submitted that the commission agent was working on behalf of the assessee and no commission has been paid by the suppliers to the commission agent and therefore, the office records for such services at the end of suppliers may not necessarily vouch for services rendered in connection with supply.

The learned AR thereafter referred to the decision of a bench of the Tribunal in case of Shri Jitendra J Mehta vs. DCIT in ITA No.5438/Mum/2010 order dated 14.10.2011 for the proposition that denial of involvement of any broker by the suppliers per se is not conclusive where the broker was appointed by the assessee and the brokerage has been paid by the assessee only. In such circumstances, the name of the broker may not appear in the books of the parties. The learned AR thereafter referred to a reply addressed to the AO pursuant to notice u/s. 133(6) from one of the suppliers M/s. Continent Impex (P) Ltd. where it was clearly admitted by the supplier that the assessee was introduced for supply by the commission agent and no fee was paid by them to the agent. The learned AR thus submitted that the factum of rendition of services, at times, cannot be approved to the hilt and requires to be gauged from the surrounding circumstances and in totality of the facts, viz; the supply to the assessee from disturbed regions of Karnataka etc., requires to be read for determination of the claim of the assessee. The learned AR thereafter referred to the profit & loss account of this supplier and submitted that the AO has incorrectly observed that the supplier has not incurred any expenses for rendering services. The learned AR, in conclusion, submitted that the AO as well as the CIT(A) have misdirected themselves in law and on facts in denying the bonafide claim towards commission expenses to the assessee.

10. The learned DR on the other hand relied upon the order of the AO and CIT(A) and submitted that the assessee has failed to provide reasonable basis for incurring of such expenditure.

11. We have carefully considered the rival submissions and perused the material available on record. The allowability of commission expenses paid to sister concern M/s. A. M. Ispat Ltd. is in question.

We take note of the plea raised on behalf of the assessee that the commission has been paid for providing services to the assessee company by way of procurement of iron ore for which TDS was duly deducted and paid on behalf of the recipient. The recipient has also accounted for the commission in its books of accounts and offered the same for taxation as per duly audited financial accounts. We notice that the AO has strongly harped on non reply to the notices issued to the suppliers or negative reply from some if suppliers in pursuance of notice issued u/s.133(6) of the Act. In this regard, the argument on behalf of the assessee that the responsibility of the commission agent was to procure iron ore and to provide support services for and on behalf of the assessee and therefore, there was no requirement for the commission agent to reveal its independent identity to the suppliers from whom they have obtained reply for and on behalf of the assessee company, is quite persuasive. As stated, the commission agent was providing services to the assessee company and not to the suppliers and therefore the plea on behalf of the assessee that the suppliers do not have any tangible reasons to maintain records or documentation in respect of commission agent/middleman is quite plausible. Such view also finds supports from the decision of co-ordinate bench of tribunal in the case of Jitendra J Mehta (supra). The assessee has cited reasons for obtaining services of the commission agent as reproduced at page no.3 of the assessment order. As per the aforesaid reply before the AO, the assessee has submitted that it was suffering the draw back of irregular procurement of iron ore from interior parts of mining area in Karnataka. The assessee had to rely on the local traders and suppliers and had to engage their key persons frequently for said purchases and settlements, disputes and many such reasons. It was contended before the AO that owing to global recession, the prices of iron and steel (sponge iron) was extremely volatile and had fallen from Rs.22,000/- per M.T. in April 2008 to Rs.14,200/- per M.T. in March 2009. A

case was made out by the assessee that such volatility itself requires services of experience middle person on crucial task of procurement of key raw material to ensure a regular supply at commensurate price. The Revenue has mainly negated the factum of commission payment on the ground that commission has been paid to the sister concern with a view to evade incidence of taxation. At this juncture, we notice that commission has been paid to the sister concern which is in the similar line of business and therefore an accomplished player. The recipient of the commission has included the commission in its books of accounts and paid taxes on remaining portion of it after deducting expenses. Noticeably, the supply of iron ore is from altogether new parties qua the parties in the preceding assessment year. This fact also gives considerable strength to the existence of services towards procurement of crucial supply. In the totality of circumstances, it will not be correct to view the claim in a petty foggy manner and put heavy burden on the assessee to discharge onus disproportionately. In our considered view, the volatility in the price, the fall in the quantity of purchase, the existence of global recession and uncertainty, supply from altogether new parties on a regular basis gives strong indicator for acceptance of services albeit from sister concern. We are satisfied in the circumstances that the claim towards commission expenses is bonafide and deserves to be allowed. Consequently, the action of the CIT(A) is set aside and the AO is directed to delete the disallowance towards commission payments.

12. In the result, the appeal of the assessee in ITA No.1779/Ahd/2014 is allowed.

ITA No. 1925/Ahd/2014

13. We shall now advert to the Revenue's appeal in ITA No.1925/Ahd/2014.

14. The solitary issue raised by the Revenue in its appeal is towards validity of action of the CIT(A) on apportionment of certain expenses of Sponge Iron Unit to power plant unit whereby the reduction of deduction claimed u/s.80IA to the extent of Rs.40,17,406/- was reversed by the CIT(A).

15. Briefly stated, the assessee inter alia claimed deduction u/s.80IA(4) on account of deemed profit arising from captive power supply to its Sponge Iron unit. The AO observed that apportionment of expenses between power plant and Sponge Iron plant has not been correctly done which has resulted in understatement of expenses to the tune of Rs.40,17,406/- attributable to power plant. The AO accordingly increased the common and indivisible expenses to the power plant by the aforesaid amount of Rs.40,17,406/- and consequently reduced the eligible deduction u/s. 80IA(4) to this extent. In the first appeal, CIT(A) revisited the issue in question and reversed the action of the AO in sync with earlier order on identical facts concerning 2008-09.

16. Aggrieved, the Revenue has preferred the appeal before the Tribunal to challenge the reversal of the action of the AO with reference to quantum of eligible deduction u/s. 80IA(4) of the Act.

17. With the assistance of the parties concerned, we find that the identical issue came up before the CIT(A) in assessment year 2008-09 where the CIT(A) granted relief to the assessee. The Revenue carried

the matter in appeal before the tribunal in ITA No. 1239/Ahd/2013 order dated 19.03.2018 where action of the CIT(A) was endorsed by the Tribunal. The relevant operative para dealing with the issue by the Tribunal concerning AY 2008-09 in Assessee's own case is reproduced hereunder:

“7. With the assistance of the ld.representatives, we have gone through the record carefully. The first adjustment made by the AO in the eligible profit is reduction of Rs.30,70,108/- on account of allocation of proportionate expenses between power plant as well as sponge iron plant. Details of expenses have been reproduced by the AO in para 3.2.4 on page no.6 of the assessment order. Major items which have been considered by the ld.CIT(A) for exemption from adjustments are as under:

<i>“Factory General Exps. -</i>	<i>Rs. 2456/-</i>
<i>Purchase of Fuel -</i>	<i>Rs. 649571/-</i>
<i>Purchase of stores & spares -</i>	<i>Rs. 924144/-</i>
<i>Repairing & maintenance -</i>	<i>Rs. 773803/-</i>
<i>Transportation Exps. -</i>	<i>Rs. 445355/-</i>
	<i>Total Rs.2795329/-</i>

8. There is no dispute with regard to the proposition that if two units consisting of 80IA and non-80A are being managed and controlled under common administration and being operated in common campus then certain expenses are bound to be identified and related to these units. In case it is a difficult to find out direct attribution, then they are to be allocated on the basis of some scientific formula. The assessee is maintaining separate accounts for both plants. It has identified all direct expenses. The AO has narrated more than 32 types of expenditure under three heads viz. manufacturing expenses, administrative expenses, and financial charges. Thereafter, he made adjustments of Rs.30,70,108/-. The ld.CIT(A) has re-appreciated all these details and worked out that adjustments made on account of five types of expenditure is concerned there could not be adjustments. Thus, we have a look on the nature of expenditure excluded by the ld.CIT(A). It is pertinent to observe that the assessee has contended before the ld.AO that power plant was newly purchased and automatic plant which requires minimum workmen. Secondly, plant was under warranty period and all the minor maintenance of on-going expenses incurred by the manufacturers. It was also pointed out that sponge iron plant undertaking has taken bank loan for installing plant in the year 2005-06 and has direct nexus with the said loan of the said sponge iron plant, whereas, there are no financial charges in power plant undertaking. It has initially raised Rs.4 crores as equity capital. Thereafter Rs.7 crores was raised from family members which is also

reflected in the main books of the company. Minimum investment of Rs.10 crores to Rs.13 crores is from contribution and no finance by any bank. Thus, there was no financial charge. The ld.CIT(A) has observed that as far as fuel expenditure allocated by the AO is concerned this expenditure relates to purchase of furnace oil, R.S. mould oil, light diesel oil, etc. None of these fuel were used in the power plant, which is steam based. Thus, there should not be any allocation from fuel expenditure. Similarly, the ld.CIT(A) has examined details of maintenance expenditure i.e. repairs, stores and spares. The assessee has pointed out that its power plant was fully automatic steam based turbine, and there was no maintenance cost during these years because it was under warranty. More so, details of spare parts were submitted by the assessee showing that these were not used in power plant. In such situation, the ld.CIT(A) has excluded this expenditure. The ld.CIT(A) has also examined other factory general expenditure and transport expenditure. After taking into consideration the finding of the ld.CIT(A), we do not find any reasons to interfere in the order of the ld.CIT(A), so far as issue no.1 is concerned. The ld.CIT(A) has directed the AO not to reduce Rs.27,95,329/- out of eligible profit on account of allocation of expenditure. The order of the ld.CIT(A) on this issue is upheld.

9. *Next item relates to adjustment of coal price. As observed earlier, power plant is being run on steam generated as by-product in the hands of sponge iron plant. In order to ensure smooth supply of steam, power plant needs re-heater which ensures smooth and continuous supply of steam to turbine. In this re-heater waste coal was being used by the assessee. Assessee has purchased waste coal at the rate of Rs.844/- per ton from steel unit. The ld.AO estimated that at least 5% of the total coal used by the assessee must be of first grade. Hence, he made adjustment of Rs.29,02,335/- of coal price i.e. the assessee must have incurred this much expenditure over and above shown by it. The ld.CIT(A) has deleted this adjustment on the ground that when power plant was not in existence then also alleged waste coal was being sold by the sponge iron plant. In the Asstt.Year 2007-08 when power plant was not there, waste coal to the tune of Rs.171.82 lakhs at an average sale price of Rs.990.95 per MT was sold to the outside party. In this year, the assessee has sold waste coal to the tune of Rs.194.45 lakhs to the outside parties. Thus, it was contended that it was not debris or waste. It has useful value and that is why it has marketable value. The ld.CIT(A) has observed that the AO has not pointed out any error in the books of the assessee or any basis to observe that 5% must be taken of is grade-A quality coal for use. On due consideration of the above finding, we are of the view that there is no basis for the AO to harbor a belief that atleast 5% coal must be used by the assessee of a premium quality. It is just a guess work on the basis of surmises. The assessee has shown consumption of coal which has been purchased from steel unit and which has been purchased at market price i.e. at the rate on which steel unit has sold to the outside party.*

Thus, there should not be any adjustment on this count. The ld.CIT(A) has rightly excluded deduction of Rs.29,02,335/- from the eligible profit. The assessee will be entitled to deduction under section 80IA of this amount.

10. Third item considered by the AO relates to electricity rates. The assessee has calculated power price charge from associated unit at the rate of Rs.5.25 per unit. The AO has observed that cost from electricity board comes to Rs.5.19 per unit, and therefore, at this rate assessee should calculate its electricity charges to associate concerns. The ld.CIT(A) did not approve this view point of the AO and deleted adjustments.

11. Before us, the ld.counsel for the assessee placed on record a chart showing month-wise details of power tariff charged by PGVCL and tariff charged by the assessee's power plant to the sponge power plant. He pointed out that as per agreement between the assessee and steel plant, power was supplied at a constant price at Rs.5.25 per unit, whereas PGVCL used to charge price at fluctuating basis. Its rate in April, 2007 was Rs.4.90 per unit which raised to Rs.7.49 per unit in the month of February, 2008. The average price was Rs.5.23 per unit. Similarly, in April, 2008 it has charged at the rate of Rs.5.41 per unit, whereas the assessee charged at Rs.5.75 per unit. The average price from April, 2008 to March, 2009 was Rs.5.75 per unit by PGVCL and Rs.5.75 per unit by the assessee. On the other hand, the ld.DR relied upon the order of the AO.

12. On due consideration of the comparative table of charges of electricity i.e. one of Electricity Board and one by assessee to the iron sponge plant, we are satisfied that the assessee has not charged the price to its associate concern at an higher rate. It is commensurate to the market rate. Considering the finding of the ld.CIT(A) on this issue, we do not see any reason to interfere in it. The AO has rightly been directed not to exclude a sum of Rs.20,75,210/- from eligible profit for grant of deduction under section 80IA of the Act. In view of the above discussion, we do not find any merit in the appeal of the Revenue. It is dismissed."

18. In parity with the view taken by the co-ordinate bench in assessee's own case, we do not see any reason to interfere with the decision of the CIT(A) in this regard. Therefore, we decline to interfere with the order of CIT(A).

19. In the result, appeal of the Revenue in ITA No.1925/Ahd/2014 is dismissed.

20. In the combined result, the appeal of the assessee in ITA No.1779/Ahd/2014 is allowed whereas Revenue's appeal in ITA No.1925/Ahd/2014 is dismissed.

[Pronounced in the open Court on this the 30th day of May, 2018.]

Sd/-
(RAJPAL YADAV)
JUDICIAL MEMBER
Ahmedabad: Dated 30/05/2018

Sd/-
(PRADIP KUMAR KEDIA)
ACCOUNTANT MEMBER

True Copy

S.K.SINHA

आदेश की प्रतिलिपि अद्येषित / Copy of Order Forwarded to:-

1. राजस्व / Revenue
2. आवेदक / Assessee
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद /
DR, ITAT, Ahmedabad
6. गार्ड फाइल / Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण, अहमदाबाद ।