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

BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER &
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER

ITA No.1022/Mum/2018
ITA Nos. 296 & 297/Mum/2021
(A.Ys.2011-12 to 2013-14)

Essel Mining & Industries Limited Industry House, 18th Floor, 10 Camac Street, Kolkata – 700017	Vs.	Dy. CIT, CC-1(4) 9th Floor, Old CGO Building, M.K. Road, Mumbai - 400020
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No: AAACE6607L		
Appellant	..	Respondent

ITA No.1549/Mum/2018
(A.Y.2013-14)

JCIT, CC-1(4) R. No. 902, Pratistha Bhavan, 9th Floor, Old CGO Building, Annexe, Mumbai – 400 020	Vs.	M/s Essel Mining & Industries Limited Industry House, 18th Floor, 10, Cama Street, Kolkata- 700017
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No: AAACE6607L		
Appellant	..	Respondent

Appellant by :	Yohesh Thar & Sukanya Jayaram
Respondent by :	Biswanath Das

Date of Hearing	22.02.2023
Date of Pronouncement	27.04.2023

आदेश / O R D E R

Per Amarjit Singh (AM):

All these 4 appeals filed by the assesse and the revenue are based on identical facts and similar issue therefore for the sake of convenience

all these appeals are adjudicated together by taking ITA No. 1022/Mum/2018 and 1549/Mum/2018 as lead case and its finding will be applied mutatis mutandis wherever it is applicable.

ITA No. 1022/Mum/2018

"1. That on the facts and in the circumstances of the case and in law, the Commissioner of Income Tax (Appeals) thereinafter referred to as the CIT(A)) erred in holding that the proceedings u/s 153C r.w.s. 153A of the Income Tax Act 1961 (hereinafter referred to as the Act) has been validly initiated by the Assessing Officer (hereinafter referred to as AO)

2. That on the facts and in the circumstances of the case and in law, the CIT(A) erred in not appreciating the fact that since the entire borrowed fund has been utilized by the appellant exclusively for business purposes, no part of the interest paid by it, could be disallowed u's 14A by applying the Rule 8D(2)(ii) and thus he erred in not deleting the entire disallowance u/s 14A/Rule 8D(2)(ii).

3. That on the facts and in the circumstances of the case and in law, the CIT(A) erred in not appreciating the fact that the AO while computing average investment for the purpose of disallowance u/s 14A/Rule 8D has wrongly considered investments in subsidiary and associate entities.

4. That on the facts and in the circumstances of the case and in law, the CIT(A) erred in not appreciating the fact that the disallowance u/s 14A should not exceed the exempted dividend income.

5. That on the facts and in the circumstances of the case and in law, the CIT(A) erred in not allowing a deduction of Rs.20,77,90,035/- in AY 2013-14 against the additions made in AYS 2008-09 to 2011-12 on account of alleged illegal mining.

5.1 That the CIT(A) erred in confirming the action of AO of double taxation on the same production quantity once in the year in which production was shown in mining returns and secondly when the same production was shown in the Tax Audit Report.

5.2 That the CIT(A) erred in not appreciating the fact that appellant is not seeking any benefit of Revenue in the proceeding u's 153A/ 153C of the Act. He failed to appreciate that the appellant's alternate claim of deduction of Rs. 20,77,90,035/- in AY 2013-14 is consequential to additions made in proceeding u/s 153A/153C in AY'S 2008-09 to 2011-12.

6. That without prejudice to the contention raised in Ground No. 5 above, the CIT(A) failed to appreciate that the Supreme Court decision in the case of Goetz (India) Ltd. was relevant only in relation to the Assessing Officer's power and not in respect of the power of an Appellate authority and thus he erred in applying the said decision in relation to the claim made by the appellant at the Appeal stage.

7. That the appellant craves leave to add, alter or withdraw any ground or grounds of Appeal at or before the hearing of the Appeal."

2. Fact in brief is that return of income declaring total income of Rs.9,33,11,95,250/- was filed on 30.11.2013. The assesse engaged in the business of manufacturing of Nitrogen Gas and Ferro Alloys, trading of iron ore and Ferro Alloys, generation of electricity (Wind Power Mill) and Railway Sidings for captive use ad operating lease of solar energy equipment's. A search and seizure action u/s 132(1) of the Act was conducted on 16.10.2013 at the premises of M/s Aditya Birla Management Corporation Pvt. Ltd., 4th Floor, UCO Bank building, Parliament Street, New Delhi. The assessing officer passed order u/s 153C r.w.s. 143(3) of the Act on 30.12.2016 determining the total income at Rs.10,73,61,93,720/-. The further fact of the case are discussed while adjudicating the ground of appeal filed by the assessee.

3. Ground No. 1 is not pressed therefore the same stand dismissed.

Ground No. 2 to 4: disallowance u/s 14A r.w.rule 8D:

4. During the course of assessment the A.O noticed that assesse company has earned dividend income of Rs.1,08,39,244/- and claimed as exempt u/s 10(34) of the Act. The assesse has made disallowance of Rs.8,82,624/- towards expenditure incurred for earning the exempt income. On query, the assessee explained that the dividend income has been earned by the company on mutual fund unit and explained that it had not incurred any direct expenditure in relation to earning the exempt income. However, the A.O has not agreed with the submission of the assessee and observed that assessee has not computed disallowance of expenditure in accordance with Sec. 14A r.w.rule 8D(2)(ii) of the Act. Therefore, in accordance with Rule 8D the A.O has

computed the disallowance of expenditure to the amount of Rs.26,59,46,510/-.

5. Aggrieved, the assesse filed the appeal before the ld. CIT(A). The ld. CIT(A) held that in the case of the assessee itself the ITAT Kolkata vide ITA No. 786/Kol/2013 for assessment year 2008-09 vide order dated 10.03.2017 directed the assessing officer for calculating the disallowance under rule 8D, only those shares should be considered which has yielded dividend income during the year under consideration and the A.O was directed to follow the decision of ITAT, Kolkata as in the case of the assesse itself for A.Y. 2008-09.

6. During the course of appellate proceedings before us the ld. Counsel contended that disallowance of interest u/s 14A r.w.rule 8D (2)(ii) is not warranted as the assesse has sufficient own funds which exceeded the investment made. In this regard, the ld. Counsel further submitted that the issue in the appeal is covered in favour of the assessee by the decision of ITAT Kolkata in the case of the assesse itself vide ITA No. 786/Kol/2013 for A.Y. 2008-09 and further by the ITAT in the case of the assessee for assessment year 2009-10 vide ITA No. 1069 & 2064/Kol/2013 for A.Y. 2009-10 & ITA No. 1004 & 1294/Kol/2014 and also made proposition no. II that only investment which have yielded exempt income should be considered for purpose of computing disallowance u/s 14A r.w.Rule 8D and also made proposition no. III that disallowance made u/s 14A of the act cannot exceed exempt income earned by the assessee during the year. In this regard, the ld. Consel submitted that identical issue on similar fact has been decided by the ITAT in the case of the assessee itself vide DCIT v. Essel Mining & Industries Ltd (I.T.A. No. 705/Mum/2021) (Mumbai Tribunal) (AY 2015-16); PCIT v. State Bank of Patiala (99 taxmann.com 286) (SC); PCIT v. Caraf Builders & Constructions (P) Ltd (101 taxmann.com 167)

(Delhi HC); PCIT v. Caraf Builders & Constructions (P) Ltd [2019] 112 taxmann.com 322 (SC); Maxopp Investment Ltd. v. CIT (402 ITR 640) (SC).

On the other hand, the ld. D.R supported the order of lower authorities.

7. Heard both the sides and perused the material on record. After considering the decision of various court's it is settled law that disallowance u/s 14A cannot exceed the exempt income earned during the year under consideration. We have perused the decision of the ITAT in the case of the assessee itself referred by the assesse wherein vide ITA No.705/Mum/2021 dated 27.06.2022 held that disallowance u/s 14A cannot exceed the dividend income earned by the assesse. Therefore, we direct the A.O to restrict the disallowance made u/s 14A to the extent of exempt income earned by the assessee during the year under consideration. Accordingly, the ground no. 2 to 4 of the assessee are partly allowed.

Ground No. 5 & 6: for not allowing deduction of Rs.20,77,90,035/- in the assessment year 2013-14 against the decision made in assessment year 2008-09 to 2011-12 on account of alleged illegal mining:

8. Heard both the sides and perused the material on record. The assesse has submitted that impugned issue has been decided against the assessee in the case of the assessee itself by the ITAT vide ITA No. 1019/Mum/2018 and vide ITA No. 1548/Mum/2018 for assessment year 2012-13 on 31.01.2023. The relevant operating part of the decision is reproduced as under:

> *"18. As far as ground of appeal of the assessee are concerned the issue relates to allowing deduction of Rs.125,97,32,609/- against additions which were made in earlier assessment year 2008-09 to 2011-12 on account of alleged illegal mining. The facts qua the issue-in-dispute are that in the case of the*

assessee certain sub standard ore was produced in the process of ore manufacturing which was claimed by the assessee of no use and having no value however, due to change in the standard of reporting by the Bureau of mining, the assessee was also required to report the said production of substandard ore (having low percentage of Iron). There was a difference in the ore production as reported to Bureau of mining and reported under the tax audit report for the purpose of income-tax and therefore, in earlier years additions were made by the Assessing Officer for assessment year 2008-09 to 2011-12.

19. Before us, the Ld. Counsel of the assessee has submitted that those additions have already been deleted by the Tribunal in assessment year 2008-09 to 2010-11. We also note that in assessment year 2011-12, we have also deleted the addition for illegal mining in ore production following finding of the Tribunal in earlier years and therefore, addition made in all the earlier assessment year 2008-09 to 2011-12 stands deleted and therefore this claim of deduction cannot survive. The ground of appeal of the assessee is accordingly dismissed."

Following the decision of coordinate bench as supra the ground no. 5 & 6 of appeal of the assessee are dismissed.

Additional Ground No. 1: Claim of deduction of education cess:

9. In view of the retrospective amendment to Sec. 40(a)(ii) the assesse has not pressed this ground, therefore, this additional ground of appeal stand dismissed.

10. In the result, the appeal of the assesse is partly allowed.

ITA No. 1549/Mum/2018 (Revenue)

Ground No. 1

11. While adjudicating the appeal of the assesee on the issue of disallowance u/s 14A vide ITA No. 1022/Mum/2018 we have restricted disallowance u/s 14A to the extent of exempt income earned by the assessee during the year under consideration, in view of these findings we don't find any merit in this ground of appeal of the revenue. Therefore, the same stand dismissed.

Ground No. 2: <u>Disallowance of claim of deduction u/s 80IA on Rail System:</u>

12. During the course of assessment the A.O noticed assesse has claimed deduction u/s 80IA(4) on the profit of its Rail Siding Unit situated at Orissa. The amount of deduction claimed was Rs.84,25,45,732/- on the gross receipt of Rs.94,61,36,588/-. The Railway Siding Unit has been treated as infrastructure facility by the assesse and accordingly deduction u/s 80IA(4) has been claimed. On query, the assesse explained that it had commenced operation of its Railway Sidings Unit from 29.04.2005 after receiving necessary approval from the South Eastern Railway and has been claiming deduction u/s 80IA since assessment year 2006-07 the initial year. The deduction u/s 80IA was allowed as per the order u/s 143(3) after detailed verification from assessment year 2007-08 to 2012-13. The assesse also explained that there was no requirement as such u/s 80IA that infrastructure facility should be used for public at large. The assessee also explained that Railway Siding has not only resulted in increased revenue to the assessee but also increased freight earning of foreign currency, earning through export and increased in iron ore production etc. However, the A.O has not agreed with the submission of the assessee and he was of the view that railway system of the assesse company was simply a private siding and was not any infrastructure facility of public utility, therefore, the deduction claimed u/s 80IA(4) of the Act on profit of railway sidings amounting to Rs.84,25,45,732/- was disallowed and added to the total income of the assessee.

13. Aggrieved, the assesse filed the appeal before the ld. CIT(A). The ld. CIT(A) has allowed the claim of the assesse after following the decision of Hon'ble Bombay High Court in the case of Paul Brothers (2016) ITR 548 and after following the decision of ITAT, Mumbai for the assessment year 2010-11 in the case of Ultratech Cement Group a group concern of the assesse.

14. During the course of appellate proceedings the ld. Counsel has submitted that assessee has been allowed the claim of deduction since initial year assessment year 2006-07 to 2012-13 after detailed verification. The A.O has disallowed the claim of deduction without considering the relevant submission made by the assessee during the course of assessment. The ld. Counsel has also supported order of ld. CIT(A) and placed reliance on the decision of ITAT, Mumbai in the case of Ultratech Cement Ltd. for assessment year 2009-10 based on similar issue and identical facts.

On the other hand, the ld. D.R supported the order of Assessing Officer.

15. Heard both the sides and perused the material on record. The assessee had set up Railway Siding Unit after receiving approval from Railway Authority. This is undisputed fact that assessee has been claiming deduction u/s 80IA since 2006-07 in respect of profit derived from the aforesaid railway system. In the assessment year 2006-07 to 2012-13 the claim of deduction was allowed after detailed verification as per order passed u/s 143(3) of the Act by the A.O. The assessee has categorically submitted before the A.O that there was no requirement u/s 80IA that infrastructure should be used for public at large. The deduction u/s 80IA was available to an enterprise carrying on the business of specified infrastructure facility. The assessee has also submitted that the Indian Railway had invited private participation in the setting up of the business of railway siding and the assessee company had set up the Railway Siding/Railway system for dispatch of iron ore to different parts of the country and even for export purpose. For making disallowance the assessing officer has relied on the decision of CIT(A)-5, Mumbai in the case of Ultratech Cement Ltd. a group concern for the AY 2010-11, however, the ld. CIT(A) has referred at para

25.2 of his findings that ITAT Mumbai has adjudicated the identical issue on similar facts in the case of Ultratech Cement Ltd. vide ITA No. 7631/Mum/2014 in favour of the assessee. The ld. CIT(A) has also incorporated the finding of ITAT in the case of Ultratech Cement Ltd. in his findings the relevant part of the operating para of CIT(A) is reproduced as under: (C) page 53 -59 paper book

> *"25.2 For disallowing the claim of the appellant company u/s 801A in the proceedings u/s 153C of the Act, the AO has mainly relied on the finding given by the Ld. CIT(A) -5, Mumbai, in the case of M/s Ultratech Cement Ltd., a group concern for the A.Y. 2010-11. During the course of the appellate proceedings, the appellant has filed a copy of the order dated 05/04/2017 of the Hon'ble Mumbai ITAT in ITA No. 7631/MUM/2014 in the case of M/s Ultratech Cement Ltd., wherein the findings of the CIT(A) has been reversed. The relevant excerpts of the said order of the Hon'ble ITAT are reproduced hereunder:*
>
> > *"46. Therefore the agreements as entered into by the assessee with Indian Railways are as envisaged u/s 80 IA(4)(i) and in no case it can be inferred that they are not the required agreements under section 80-IA.*
> >
> > *47. We also found that no siding charges are levied by Indian Railways for the rail systems developed by the assessee. The assessee has developed, operates and maintains the rail systems. The systems are being operated by the assessee as permitted under the agreements entered into with Indian Railways and under the rules and regulations of Indian Railways from time to time. The entire cost was borne by the assessee and is appearing in the balance sheet of the assessee as placed on record. We have also verified the same and found it correct...*
> >
> > *49. From the record we found that the rail systems were developed under the agreements entered into with Indian Railways and assessee operates and maintains the same in accordance with terms and conditions of the Agreements, under the supervision and as per guidelines of Indian Railways. We have carefully gone through the relevant clauses of the agreements substantiating the same which reads as under. a) Clause No. 2, Agreement to Construct Siding Wherein it is mentioned that "the Railway administration will at the cost and the expenses of the applicant, in all respect, construct the railway sidings Further kindly be informed that, for construction of the siding under the supervision of the Railways, the contract for construction and supervision has been awarded by the applicant and the entire cost has been borne by the applicant. b) Clause no. 6-Payment by Applicant against the total estimated cost wherein it is mentioned that, The applicant will pay in advance to the railway administration the total estimated cost of the work consisting of the estimated costs of work done by the party and those by the railway administration c) Clause no. 7(a) Permanent way materials "The applicant will provide and deliver at site the permanent way and other materials (which includes Girders, Rails,*

Sleepers, fastenings, points, crossings, fencings, signals and overhead structures and any other things connected therewith for electric tractions and other machinery and equipments necessary for working of the sidings) in accordance with the Railway administration's standards and specifications. All charges incurred in laying and fitting the permanent way materials and all other equipments which may be provided shall entirely be borne by the applicant." d) Clause No. 17 Working of the Siding wherein it is mentioned that the applicant shall provide labour for and bear the cost of all Operations on the siding. The applicant shall be responsible for the strict compliance by himself and his employees and agents of all rules, regulations and standing orders made by the railway administration from time to time for the working of sidings and for all accidents, loss or damage that may be ensured or be caused by reasons of negligence or non-observance of such rules, regulations and orders..... Further, the appellant carries out all the operations for smooth movement of its goods, viz. Shunting of the Wagons, placing of the wagons at appropriate locations, Loading/Unloading of Wagons within the stipulated time and stipulated methods of Indian Railways through Wagon Loading Machines and Wagon Tipplers, Weighing of Wagons on Motion Weigh Bridges, Maintaining signaling systems, Wagons, Couplings, Rake formation for dispatch, hauling of Wagons through its own locomotives, etc. Further, in Clause No. 14 Traffic on Siding - it is mentioned that applicant undertakes to shunt the wagons from such point to his premises and back with his own labour and the railway administration would not be responsible for any delay, loss and damages caused in consequence of the failure of the applicant to arrange for such shunting." Thus, the rail system is being operated by the appellant and the cost of above operations is borne by appellant. e) Clause No. 8(b) - Wherein it is mentioned that, Maintenance and other Charges for the portion of the sidings- The applicant will at their own cost and expenses in all things and to the satisfaction of the railway administration and if required by the railway administration under its supervision maintains in good order and repair the said portion of the siding. Such charges as may be fixed by the railway for the supervision rendered shall be paid by the applicant. There are other various clauses wherein it is evident that the Development, Operation and Maintenance is done by the appellant and the entire cost for the same is borne by the appellant.

50. The question of allowability of the deduction u/s. 801A in respect of rail systems has been settled in earlier years by the Hon'ble ITAT in assessee's own case. The facts and the agreements were also placed before authorities in those years. Therefore, the claim based on same facts needs to be allowed following the principle of Consistency in assessment proceedings. Even though the 'principles of res judicata' do not apply to income tax proceedings and each assessment year being a separate unit, what is decided in one year may not apply in the following year but where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be appropriate to allow the position to be changed in a subsequent year. The above principles have been accepted in the undernoted case: Shah & Co (HA) v. CIT (1956) (30 ITR 618) (Bom).

Amalgamated Coalfields vs. Janapada Sabha AIR 1964 SC 1013 South India Trust Association vs. Telugu Church Council (1996) 2 SCC 520. Radhasoami Satsang vs. CIT (1992) 193 ITR 321 (SC).

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54. We have also verified the calculation of revenue from rail system, filed before the lower authorities and found that the basis adopted for calculating the revenue from rail system is, lower of the Freight chargeable through Road and Rail. The Rail Freight being lower is considered after discounting it further by 50% based on the Circular of Indian railways for the freight chargeable upto the nearest railway station. Freight Rates are considered as per the Freight Rate chart & Freight Circulars issued from time to time by Indian Railways, based on the classification of the goods transported. The Railway freight rates are uniformly charged to everyone by Indian Railways. The copies of Form 10CCB mcluding the Profit and loss account, Balance sheet along with Schedules, giving therein the basis for calculation of revenue has been submitted before the lower authorities and had been duly examined by us and found to be correct.

55. We also found that the loading and unloading of goods is being done by the integrated Rail system set up by the assessee and expenses which were incurred earlier for loading and unloading of materials at the plant as well as the nearest Indian Railway station have been avoided and saved and are considered as income of the rail system arising due to setting up of such integrated rail system. The assessee has already submitted for all the Rail Systems form 10CCB duly certified and audited by M/s. GP Kapadia & Co. Chartered Accountants, along with Balance Sheet, P&L Account, Schedules forming part of Balance sheet and P&L Account. We have also checked the amount eligible for deduction as furnished in form 10 CCB and found the same as correct.

58. We have carefully gone through the terms and conditions of the agreement entered by the assessee with the railway authority, a perusal of clause 19 of the Railway Siding agreement entered into by the assessee with the Railway authorities, clarifies that construction and operation of the railway siding was not merely for the purpose of the business of the assessee, but was with a long term perspective to create an infrastructure facility which could, at a future point of time and in case a need arise, potentially confer benefit to the public at large. The agreement with the Railway authorities, provided that the facility so created could be made available to others with the discretion and prior permission of the railway authorities thereby rendering the facility open for general public at large. Hence, such a facility is in fact a public utility.....

61. As far as operations is concerned, we found that the assessee carries out all the following operations for smooth movement of its goods, viz. shunting of the wagons, placing of the wagons at appropriate locations, loading/unloading of wagons within the stipulated time and stipulated methods of Indian Railways through Wagon Loading Machines and Wagon Tipplers, weighing of wagons on Motion Weigh Bridges, wagon couplings and decouplings, rake formation for dispatch, hauling of

wagons through its own locomotives within the factory premises, etc. Thus, the rail system is being operated by the assessee and the cost of above operations is borne by assessee.

63. As per materials placed on record, all the railway systems are established and owned by the assessee which is a Company as defined under the Income tax Act. This is an undisputed fact and there is no adverse remark by the AO or CIT(A) in this regard.

64. As per clause (b)of Section 801A (4)(1) an agreement has to be entered with the Central Government or a State Government or a Local Authority or any other statutory body for (1) developing or (ii) Operating and maintaining or (ii) Developing, Operating and Maintaining the infrastructure facility. The Indian Railways, with whom the assessee has entered into an agreement, is the statutory body designated under the Indian Railways Act.

65. We also observe that the agreements entered into by the assessee are for the development, operation and maintenance of the Railway siding. Thus this fulfills the requirement in clause (b)……

70. As per our considered view, the operation of Rail System is not simply running of goods train. Operation of Railway Systems comprises of various activities viz. shunting of the wagons, placing of the wagons at appropriate locations, loading/unloading of wagons within the stipulated time and stipulated methods of Indian Railways through Wagon Loading Machines and Wagon Tipplers, weighing of wagons on Motion Weigh Bridges, wagon couplings and de-couplings, rake formation for dispatch, hauling of wagons through its own locomotives within the factory premises, etc. Thus, the rail system is being operated by the assessee and the cost of above operations is borne by assessee.....

77. After verifying the computation of income eligible for deduction u/s.801A, as filed by assessee, we found that the CIT(A) has misunderstood the working of the revenue calculation and alleged that such working is ill-conceived as the actual transportation of materials on the siding is carried out by the railway authorities. Based on such misunderstanding, he further alleged that assessee has claimed deduction for notional profits whereas section 801A allows deduction for profits derived from actual operations.....

81. In view of the above discussion, the explanation given by the CIT(A) and the tabular representation of the computation of revenue of rail system in Table F, has no relevance since it is merely based on his incorrect assumption.

82. Further, we found that observation of CIT(A) with respect to the freight rate is also not correct in so far as for comparison, he has considered the rate per quintal as against per Metric Ton adopted by the assessee which can be observed from the calculation submitted by assessee before the lower authorities. Without any evidence in hands, the CIT(A) has merely stated that crucial facts were not disclosed by the

assessee without referring to any specific facts which were not disclosed. Perhaps he is indicating about the operations of railway siding being carried out by the railways and not by the assessee. However, as aforesaid, he is comparing the operation of railway siding with merely hauling of wagons. The operations of railway siding involves various activities other than the hauling of wagons. Mere haulage of wagons cannot be equated with operations of railway siding. We found that assessee has filed reports in Form 10CCB from M/s G. P. Kapadia & Co., Chartered Accountant. The CIT(A) himself has allowed the deduction in AY 2009-10 based on the similar facts available on records but changed his decision merely based on the replies to questionnaire from various Railway Department.

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95. Section 80IA(2) further provides that the deduction is available at the option of the assessee for any ten consecutive assessment years out of twenty years beginning from the year in which the undertaking or enterprise develop and operate any infrastructure facility. UTCL has started to claim deduction within the prescribed period of twenty years. The claim is thus legitimately made by assessee complying the requirements mentioned under section 80IA.

96. In view of the above discussion and respectfully following the order of the Tribunal in assessee's own case for the A.Y.2004-05 to 2008-09, we do not find any merit in the action of the Revenue authorities declining the claim of deduction u/s.80IA(4). Accordingly AO is directed to allow the deduction as claimed by the assessee with respect to its rail system. We direct accordingly."

25.3 During the course of the appellate proceedings, the appellant has also stated that there is no provision for withdrawal of deduction u/s 801A for the subsequent year ie. AY 2013-14 under appeal, unless the deduction granted in initial year i.e. AY 2006-07 is withdrawn. In this regard, reliance is placed on the judgment of the Hon'ble Bombay High Court's Order in the case of Paul Brothers (216 ITR 548), the relevant excerpts of which are reproduced hereunder.

"6. Either in section 80HH or in section 80J, there is no provision for withdrawal of special deduction for subsequent years for breach of certain conditions. Hence unless the relief granted for the assessment year 1980-81 was withdrawn, the Income Tax Officer could not withheld the relief for the subsequent years."

25.4 In view of these facts and circumstances and following the order of the Hon'ble ITAT, Mumbai for the A.Y. 2010-11 in the case M/s Ultratech Cement Ltd, a group concern, the AO is directed to allow the claim of the Appellant u/s 80IA(4) of the Act. Accordingly, this Ground of Appeal No. 5 of the appellant company is allowed."

The ld. Counsel also referred the decision of Hon'ble Supreme Court in the case of Radhasoami Satsang V. CIT (1992) 193 ITR (SC) on the

principle of consistency stating that A.O had allowed the 80IA in respect of rail system claim from AY. 2006-07 to A.Y. 2012-13. Following the decision of coordinate bench of the ITAT in the case of Ultratech Cement Ltd. Vs. ACIT-2(2) (2017) 88 taxmann.com 907 (Mumbai Tribunal) as referred supra we don't find any infirmity in the decision of ld. CIT(A) therefore this appeal of the revenue stand dismissed.

Ground No. 3 & 4: Disallowance made towards sale of carbon credit:

16. During the course of assessment the A.O noticed that assessee company had received Rs.5,84,53,107/- against the sale of carbon credit. The assessee company has treated this receipt as capital receipt. However, the AO was of the view that the same was a revenue receipt has held by the ITAT cochin in the case of Appollo Tyres Ld. Vs. ACIT (2014) 149 ITD 756. The A.O stated that certified emission reduction/carbon credit was given to the assesse in the course of business activity, therefore, the same would fall within the definition of income u/s 2(24)(vd) of the Act. Therefore, the same was treated as revenue receipt and added to the total income of the assesse.

17. The assessee filed appeal before the ld. CIT(A). The assesse has placed reliance on the decision of Hon'ble High Court of Andhra Pradesh in the case of CIT Vs. My Home Power Ltd. 46 taxmann.com 314 and decision of ITAT, Chennai in the case of India Dying Mills Pvt. Ltd. Vs. ACIT vide ITA No. 498/Mum/2014 dated 08.10.2014. The assesse has also placed reliance on the decision of ITAT, Mumbai in the case of Ultratech Cement Ltd. Vs. ACIT (2015) – TIOL-989- ITAT Mumbai. After considering the aforesaid decision and decision of ITAT, Mumbai ld. CIT(A) has allowed the claim of the assesse.

18. During the course of appellate proceedings before us the ld. Counsel contended that the issue on sale of carbon credit is covered in the case of the assesse by the decision of ITAT, Mumbai in the case of

the assessee itself for assessment year 2015-16 vide ITA No. 602/Mum/2021. With the assistance of the ld. Representative we have perused the aforesaid decision of ITAT as supra the relevant operating part of the decision is reproduced as under:

> *"9. Next ground of appeal pertains to taxability of Carbon Credit received by assessee amounting to Rs. 10, 20,587/-. We have gone through the order of AO and ld. CIT (A). The decisions of various High Courts and Co-ordinate Benches of Tribunal relied upon by the ld. CIT (A) are distinguishable and not applicable to the facts of the case.*
>
> *10. Issue is whether receipts received by the assessee on sale of alleged carbon credit is revenue in nature or capital in nature.*
>
> *11. Thus, taking into consideration resolution of litigation on this issue by the Legislature itself, which had made provision for taxation of such receipts at the rate of 10 per cent from the assessment year 2018-19. Thus, any sum received on account of carbon credit or protecting the environment is not included in the business income however, subsequently there is an amendment by Finance Act, 2017 whereby Section 115BBG has been inserted in the statute w.e.f 01.04.2018 which reads as under: — "Following section 115BBG shall be inserted after section 115BBF by the Finance Act, 2017, w.e.f. 1-4-2018: Tax on income from transfer of carbon credits. 115BBG. (1) Where the total income of an assessee includes any income by way of transfer of carbon credits, the income tax payable shall be the aggregate of— (a) the amount of income-tax calculated on the income by way of transfer of carbon credits, at the rate of ten per cent; and (b) the amount of income-tax with which the assessee would have been chargeable had his total income been reduced by the amount of income referred to in clause (a). (2) Notwithstanding anything contained in this Act, no deduction in respect of any expenditure or allowance shall be allowed to the assessee under any provision of this Act in computing his income referred to in clause (a) of subsection (1). Explanation.—For the purposes of this section "carbon credit" in respect of one unit shall mean reduction of one tonne of carbon dioxide emissions or emissions of its equivalent gases which is validated by the United Nations Framework on Climate Change and which can be traded in market at its prevailing market price." Thus, the income by way of transfer of carbon credit has been given a special treatment as chargeable to tax @ 10% and not as part of the normal business income of the assessee. The said amendment is prospective in nature and therefore, cannot be applied to the assessment years under consideration.*
>
> *12. The ld. AR for the assessee brought to the notice of the Bench that the identical issue has already been decided by the Co-ordinate Bench of Tribunal in favour of assessee in case cited as DCIT Vs. M/s Dawarkesh Sugar Industry Ltd. in ITA No. 312/Mum/2019 for A.Y. 2014-15 by following the decisions rendered by the Hon'ble Andhra Pradesh High Court in the case of My Home Powers Ltd. (2014) 365 ITR 082 (AP).*
>
> *13. We have perused the order passed by the Co-ordinate Bench of Tribunal in case of M/s Dawarkesh Sugar Industry Ltd. (supra), wherein identical issue has been decided in favour of the assessee by returning following findings.*

"7. Considered the submissions of the learned Counsel for both the parties and perused the material on record. While going through the judicial pronouncements relied upon by the learned Counsel for the assessee, we find that the issue for our adjudication is squarely covered by the aforesaid decisions relied upon by the learned Counsel wherein in one of the cases relied upon in CIT v/s My Home Power Ltd., [2014] 365 ITR 082 (AP) (supra) filed by the Revenue, the Hon'ble Andhra Pradesh High Court held that the Tribunal had factually found that Carbon Credit was not off-shoot of business but off-shoot of environmental concerns and no asset was generated in course of business but it was generated due to environment concerns. Further we find that the Hon'ble A.P. High Court agreed with the factual analysis as the assessee carried on business of power generation and Carbon Credit was not even directly linked with power generation. It is held that on sale of excess Carbon Credits income was received and the Tribunal correctly held that it is capital receipt and could not be a business receipt or income. As a matter of convenience, the observations of the Hon'ble A.P. High Court in CIT v/s My Home Power Ltd., [2014] 365 ITR 082 (AP) (supra) is reproduced below:

> *"ITAT have considered the aforesaid submission and ITAT are unable to accept the same, as the learned Tribunal has factually found that "Carbon Credit is not an offshoot of business but an offshoot of environmental concerns. No asset is generated in the course of business but it is generated due to environmental concerns' ITAT agree with this factual analysis as the Assessee is carrying on the business of power generation. The Carbon Credit is not even directly linked with power generation. On the sale of excess Carbon Credits the income was received and hence as correctly held by the Tribunal it is capital receipt and it cannot be business receipt or income. In the circumstances, we do not find any element of law in this appeal."*

14. Following the order passed by Co-ordinate Bench of Tribunal in case of M/s Dawarkesh Sugar Industry Ltd. (supra) which is based upon the decision rendered by Hon'ble Andhra Pradesh High Court in case of My Home Power Ltd. (supra), we are of the considered view that sale of Renewable Energy Certificate (Carbon Credit) of income received by the assessee is a capital receipt and could not be business receipt or income nor it is directly linked with the business of the assessee nor any asset is generated in the course of business but it is generated due to environmental concern. So the addition of Rs.10,20,587/- by the AO from the sale of Carbon Credit and confirmed by the ld. CIT(A) is not sustainable, hence, ordered to be deleted."

Following the decision of coordinate bench as supra we don't find any infirmity in the decision of ld. CIT(A) therefore this ground of appeal of the revenue is also dismissed.

Ground No. 5 &6: disallowance of common expenses while claiming deduction u/s 80IA:

19. During the course of assessment the A.O noticed from the profit and loss account that assessee has not debited expenditure which was common nature under the head travelling and conveyance expenses to the railway siding unit which were attributable to the unit and such expenditure were required for running the business. Similarly, for the Wind Power Energy unit the A.O observed that assessee has also not debited expenditure under the head travelling and conveyance which was common in nature. Therefore, the A.O was of the view that profit shown in respect of 80IA unit was higher than actual profit on account of not debiting expenses to the amount of Rs.32,08,000/- to the profit and loss account. Therefore, the same was added to the total income of the assesse.

20. The ld. CIT(A) has allowed the appeal of the assessee after following the decision of his predecessor on the similar issue for the earlier years and held that the assesse had properly maintained and allocated the expenses in the profit and loss account.

21. Heard both the sides and perused the material on record. During the course of appellate proceedings before us the ld. Counsel submitted that identical issue on similar facts has been adjudicated by the ITAT vide ITA No. 602/Mum/2021 for the AY 2015-16. We have perused the decision of ITAT in the case of the assessee itself as referred supra. The relevant part of the decision is reproduced as under:

> *6. The ld. CIT (A) while dealing with disallowance of Common Expenses against deduction claimed under section 80IA of Rs. 5, 92, 7000/- held as under:*
>
> > *"12.0 Ground no.7 deals with deductions claimed by the assessee u/s.80IA in respect of common expenses of Rs.59, 27,000/-. It is seen that while completing the assessment, the Assessing Officer held that profits shown in S8OIA units appears to be higher than actual profit on account of not debiting of expenses in respect of travelling and conveyance amounting to Rs.59,27,000/- to the -Units claimed deduction u/s.80IA is disallowed to the extent of Rs.59,27,000/-. He therefore allocated additional travelling expenses of Rs. 59, 27,000/- to the 80IA Units, in the ratio of their turnover to the total turnover and thus reduced deduction u/s 80IA by equivalent amount.*

12.1 During the course of appellate proceedings, assessee relied upon decision of CIT(A) - 6, Kolkata, who allowed relief to the assessee on this issue in AY 2012-13, vide order dated 26/10/2016. The assessee has also relied upon decision of Ld. Predecessor dated 26/12/2017, wherein following the decision of CIT(A) Kolkata, he directed to delete identical addition. The assessee also argued that this issue is covered in their favour by Hon'ble ITAT decision in the case of assessee for AY 2009- 10 and 2010-11.

12.1. I have considered the facts of the case, and submissions of the assessee. My Ld predecessor by order dated 26/10/2016 in the case of the assessee for AY 2012-13, observed as under:

> *"This issue also came up in the appellant's case in the immediately preceding year i.e. AY 2009-10. While deciding the appeal no.269/CIT(A)-VI/Cir-5/11-12 for that year, my Ld. Predecessor has upheld the allocation made by the Assessing Officer in respect of the director's remuneration and auditors remuneration. However, so far as the legal and professional expenses and travelling expenses are concerned, he accepted the allocation made by the appellant. It has been submitted that the material facts of the year under consideration are same. I agree with the decision given by my Ld. Predecessor. Following the reasoning given in his order, the allocation made by the Assessing Officer is confirmed in respect of the director's remuneration (allocation of Rs.512.23 lakhs) and auditors remuneration (allocation of Rs.4.23 lakhs) however, the allocation made by the appellant is found to be reasonable in respect to legal and professional expenses and travelling expenses and the Assessing Officer is directed not to disturb the same. The appellant thus gets part relief."*

16. from the above decision, it is clear that while deleting the addition he followed the earlier decision of CIT (A)-6 Kolkata for AY 2009-10. Therefore, it appears that the merit of the issue was not examined in the above decision. Since the decision of CIT (A)-6 Kolkata for AY 2009-10 is not before me, I am not in a position to offer any comments thereon. Further, my Ld. predecessor while deciding this issue vide order dated 26/12/2017, has followed the order of CIT(A)-6 Kolkata for AY 2012-13 and noted that allocation of travelling and conveyance expenses in the said order was reasonable. However, it appears that merit of issue and apportioned mess of the allocation of the expenditure was not examined. The Assessing Officer while completing assessment has apportioned expenditure in the ratio of turnover as under:

Head of common expenditure	Expenses debited in common P & L a/c (Rs. In lacs)	Consolidated turnover of entire business	Turnover of Wind power energy 60 MW Rs. In lacs)	Turnover of Wind power Energy 15 MW Rs. In Lacs)	Turnover of Railway siding unit (Rs. in lacs	Expenses added to for the purpose of deduction u/s 80IA(Rs.)
Travelling & Conveyance	990.30	856229.22	4161.13	964.06	Nil	59,27000

12.2. Thus, the Assessing Officer held that expenses to the tune of Rs. 59, 27,000/- was claimed less in respect of units which were covered u/s 80IA. In appellate proceedings the assessee has failed to furnish any credible explanation or criteria on the basis of travelling and conveyance expenses was allocated to different units including 80IA units. It may also be slated that some travelling expenditure may be done at the level of corporate office or head office, which may have to be allocated to different units in absence of any details to the contrary; I feel the allocation of expenses in the ratio of turnover is a reasonable basis. Since the assessee has not given me details of the turnover and conveyance expenses and how the same has been allocated between various units, f am inclined to uphold the decision of the Assessing Officer in the allocating further expenses of Rs.59,27,000/- in the hands of the assessee for the year. 12.3 Consequently, I also upheld decision of the Assessing Officer in reducing deduction u/s.80IA of the Act by an amount of Rs. 5927000/- for the year. This ground of appeal is therefore, decided against the assessee."

7. Assessee relied upon the decision of CIT (A)-6, Kolkata (AY 2012-13) and ITAT's decision in the case of assessee itself for AY 2009-10 and 2010-11. Wherein it was held that Director's remuneration and Auditor's remuneration should be allocated proportionately as calculated by AO and Legal & Professional Expenses and Travelling Expenses are found to be acceptable as done by assessee. 8. We have considered the order of AO, order of Ld. CIT (A) and submissions of assessee. We found force in the contention of assessee that earlier precedents settled in assessee's own case needs to be examined and followed. Hence, on this issue, we restore the matter back to the file of the AO and the ground of appeal is partly allowed.

22. Following the decision of the ITAT the issue of allocation of common expenses while claiming deduction u/s 80-IA is remanded back to the A.O for examination and to follow on the basis of earlier settled cases in the case of the assessee itself. Therefore, this ground of appeal of the Revenue is partly allowed for statistical purpose.

ITA No. 296 & 297/Mum/2021

Ground No. 1:

23. This ground of appeal is not pressed therefore the same stand dismissed.

Ground No. 2:

24. This ground of appeal of the assesse is also not pressed therefore the same stand dismissed.

25. In the result, the appeals of the assessee is partly allowed and the appeal of the revenue is partly allowed for statistical purpose.

Order pronounced in the open court on 27.04.2023

Sd/-	Sd/-
(Amit Shukla) Judicial Member	(Amarjit Singh) Accountant Member

Place: Mumbai
Date 27.04.2023
Rohit: PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त / CIT
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण DR, ITAT, Mumbai
5. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//
आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण/ ITAT, Bench, Mumbai.