

IN THE INCOME TAX APPELLATE TRIBUNAL "K" BENCH, MUMBAI

BEFORE SHRI PRASHANT MAHARISHI, AM
AND
MS KAVITHA RAJAGOPAL, JM

ITA No. 5242/MUM/2013
(Assessment Year 2007-08)

M/s Hindalco Industries Ltd
3rd Floor, Century Bhavan, Dr A.B.
Rd, Worli
Mumbai-400 030
(Appellant)

ADDL CIT Range 6(3)
5th Floor, Room No. 522,
Aayakar Bhavan, M.K. Road,
Mumbai-20
(Respondent)

ITA No. 5302/MUM/2013
(Assessment Year 2007-08)

DCIT, CIR- 6(3)
5th Floor, Room No. 522,
Aayakar Bhavan, M.K. Road,
Mumbai-20
(Appellant)

M/s Hindalco Industries Ltd
3rd Floor, Century Bhavan, Dr A.B.
Rd, Worli
Mumbai-400 030
(Respondent)

PAN No. AAACH1201R

Assessee by : Shri Percy Pardiwala & S.M.
Bandi
Revenue by : Dr. Samuel Pitta –SR AR

Date of hearing: 22.12.2022
Date of pronouncement : 16.03.2023

ORDER

PER PRASHANT MAHARISHI, AM:

01. These are the cross appeals for A.Y. 2007-08 filed by the Addl. Commissioner of Income Tax, Range-6(3), Mumbai, (the learned Assessing Officer) as well as the assessee against the order of



the learned Commissioner of Income-tax (Appeals)-15, Mumbai, [the learned CIT (A)] dated 20th May, 2013.

02. The learned Assessing Officer in ITA No. 5302/Mum/2013 has raised following grounds of appeal:-

"1. Whether on the facts and in the circumstances of the case and in law, the Ld CIT(A) was justified in allowing deduction u/s 801A in respect of Renupower Unit Nos 7,8,9, & 10 without appreciating the fact that these are captive power plants established by the assessee for generation of power for its own use and are part and parcel of the aluminum plant of the assessee and not a separate industrial undertaking and thereby do not fulfill the condition for eligibility of fulfilling the condition for eligibility of deduction u/s 80IA of the Income Tax Act, 1961.

2. Whether on the facts and in the circumstances of the case and in law the, Ld CIT (A) was justified in holding that for the purpose of calculation of deduction us 80IA of the Income Tax Act in respect of Renupower Unit Nos 7, 8, 9 & 10 the value of power generated is to be calculated by adopting the rates of UPSEB?

3. Whether on the facts and in the circumstances of the case and in law, the Ld CIT(A) was justified in allowing deduction us 80IA in respect of Co-Generation Plant without appreciating the fact that it is captive power plant established by the assessee for generation of power for its own use and are part and parcel of the aluminum plant of the assessee and not a separate industrial undertaking and thereby not fulfill the condition for eligibility of fulfilling the condition for eligibility of deduction us 801A of the Income Tax Act, 1961.



4. *Whether on the facts and in the circumstances of the case and in law the Ld CIT(A) was justified in holding that for the purpose of calculation of deduction u/s 80IA of the Income Tax Act in respect of Co-Generation Plant the value of power generated is to be calculated by adopting the rates of UPSEB?*

5. *Whether on the facts and in the circumstances of the case and in law, the Ld CIT (A) was justified in considering "notional income" from steam which is generated by the assessee itself and consumed by the assessee for the purposes of generation of power for captive consumption i.e. steam (transient product), as part of eligible profits for computing deduction us 80-1A in respect of is Co-Generation Plant?*

6. *Whether on the facts and in the circumstances of the case and in law, the Ld CIT (A) was justified in including "notional income" from steam [which is generated by the assessee itself and consumed by the assessee for the purposes of generation of power for captive consumption (i.e. steam is a transient product), as part of eligible profits for computing deduction u/s 80-1A] when it amounts to earning income by the company from itself?*

7. *Whether on the facts and in the circumstances of the case and in law, the Ld CIT(A) was justified in allowing deduction u/s 80IA in respect of Birla Copper Power Plant I, II and III, without appreciating the fact that these are captive power plants established by the assessee for generation of power for its own use and are part and parcel of the aluminum plant of the assessee and not a separate industrial undertaking and thereby do not fulfill the condition for eligibility of fulfilling the condition for eligibility of deduction u/s 801A of the Income Tax Act. 1961.*



8. *Whether on the facts and in the circumstances of the case and in law, the Ld CIT (A) was justified in holding that for the purpose of calculation of deduction u/s 80IA of the Income Tax Act in respect of Birla Copper Power Plant I, II and III, the value of power generated is to be calculated by adopting the rates of UPSEB?*

9. *Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) was justified in allowing deduction u/s 80-IA from Power Generation Plants (Renu Power Units 7,8,9,10, & Co-generation Plants and Birla Copper Power Plant I, II, and III, without restricting the deduction u/s. 80I-A @ 16% of investment, which was considered reasonable rate of return in case of Power Generation Plants by Ministry of Power while fixing tariff for electricity.*

10. *Whether on the facts and in the circumstances of the case and in law, the Ld. CIT (A) was justified in allowing deduction u/s. 80IA in respect of Foil Plant at Silvasaa without appreciating the fact that the assessee do not fulfill the condition for eligibility the condition for eligibility of deduction u/s. 80IA of the Income Tax Act, 1961.*

11. *Whether on the facts and in the circumstances of the case and in law, the Ld CIT(A) was justified in allowing deduction us 80IA in respect of Wheel Plant at Silvassa without appreciating the fact that the assessee do not fulfill the condition for eligibility of fulfilling the condition for eligibility of deduction us 80IA of the Income Tax Act, 1961.*

12. *Whether on the facts and in the circumstances of the case and in law, the Ld.CIT (A) was justified in allowing deduction u/s. 80IA in respect of Hirakud Power*



Unit No 2 without appreciating the fact that the assessee do not fulfill the condition for eligibility of fulfilling the condition for eligibility of deduction u/s 80IA of the Income Tax Act, 1961.

13. Whether on the facts and in the circumstances of the case and in law the Ld CIT(A) erred in treating the service charges received in respect of Income from House Property as income from Other Sources and directing the AO to allow deduction of expenses erred for earning the income from service charges us 57 on a priori basis when no details have been filed by the assessee as to what is the nature of receipt of amount under the head "service charges" and also when no details have been filed by the assessee as to what is the nature of expenses incurred. If any details have been filed before the CIT(A) during the course of appeal proceedings then decision has been rendered in violation of Rule 46A of the Income Tax Rules and order deserves to be set aside and remanded back to the file of the A.O.

14. Whether on the facts and in the circumstances of the case and in law the Ld CIT(A) erred in treating the service charges received in respect of Income from House Property as Income from Other Sources without appreciating the fact that receipt was incidental to earning income from House Property and ought to have been treated as part of Income from House Property?

15. Whether on the facts and in the circumstances of the case and in law the Ld CIT (A) erred in directing to allow deduction of expenses earned for earning the income from service charges u/s 57 without appreciating the fact that the expenses incurred is in the nature of repairs, maintenance, power and electricity charges and since the receipt is incidental to earning income from house

property no other deduction other than provided in Section 24 of the Income Tax Act 1961 is allowable?

16. Whether on the facts and in the circumstances of the case and in law, the Ld CIT (A) erred in deleting the adjustment made by the TPO on account of receipt of interest on advance against supply?

17. Whether on the facts and in the circumstances of the case and in law, the Ld CIT (A) erred in deleting the adjustment made by the TPO by observing that the advance is "Trade Advance", without appreciating the fact that the TPO has clearly brought out that there was no agreement for supply and that the transaction entailed similar risk as loan given?"

03. The assessee, Hindalco Industries Ltd. in ITA no.5242/Mum/2013, has raised following grounds of appeal:-

"GROUND I: UPHOLDING DISALLOWANCE OF ₹ 14,80,77,732/- UNDER SECTION 43B OF THE ACT:

- 1. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in upholding the action of the AO in disallowing the interest amounting to ₹ 2,50,50,049/- under clause (d) and (e) of section 43B of the Act being interest accrued but not payable on March 31, 2007 to Public Financial Institutions and Scheduled Banks.*
- 2. The learned CIT(A) further erred in upholding the action of AO in not allowing deduction towards provision for leave encashment of ₹ 12,28,27,683/- being difference of provision of ₹ 16,12,02,307/- considered as allowable u/s*

43B(f) and ₹ 3,83,74,624/- paid by appellant before the date of filing of return of income.

3. The Appellant prays that the aforesaid disallowances be deleted.

Ground II: UPHOLDING DIALLOWANCE OF INTEREST PAID ON LATE PAYMENT OF TDS OF ₹1,15,860/- TO THE INCOME TAX DEPARTMENT:

1. On the facts and circumstances of the case and in law, the Ld.CIT (A) erred in upholding the action of the AO in disallowing the interest paid of ₹ 1,15,860/- on late payment of TDS to the Income Tax Department on the alleged ground that the same is not in the nature of compensatory nature and hence, the same was not allowable under section 37(1) of the Act.
2. The Appellant prays that the aforesaid disallowance of interest paid of ₹ 1,15,860/- be deleted.

GROUND NO III: UPHOLDING ADDITION UNDER SECTION 92CA OF THE ACT MADE IN RESPECT OF CORPORATE GUARANTEE FEE OF ₹ 7,88,89,962/-:

1. On the facts and in the circumstances of the case and in law, the Ld. CIT (A) erred in upholding the action of the AO/TPO in re-computing the 'Arm Length Price' of the Corporate Guarantee Fee charged by the Appellant to its AE.
2. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in upholding the action of the AO/TPO and not appreciating the submission of the Appellant that the AEs were

able to borrow at an interest cost which was lower by 25 bps because of Corporate Guarantee given by the Appellant.

- 3. On the facts and circumstances of the case and in law, the Ld. CIT (A) erred in upholding the action of the AO/TPO disregarding the quotation received from an independent bank which had agreed to charge only 25 basis points for a similar facility.*
- 4. On the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in upholding the action of the AO/TPO in arbitrarily accepting a quotation from a bank to a third party as a comparable without taking into consideration the comparability of the functions performed, assets employed and risks undertaken by the Appellant and it's AE vis-à-vis this third party quote.*
- 5. The Appellant prays that the arm's length price of Corporate Guarantee Fee be restricted to 25 bps and addition of ₹ 7,88,89,962/- needs to be deleted.*

GROUND IV: UPHOLDING DISALLOWANCE OF PROVISION FOR CRYSTALISED LIABILITY FOR DAMAGES AMOUNTING TO ₹20 CRORES

- 1. On the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in upholding the action of the AO in disallowing provision for crystallized liability for damages payable to Air India amounting to ₹ 20 Crores.*
- 2. The appellant prays that provision for crystallized liability for damages should be allowed.*

GROUND V: UPHOLDING DISALLOWANCE OF BORROWING COST FOR PROJECTS CAPITALIZED BUT CLAIMED AS REVENUE U/S 36(I)(iii) ₹78,42,000/-

1. *On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in upholding the action of the AO in disallowing deduction of interest capitalized to the tune of ₹ 78,42,000/- u/s. 36(I)(iii).*
2. *The learned CIT(A) erred in recognizing the submissions of appellant stating that, as the appellant has not borrowed funds for the acquisition of specific asset the revenue deduction must be allowed for such interest capitalized u/s. 36(I)(iii).*
3. *The appellant prays that such disallowance of revenue deduction should be deleted.*

GROUND VI: UPHOLDING LEVY OF INTERST U/S 234B, 234C, AND 234D OF THE ACT

1. *On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in upholding the action of AO of levying interest under section 234B, 234C and 234D of the Act.*
2. *The appellant prays that levy of interest under section 234B, 234C and 234D of the Act be deleted.*

GROUND VII – DISMISSAL OF GROUND RELATING TO LEVY OF PENALTY UNDER SECTION 271(1) (C)

On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in dismissing the

ground relating to levy of penalty under section 271(1)(c) of the Act.

GROUND VIII: ENHANCEMENT OF 14A DISALLOWANCE BY ₹ 41.87 CRORES.

- 1. On the facts and in the circumstances of the case and in law, the Ld. CIT (A) erred in not accepting the disallowance offered by appellant and accepted by the learned AO of ₹ 25,92,424/- but also enhancing the disallowance by ₹ 41.8708 Crores towards interest and administration expenses thus aggregating the total disallowance to ₹ 42.13 Crores under sections 14A of the Act.*
- 2. Further, the Ld. CIT (A) erred in applying Rule 8D of the Income-tax Rules, 1962 ("the Rules") in an interest manner through Rule 8D of the Rules was not applicable to the captioned Assessment Year.*
- 3. The Appellant prays that the enhancement made by the Ld.CIT (A) amounting to ₹ 41,87,08,000/- be deleted."*

04. The brief facts of the case shows that assessee is a company engaged in manufacturing and selling of Aluminium metal and various other products and engaged in generation of power. It filed its return of income on 30th October, 2007 at a total income of ₹2517,48,19,484/-. The assessment order under Section 143(3) was passed by the learned Assessing Officer on 11th January, 2011 at a total income of ₹3319,12,93,411/-. Aggrieved by that order, assessee preferred the appeal before the learned CIT (A)-15, who passed the appellate order on 20th May, 2013, against which both the parties are aggrieved and therefore, this cross appeal.



05. First we come to the appeal of the assessee in ITA No.5242/Mum/2013.
06. As per no. 1 to 3 of ground no. I, assessee challenge applicability of the Provision of Section 43B of the Income-tax Act, 1961 (the Act).
07. As per ground no. 1, assessee challenges that disallowance of interest of ₹2,52,50,049/- being interest accrued but not payable to public financial institutions and scheduled banks. At the time of hearing, assessee did not press the same hence dismissed.
08. Ground no.2 is with respect to the disallowance of leave encashment expenditure under Section 43B (f) of the Act. The assessee has made a provision ₹12,28,27,683/- out of sum of ₹16,12,02,307/- being difference of provision and hence, allowable under Section 43B (f) of the Act. Sum of ₹3,83,74,624/- is paid before the due date of filing of return of income. The learned Assessing Officer disallowed leave encashment expenditure not paid before the due date of filing of return of income. The assessee says that the Hon'ble Calcutta High Court in case of Exide Industries vs. Union of India 292 ITR 470 is in favor of the assessee. We find that the learned Assessing Officer disallowed the balance amount of ₹12,28,27,683/-. The learned CIT (A) following the decision of Hon'ble Supreme Court which upheld the constitutional validity of clause (f) of section 43B of the Act, thereby deduction is allowable of leave encashment provision fee paid before due date of filing of the return. Accordingly, we do not find any merit in ground no.2 of the appeal hence, dismissed.
09. Ground no.3 is in general and hence dismissed.
010. Ground No. II is with respect to disallowance of interest paid on late payment of TDS of ₹1,15,860/-. Assessee does not want to



press it, in view of smallness of the amount. The learned CIT (A) has categorically held that such payment is not allowable in view of the decision in assessee's own case for earlier year. We find that interest on late payment of TDS of ₹1,15,860/- is neither an expenditure incurred wholly and exclusively for the purpose of the business hence, disallowable under Section 37(1) of the Act. Further, it is also not an interest on borrowed capital. Hence, it is also not allowable as interest expenditure under Section 36(1) of the Act. The learned CIT (A) has correctly decided this issue on the principle of judicial precedents available as well as in accordance with the provisions of the law. Ground no. II is dismissed.

011. Ground no. III, is with respect to corporate guarantee fee of ₹7,88,89,962/-. The co-ordinate Bench for A.Y. 2005-06 has upheld the benchmarking adopting the Arm's length rate of 0.5%. The above issue reached before the Hon'ble High Court in ITA No.1316 of 2016, wherein vide order dated 22nd April, 2019, the benchmarking adopted by the ITAT was upheld. The fact shows that assessee has given a corporate guarantee to M/s Birla Mt. Gordon Pty Ltd. and M/s Birla Nifty Pty Ltd. These Associated Enterprises have taken loan from HSBC Bank, Australia. It had charged corporate guarantee fee of 0.25%. The learned Transfer Pricing Officer held that assessee should have charged guarantee fee @ 1.75%. The learned CIT (A) following his own order for earlier year dismissed the appeal of the assessee. Now, this issue is covered by the decision of Hon'ble Bombay High Court upholding the rate of 0.5% as Arm's Length Price of guarantee fees. Respectfully following the decision of Honourable High court in case of assessee, the learned Transfer Pricing Officer/ Assessing Officer is directed to restrict the addition to 0.5% of the corporate guarantee fees. Accordingly, ground no. III of the appeal of the assessee is party allowed.



012. Ground no. IV, is with respect to disallowance of provision of ₹20 crores being crystallized liability for damages. The fact of the case shows that assessee has made provision of ₹20 crores on account of damages in respect of possession of 10,496 sq.ft., on 15th floor of Air India building, Nariman Point, Mumbai. The fact shows that Indian Aluminium Company Ltd. merged with the assessee was occupying on lease 10,496 sq. ft. on 15th floor of Air India Building from Air India. The tenancy agreement was up to 31st March, 1995. The owner refused to extend the agreement. Despite this, the Indian Aluminium Company Ltd. occupied the possession. Due to this evacuation proceedings resulted into order dated 3rd October, 2001, in favour of the owner holding that the company is in unauthorized occupation of the above premises. The assessee approached City Civil Court, where the evacuation proceedings were stayed. The owner filed a suit for damages. On 20th November, 2003, damages were claimed of ₹32.43 crores, assessee did not recognize anything till F.Y. 2005-06. In November, 2005, Air India filed an affidavit for examination of its witness. For this claim a provision of ₹20 crores was made on prudent basis. Assessee claims that such provision is allowable to the assessee. The learned Assessing Officer disallowed the same holding that assessee has claimed merely a provision in the books of account. The liability is uncertain. The learned Assessing Officer relied on the decision of the Hon'ble Supreme Court in case of Indian Smelting and refining Co. Ltd. vs. CIT 248 ITR 4. Assessee approached the learned CIT (A), who also found that no event had taken place in the year under consideration. The claim of the assessee is merely a provision. The learned CIT (A) further noted that A.Y. 2012-13, such claim has been made in the return of income. As it is mere provision, disallowance was upheld. On hearing the parties and careful examining the facts of the case, we find that there is no event during the year, wherein any liability amounting to ₹20 crores has crystallized



during the year. It is absolutely merely a provision out of the total liability of ₹34 crores, and therefore, it is not an expenditure incurred during the year. Further, the assessee has already been allowed deduction of this claim in A.Y. 2012-13. We do not find any reason that such a claim, which is merely a provision without any basis about happening of any event in previous year, is allowable. Accordingly, ground no. IV of the appeal is dismissed.

013. Ground no. V is with respect to the disallowance of interest on borrowing cost which was not pressed before us, hence same is dismissed.
014. Ground no VI is against levy of interest under Section 234B, 234C and 234D of the Act which is consequential in nature and hence, dismissed.
015. Ground no. VII is with respect to initiation of penalty under Section 271(1) (c) of the Act, which is premature and hence, dismissed.
016. Ground no. VIII is against the enhancement of disallowance under Section 14A of the Act of ₹41.87 crores by the learned CIT (A). The facts of the case shows that assessee earned dividend income of ₹166,36,13,489/- which is claimed as exempt under Section 10(34) of the Act. Assessee on its own has disallowed expenditure of ₹25,92,424/- under Section 14A of the Act. The learned Assessing Officer asked to justify the above disallowance. The assessee submitted the detail reply submitting that three employees of the company invest their time with these activities. Assessee named four employees given number of hours put in by them into activity and submitted that employee cost of ₹23,32,356/- is disallowance under Section 14A of the Act. Assessee further identified interest expenditure of ₹86,125/-, Demat charges of ₹56,400/- and other administrative expenditure of ₹1,17,543/-



aggregating to ₹25,92,424/-. The learned Assessing Officer accepted the suo moto disallowance and did not make any further disallowance. The assessee approached the learned CIT (A) on the ground of appeal. However, the learned CIT (A) considering disallowance made by the learned Assessing Officer as per the disallowance offered by the assessee and based on his earlier year's orders for A.Y. 2005-06 issued enhancement notice. The assessee replied the same. Despite this, the learned CIT (A) enhanced the disallowance by ₹42.13 crores applying the provision of Rule 8D of the Rules. Assessee aggrieved with that. It was submitted that identical issue arose in assessee's own case for A.Y. 2005-06, wherein the co-ordinate Bench has deleted the disallowance and further rule 8D is operative from A.Y. 2008-09 only. It was submitted that against the order of the co-ordinate Bench the appeal of the Revenue was not admitted by honourable High court. We find that this issue is squarely covered in favour of the assessee by the decision of the co-ordinate Bench in assessee's own case for A.Y. 2005-06 which has been upheld by the Hon'ble High Court, respectfully following the decision of the Hon'ble High Court we allow the ground no. VIII of the appeal of the assessee and directed the learned Assessing Officer to delete the disallowance of ₹41.87 crores under Section 14A of the Act.

017. Accordingly, ITA No.5242/Mum/2013 filed by the assessee is partly allowed.
018. Now we come to the appeal of the Revenue.
019. The first ground of appeal is with respect to the deduction under Section 80IA of the Act allowed by the learned CIT (A) on the captive power plant for generation of power for its own use. The claim of the learned Assessing Officer is that these are not a separate industrial undertaking but are part and parcel of aluminum plant of the assessee. Therefore, they do not fulfill



the condition of the separate industrial undertaking; accordingly, the deduction under Section 80IA of the Act is not allowable.

020. We find that the identical issue arose in case of the assessee for A.Y. 2005-06, wherein it has been held that power plants established by the assessee for generation of power for its own use are independent and separate industrial undertaking from its aluminum plant. Accordingly, we find that this ground of appeal deserves to be dismissed. Therefore, ground no.1 is dismissed.
021. Ground no.2 is with respect to the calculation of deduction under Section 80IA of the Act by adopting the rate of UP State Electricity Board (UPSEB). The learned Assessing Officer held that market value of the goods is required to be determined for computation of rate of electricity transferred from power undertaking to aluminum unit. For this proposition, the learned Assessing Officer was of the view that correct market value of the price of electricity are not UPSEB rates, when the matter reached before the learned CIT (A), he held that power generated is to be calculated by the rates of State Electricity Board. When this issue reached before the Hon'ble High Court, Hon'ble Bombay High Court in assessee's own case upheld the decision of the co-ordinate Bench holding that State Electricity Board rates has to be taken as market value for computing deduction under Section 80IA of the Act. Therefore, respectfully following the decision of Hon'ble Bombay High Court, we direct the learned Assessing Officer to compute the deduction under Section 80IA of the Act considering the rate of State Electricity Board as market value. Ground no.2 of the appeal is dismissed.
022. Ground no.3 is with respect to the deduction under Section 80IA of the Act on co-generation plant holding that they are not separate undertaking, ground no.4 is with respect to market

rate of the electricity at the rate specified by the State Electricity Board. It was claimed that both these issues are covered by the decisions of the co-ordinate bench in assessee's own case holding that co-generation plant are separate industrial undertaking and further the market value for computation of deduction can be taken at the rate of UPSEB. Accordingly, ground nos.3 and 4 of the appeal are dismissed.

023. Ground no.5 is with respect to the deduction claimed by the assessee under Section 80IA of the Act on steam generation plant. The assessee claims that this issue does not arise from the order of the learned Assessing Officer or the order of the learned CIT (A). The learned Departmental Representative could not show us any reason why this ground is taken in this appeal. Similarly, ground no.6 of the appeal which also does not arise from the order of the lower authorities. Accordingly, ground nos.5 and 6 are dismissed.
024. Ground no.7 is with respect to disallowance deleted by the learned CIT (A) of deduction under Section 80IA of the Act of Birla Copper Power Plant, generating captive power. The claim of the learned Assessing Officer is that these are not separate industrial undertaking. This issue has already been decided by the co-ordinate Bench in assessee's own case for A.Y. 2003-04, till A.Y. 2006-07.
025. Further, ground no.8 is with respect to the rate to be adopted for computing deduction under Section 80IA of the Act. This issue is also decided in favour of the assessee by the co-ordinate Bench and upheld by the Hon'ble High Court holding that the rates charged by the State Electricity Board can be considered as the market rate for the purpose of deduction under Section 80IA of the Act. Accordingly, ground no.7 and 8 are dismissed.



026. Ground no.9 is with respect to the claim of the learned Assessing Officer that deduction under Section 80IA of the Act should be restricted at the rate of 16% of the investment which was considered reasonable rate of return in case of power generation plants by Ministry of Power while fixing tariff for electricity. It is found that the learned Assessing Officer has simply denied the deduction under Section 80IA of the Act to the various power plants of the assessee. Therefore, it was not an issue before the learned CIT (A) that whether the deduction under Section 80IA of the Act is to be restricted to 16% of total investment. He find that there is no mandate under Section 80IA of the Act to restrict the deduction under Section 80IA of the Act at the rate of 16% of investment. It is also not the claim of the assessee that even if the profit is lower of the eligible unit it may be allowed deduction of 16% of the total investment. Further, the mandate of section 80IA of the Act clearly shows that the profit and gains derived by an undertaking is allowable as deduction. The profit is also required to be computed in accordance with sub section 9 and sub section 10 of that section. Accordingly, we do not find any merit in this ground. Further, several judicial precedents also say that profit is required to be computed by taking the market rate of goods and services. Further, deduction under Section 80IA of the Act is not a presumptive deduction hence, ground no. 9 is dismissed.
027. Ground no.10 is with respect to the deduction under Section 80IA of the Act in respect of foil plant at Silvassa. Assessee commenced production in FY 1997-98. In view of the loss in earlier years, assessee did not claim any deduction. During the current year also there was no profit. The learned Assessing Officer himself held that eligibility would be considered when actual deductions are claimed. The learned CIT (A) directed the learned Assessing Officer to allow deduction when there is a claim in a particular year. We find that as there is no profit during the year, this ground is not required to be adjudicated



now, hence, dismissed, similarly, ground no.11 with respect to Wheel Plant at Silvassa.

028. Ground no.12 is with respect to deduction under Section 80IA of the Act of Hirakud Power Plant. This power plant commenced production in A.Y. 2006-07 and this is the second year of the deduction. The learned Assessing Officer vide paragraph no.8.1 noted that assessee has incurred loss on this unit and the assessee has exercised his option to not to claim any deduction for A.Y. 2007-08. Though the learned Assessing Officer has also held that it is not a separate industrial undertaking. We find that the Hirakud Power Plant no.2 is a separate industrial undertaking. Therefore, on this ground deduction cannot be denied. However, same would be decided in the year in which deduction is claimed. Accordingly, ground no. 12 of the appeal is dismissed.
029. Ground no.13 to ground no.15, are with respect to the characterization of the income. The fact shows that the assessee is a co-owner of Industry House in Calcutta Company, treats the receipt from this property as business income of the assessee. The claim of the assessee is that it has acquired this property and is exploiting it by giving on rent. The assessee is also claiming deduction of depreciation and several other expenditures allowable from business income. The alternative claim of the assessee is that if rent and service charges are not treated as business income same are income from other sources and deduction in respect of depreciation and other expenses should be allowed to the assessee. When the matter reached before the learned CIT (A), the learned CIT (A) following the decision of the co-ordinate bench in assessee's own case for earlier years held that rental income is income from house property and service charges is income from other sources. The learned Assessing Officer was directed to allow deduction of expenses from service charges. As this issue is covered by the



order of the co-ordinate bench in assessee's own case and there is no change in the facts of the case compared to earlier years and further no new additional evidences are placed before the lower authorities, we dismiss ground no.13 to 15 of the appeal.

030. Ground no. 16 and 17 is with respect to the transfer pricing adjustment. Assessee has received interest of ₹2.34 crores from its Associated Enterprises on advances against the supply based on professional invoice for import of copper concentrate. Assessee has charged interest at 3 months LIBOR + 50 basis points for the purpose of short term advance given to its Associated Enterprises. Assessee contended that it has received buyer's credit at lower rate. The Assessing Officer was of the view that assessee has charged LIBOR + 50 basis points, however, it has advanced loan to its Associated Enterprises at 6.75%, the learned Assessing Officer rejected the contention of the assessee holding that advances against supply and short term loan to the same Associated Enterprises bears similar kind of risk and there is no reason for charging interest for advances against supply at lower rate than interest of short term loan. The learned Assessing Officer made an adjustment of ₹44,95,756/-. Assessee challenged the same before the learned CIT (A). The learned CIT (A) decided this issue vides para no. 16.4 of his own order. He held that the learned Transfer Pricing Officer has not brought any independent CUP and further the advances given by the assessee is trade advances to be adjusted against the supplies. He followed the decision of A.Y. 2006-07 in the case of the assessee, deleting the adjustment. Therefore, the learned Assessing Officer is in appeal before us. The assessee contested the above ground submitting as under:-

"The TPO / AO have given a finding that there is no agreement with the AE with regard to payment of advance against supply. However, this finding is incorrect as Clause



8.3 of agreement dated 30.04.2004 with the AE stipulates payment of advance against provisional invoice. AE against

2. The TPO / AO have compared the rate of interest on advance to the supply with the rate of interest on loan given to the AE, considering it as internal CUP. This comparison itself is false as the transaction of advance against supply of goods is not at par with the transaction of loan.

3. Where there is no independent CUP which has been brought by the TPO / AO and that the assessee has charged higher rate of interest than it has paid to banks on buyer's credit obtained from bank and further the fact that such advance given by assessee is a trade advance to be adjusted against the supplies dispatched by AE to assessee, the rate of interest charged by assessee from its AE is considered to be at arm's length.

4. The Hon'ble High Courts and Tribunals have held in several cases that the international transaction of loan being in foreign currency, the applicable rate of interest would be EURIBOR / LIBOR Rate. EURIBOR/ LIBOR and basis point. Such cases are as under:

i. CIT V/s. Cotton Naturals (I) Pvt. Ltd. (2015) 55 taxmann.com 523 (Delhi HC)

ii. CIT V/s. Vaibhav Gems Ltd. (2017) 88 taxmann.com 12 (Rajasthan HC)

iii. CIT V/s. Tata Autocamp Systems Ltd. (2015) 56 taxmann.com 206 (Bombay HC)

iv. DCIT V/s. Tech Mahindra Ltd. (2011) 46 SOT 141 (Mumbai ITAT URO)



v. Piramal Glass Ltd. V/s. DCIT (2017) 80 taxmann.com 68 (Mumbai ITAT)

vi. Four soft Ltd. V/s. DCIT 142 TTJ 358 (Hyderabad ITAT)

vii. Shiva Industries and Holdings Ltd. V/s. ACIT (2012) 26 taxmann.com 96 (Chennai ITAT) iii. VVF Ltd. V/s. DCIT (2010) TII-04 (Mumbai ITAT)

viii. VVF Ltd. V/s DCIT (2010) TII-04 (Mumbai ITAT)”

031. The learned Authorized Representative further referred to page no. 156 of the Paper Book, wherein at paragraph no.4.2.2 the above international transaction is explained.
032. The learned Departmental Representative supported the order of the learned Assessing Officer.
033. We have carefully considered the rival contentions and perused the orders of the lower authorities. During the year, assessee has charged interest to its Associated Enterprises against advance payment for procurement of goods. As per the TPSR, the assessee has received interest at the rate of 3 months LIBOR rate+ 50 basis points, which is lower than the rate charged to Associated Enterprises. We find that buyers' credit is allowed by the bank to the Hindalco. Generally it is given as credit facility for the Indian exporters. Therefore, we do not find any reason to agree with the TPSR of the assessee. Further the learned Transfer Pricing Officer has adopted the short term loan interest rate of 6.75% to the same Associated Enterprises. We find that it is not a transaction of a loan but advances given against supply of goods. Therefore, the benchmarking rate of the assessee as well as the learned Transfer Pricing Officer both are not correct. The learned CIT (A) has deleted the addition same comparing the buyers' credit obtained by assessee. In view of this, we set aside the ground no. 16 and 17 of the appeal back to the file of the learned Assessing Officer with a



direction the assessee to benchmark this international transaction by adopting the most appropriate method and giving the comparability study. The learned Assessing Officer may examine the same and decide the issue afresh by considering the decisions cited. Accordingly, ground nos. 16 and 17 of the appeal of the learned Assessing Officer are allowed with above direction.

034. In the result, the appeal of the learned Assessing Officer is partly allowed.

035. In the result, both the appeals are partly allowed.

Order pronounced in the open court on 16.03.2023.

Sd/-
(KAVITHA RAJAGOPAL)
(JUDICIAL MEMBER)

Sd/-
(PRASHANT MAHARISHI)
(ACCOUNTANT MEMBER)

Mumbai, Dated: 16.03. 2023
Sudip Sarkar, Sr.PS



Copy of the Order forwarded to:

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

BY ORDER,

True Copy//

Sr. Private Secretary/ Asst. Registrar
Income Tax Appellate Tribunal, Mumbai