IN THE INCOME TAX APPELLATE TRIBUNAL, 'C' BENCH MUMBAI

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

ITA No.612/KOL/2007
(**Assessment Year:2003-04**)

M/s. Hindalco Industries Ltd. (Earlier known as Indian Aluminium Company Ltd.) Ahura Centre, 1st Floor, B Wing, Mahakali Caves Road, Andheri (E) Mumbai-400 093	Vs.	DCIT CC-1(4), Mumbai (Earlier Deputy Commissioner of Income Tax Circle-8, Kolkata
PAN/GIR No.AAACH1201R		
(**Appellant**)	..	(**Respondent**)

ITA No.619/KOL/2007
(**Assessment Year:2003-04**)

DCIT CC-1(4), Mumbai	Vs.	M/s. Hindalco Industries Ltd. (As a successor to M/s. Indian Aluminium Co. Ltd. Century Bhavan Dr. Annie Besant Road Worli, Mumbai-400 030
PAN/GIR No.AAACI5375F		
(**Appellant**)	..	(**Respondent**)

Assessee by	Shri Mahavir Jain
Revenue by	Shri Manoj Kumar Sinha
Date of Hearing	**05/04/2024**
Date of Pronouncement	**04/07/2024**

आदेश / O R D E R

PER AMIT SHUKLA (J.M):

The aforesaid cross appeals filed by the assessee as well as by the Revenue against order dated 11/12/2006 passed by CIT(A)-8, Kolkata for the quantum of assessment passed u/s.143(3) for the A.Y.2003-04.

2. We will first take up assessee's appeal (ITA 612/Kol/2007)

3. The assessee is a widely held public limited company engaged in the business of manufacture / production of aluminum and related products. The return of income was filed on 27/11/2003 declaring total income of Rs.21,36,92,350/- under the normal provisions of the Act and a book profit of Rs.1,31,31,06,388/- u/s.115JB. The ld. AO in his assessment order has computed the income of Rs.159,59,35,610/- under the normal provisions of the Act after making various additions / disallowances.

4. Ground No. 1 of the assessee reads as under:-

GROUND OF APPEAL NO. 1 with respect to claim of deduction u/s 80IB of the Income Tax Act in respect of Unit at Belur, West Bengal

1. That the Commissioner of Income Tax (Appeals) erred on facts and in law in confirming the action of the assessing officer in allowing deduction under section 80IB of the Income Tax Act, 1961 ("the Act") to the extent of Rs 2,01,22,104, only as against deduction of Rs 3,87,41,881, claimed by the appellant in respect of the SMS 4- Ili Cold Rolling Mill at Belur, West Bengal.

1.1. That the Commissioner of Income Tax (Appeals) erred on facts and in alleging that the appellant has not controverted the finding of the

assessing officer that the profits derived by the appellant from the aforesaid units have not been worked out on a reasonable basis.

1.2. That the Commissioner of Income Tax (Appeals) erred on facts and in law in confirming the action of the assessing officer in computing the profit of the aforesaid units eligible for deduction under section 80-1B of the Act by applying the net profit ratio of the appellant as a whole on the turnover of the aforesaid units.

5. The brief facts are that assessee company owns an industrial unit in Belur, West Bengal, the profit of which is eligible for deduction under Section 80(IB) of the Act. The assessee company claimed a deduction of Rs. 3,87,41,881 under Section 80(IB) for the industrial unit at Belur, West Bengal.

6. The ld. AO partially allowed the claim of the assessee and has restricted the claim by applying the Global Net profit rate of the company to the turnover of the Belur unit, arriving at a restricted deductible claim of Rs. 2,01,22,104 u/s 80(IB) for the unit. One of the reasons given by him in restricting the claim for that assessee had not submitted a separate profit and loss account for the Belur Unit. Therefore, the ld. AO concluded that the profit of the Belur unit claimed in the profitability statement furnished by the assessee at 11.66% of the turnover is on the higher side keeping in view the global net profit ratio of 6.06% of the global turnover of the company. The ld. AO restricted the claim u/s 80IB for the Belur unit by applying the global net profit ratio of company to the turnover of the Belur Unit. The ld. CIT(A) had confirmed the said addition / disallowance and held that similar issue had come up for consideration in assessee's own case for A.Y.2002-03

by the action of the ld. AO and the decision of the First Appellate Authority had been upheld by the Tribunal in ITA No. 1221/Kol/2006 and ITA No. 1045/Kol/2006 in its decision dated 20/10/2006.

7. We have heard both the parties at length and also perused the relevant finding given in the impugned order as well as material placed on record. The main contention of the ld. Counsel for the assessee was that the Ld. AO as well as Ld. CIT(A) have grossly erred in completely ignoring the fact that an audit certificate in Form 10CCB for the undertaking has been filed for the current AY 2003-04. This was done because of an amendment brought in Finance Act 2002 requiring furnishing of 10CCB as an audit certificate for the eligible business. The said Form 10CCB was enclosed with the return of income and has been placed at page number 26 of the paper book 1. The assessee contended that at page 18 of CIT(A) order, it has been mentioned that the auditor has duly verified the deduction u/s 80IB and certificate to this effect been issued to the assessee. It was also the contention of assessee that the profitability statement of the Belur unit, was filed before AO (which has also been filed at page 19 of paper book), is nothing but a profit and loss account only. Thereafter, ld. Counsel also pointed out that ITAT Mumbai for the A.Y.2001-02 on exactly same issue after considering the decision of the Tribunal for A.Y.2002-03 had referred the matter back to the file of the ld. AO to examine the claim u/s.80IB afresh in line with the profitability statement filed for

the unit. He pointed out that in the set aside proceedings, ld. AO had allowed the claim in full after verification of the profitability statement for A.Y.2001-02 while allowing full deduction u/s.80IB for the Belur unit and agreed that unit has reported net profit rate @16.29% of the turnover as compared to the normal net profit of 10.23% of the turnover. The ld. AO gave the finding that the net profit ratio of 16.29% of turnover is reasonable keeping in view the global net profit ratio of 10.23% of turnover. Before us, the assessee's contention is that in the present case also the net profit reported by the undertaking in the profitability statement is 11.66% of turnover as compared to the global net profit of 6.06% of the global turnover. Therefore, by applying the same yardstick as applied by AO in AY 2001- 02, the net profit of 11.66% of turnover of the Belur unit should be taken as reasonable.

8. On the other hand, ld. DR strongly relied upon the order of the ld. AO and ld. CIT(A) without prejudice submitted that matter should be restored back to the file of the ld. AO in line with the direction given by the Tribunal for A.Y.2001-02.

9. From the perusal of the impugned orders, it is seen that, the case of the ld. AO is, *firstly*, assessee had not maintained separate profit and loss account for the Belur unit; and *secondly*, following the earlier year, he has held that global profit of the entire company should be applied on the profit of the Belur unit. From the records it is seen that assessee had filed audit report in Form 10CCB which was part of the return of income. The

Auditor has duly verified the deduction u/s.80IB and profitability statement of the Belur unit was also filed before the ld. AO. Thus, in this year unlike in A.Y.2002-03, assessee did filed separate profit and loss account for the Belur unit duly certified by the Auditor in Form 10CCB. In A.Y 2001-02, this matter was remanded back to the ld. AO and as stated by the ld. Counsel, the ld. AO has accepted the profitability as shown by the assessee. Thus, the net profit of 11.66% of the turnover of the Belur unit is to be accepted and global profit cannot be applied. This principle has been upheld by the Hon'ble Delhi High Court in the case of **Commissioner of Income Tax v. Delhi Press Patra Prakashan (2013) 355 ITR 1 (Delhi),** wherein under similar facts, the AO had sought to impose the overall margin of the assessee's units (9.92% in that case) against the profit rate of 62.31% of the concerned unit declared by the assessee therein. The Hon'ble High Court held that the assessee was entitled to a deduction under Section 80IA and 80IB of the Act on the profits of the concerned unit. The relevant observations of the Court are reproduced herein:

26. In the present case, there is no material to support the view that the job work charges charged by Unit No.4 from Unit No.1 were not at market rates. We are agreement with the view taken by the Tribunal that in the absence of any defect or manipulation found by the Assessing Officer in the books maintained for Unit No.4 and in the absence of any material to indicate that the amount charged by Unit No.4 from Unit No.1 was not at comparable market rates, it would not be open for the revenue to disregard the profits of Unit No.4 as disclosed by the assessee only on the basis that the profits were significantly higher than profits earned by the assessee from other undertakings.

27. Given the fact that Unit No.4 carries on job work of printing

only, the expenses attributable to Unit No.1 which relate to the publishing business cannot be allocated to Unit No.4. Only those expenses which relate to the printing work carried on by the assessee in Unit No.4 are liable to be deducted from the job charges to arrive at the profits eligible for deduction under Section 80-IA of the Act or 80-IB of the Act as the case may be.

10. Thus, this issue stands covered by the decision of the aforesaid judgment of Hon'ble Delhi High Court. It has been informed that the decision of the Tribunal for A.Y.2002-03 partially disallowing assessee's claim u/s.80IB which has been relied upon by the ld. CIT(A) has been subsequently set aside by the Hon'ble Calcutta High Court and therefore, the stand taken by the ld. CIT(A) now gets vitiated. Accordingly, the claim made by the assessee in the return of income to the tune of Rs.3.87 Crores which is as per the certificate in Form 10CCB is allowed in full.

11. Accordingly, ground No.1 raised by the assessee is allowed.

12. Ground of Appeal No. 2 with respect to claim of deduction under Section 80HHC of the Act reads as under:

2.That the Commissioner of Income Tax (Appeals) erred on facts and in law in confirming the action of the assessing officer in disallowing deduction of Rs 6,04,02,369 claimed by the appellant under Section 80HHC of the Act.

2.1 That the Commissioner of Income Tax (Appeals) erred on facts and in law in not holding that deduction under Section 80HHC of the Act was allowable to the appellant at least in respect of profits earned from manufacturing activity, on the ground that the said

claim should have been made before the assessing officer and that the claim is not supported by any documentary evidence.

13. BRIEF facts are that the assessee made a claim of deduction u/s 80HHC of Income Tax Act of Rs. 6,04,02,369 in its return of income. The ld. AO has disallowed the claim of assessee u/s 80HHC as the assessee has received money from the sale of DEPB license. For this purpose, AO has relied on the retrospective amendment made in section 80HHC which denied deduction u/s 80HHC to company having export turnover in excess of Rs. 10 crores on account of sale of DEPB license. Ld. CIT (A) confirmed finding of the ld.AO and gave finding based on second proviso to section 80HHC(3) inserted by taxation laws (Amendment) Act, 2005 with effect from 01/04/1998.

14. We find that reliance placed by the ld. AO and ld. CIT(A) on the retrospective amendment has now been struck down by Hon'ble Gujarat High Court in the case of Avani Exports v. Commissioner of Income Tax 348 ITR 391 wherein the Hon'ble High Court observed and held as under:-

> *"26. On consideration of the entire materials on record, we, therefore, find substance in the contention of the learned counsel for the petitioners that the impugned amendment is violative for its retrospective operation in order to overcome the decision of the Tribunal, and at the same time, for depriving the benefit earlier granted to a class of the assessees whose assessments were still pending although such benefit will be available to the assessees whose assessments have already been concluded. In other words, in this type of substantive amendment, retrospective operation can be given only if it is for the benefit of*

the assessee but not in a case where it affects even a fewer section of the assessees.
27. We, accordingly, quash the impugned amendment only to this extent that the operation of the said section could be given effect from the date of amendment and not in respect of earlier assessment years of the assessees whose export turnover is above Rs.10 crore. In other words, the retrospective amendment should not be detrimental to any of the assessees.

15. This judgment of the Hon'ble Gujarat High Court has been affirmed by the **Hon'ble Supreme Court in the case of Commissioner of Income Tax v. Avani Exports (2015) 277 CTR 460** with the following Observation:

4. Against the High Court judgment these SLPs are filed by the Union of India. Mr Mukul Rohatgi, learned Attorney General for India submits that once the prayer made was to sever the aforesaid two conditions as onerous and ultra vires, the High Court should have couched the reliefs in terms of that prayer only, instead of stating that the operation of the section would be given effect to prospectively only and these conditions would not operate retrospectively. At the same time, he accepts that the legal position would be that those exporters with turnover of rupees less than Rs 10 crores and other like the respondents with turnover of more than Rs 10 crores would be on a par and both would be entitled to the benefits.

5. We find that in essence the High Court has quashed the severable part of third and fourth proviso to Section 80-HHC(3) and it becomes clear therefrom that challenge which was laid to the conditions contained in the said provisos by the respondent has succeeded. However, to make the position crystal clear, we substitute the direction of the High Court with the following direction:

"Having seen the twin conditions and since Section 80-HHC benefit is not available after 1-4-2005, we are satisfied that cases of exporters having a turnover below and those above Rs 10 crores should be treated similarly. This order is in substitution of the judgment in appeal."

16. Further, Hon'ble Jurisdictional Bombay High Court in the case of **Vijaya Silk House reported in 348 ITR 566** has also held that retrospective amendment u/s 80HHC is *ultra vires* and invalid. Thus, keeping in view the aforesaid judgments exclusion of profit on sale of DEPB license from business profit for computation of deduction u/s 80HHC is not correct and the entire claim for deduction u/s 80HHC is held to be allowed because the sole basis for disallowance was retrospective amendment which has been quashed by the constitutional Courts.

17. In view of the above, Ground No.2 raised by the assessee is allowed.

18. GROUND OF APPEAL NO. 3 with respect to the claim of deduction for commissions paid by the assessee

1."That the Commissioner of Income Tax (Appeals) erred on fact and in law in confirming the action of the assessing officer in disallowing the sum of Rs 28,49,914 being the commission paid by the appellant on the ground that confirmation was not received from the parties in this regard."

19. The assessee company has incurred Rs. 10,48,67,000/- under the head commission and claimed the same through debit in profit and loss account. During the course of assessment proceeding Assessing officer, the assessee could furnish details in respect of Rs. 6,50,34,396/- only. The ld. AO disallowed the expense of commission to the extent of Rs. 3,98,32,604/- in absence of details. During the course of appellate proceedings, the details of entire commission

payment was furnished to the ld.CIT(A) by way of Additional evidence. Remand Report for additional evidence was also sought from AO. Entire commission payment details amounting to Rs. 10,48,67,000/- was explained to the satisfaction of ld. CIT(A). The ld CIT(A) substantially deleted the addition made by ld. AO, however, confirmed the addition on account of commission payment amounting to Rs. 28,49,419/. This disallowance of commission payment was with respect to the three commission parties to whom notice u/s 133(6) could not be served.

20. Before us it has been submitted that this issue stands covered by the decision of the **Hon'ble Culcutta High Court in the case of Mather & Platt (India) Ltd. v. Commissioner of Income Tax (1987) 168 ITR 493 (CAL),** the Hon'ble High Court of Calcutta held that deduction claimed for amount paid as commission cannot be disallowed merely on the ground that the summons served on the parties came back unserved. The relevant extract from the judgement is reproduced herein below:

19. The only fact on which the Tribunal has proceeded is that four years after the transactions, summonses served on the commission agents had come back unserved. On entirety of the evidence, it cannot be held that if a person is not found in an address after four years, he is non-existent. In our view, the assessee has discharged its primary onus and established identities of the said two commission agents and no evidence had been brought on record by the Revenue to rebut the case of the assessee. On the entirety of the evidence, it would be unreasonable to hold that the assessee had failed to establish the identity of the said two commission agents and that payments to the said commission agents were not genuine.

21. We find that that here in this case the disallowance of commission has been made with respect to three parties only for the reason that notice u/s.133(6) could not be served and accordingly, commission payment of Rs.28,49,419/- out of Rs.10,48,67,000/- has been disallowed. Rest of the amount got verified by the AO in remand proceedings. Simply because notice u/s.133(6) has not been served cannot be the ground when assessee has produced all the evidences and details before the ld. CIT(A) as additional evidence on which remand report has also been sought. Once there is no discrepancy found in the details and evidences filed, then as held by the Hon'ble High Court disallowance cannot be made simply for non-service of notice u/s.133(6). Accordingly, we hold that no addition can be made simply by want of the confirmation from the parties and accordingly, deduction of amount of Rs.28,49,914/- paid as commission is allowed.

22. In the result, ground No.3 raised by the assessee is allowed.

23**.** GROUND OF APPEAL NO. 4 with respect to the claim of deduction of eexpenditure incurred on repairs and rreplacements of plant and machinery.

1. *That the Commissioner of Income Tax (Appeals) erred on facts and in law in confirming the action of the assessing officer in disallowing the sum of Rs 66,38,184/- being the expenditure incurred on repairs and replacements of plant and machinery, holding the same to be capital expenditure.*

24. The ld. AO disallowed the amount of Rs 66,38,184/- claimed as deduction by the assessee by virtue of expenditure in respect of repairs and replacement of plants and machinery

on the ground that the same is capital in nature and cannot be allowed as revenue expenditure. The basis for this was the contention that the assessee itself treated this expenditure to be a capital expenditure in its books of accounts.

25. The ld. CIT (A) upheld the action of ld. AO in treating the said expenditure as capital in nature for the reason that the assessee had capitalized the same in its books of accounts. He held that the assessee could not discharge the onus of treating the said expenditure as revenue expenditure. The ld. CIT(A) also relied on the assessee's own case for the assessment year 2002-03 wherein the Hon'ble Kolkata Bench upheld the action of the AO and the decision of the first appellate authority.

26. Before us ld. Counsel submitted that the decision of the ITAT Kolkata Bench in A.Y.2002-03 in ITA No. 1221/Kol/2006 and ITA No. 1045/Kol/2006 disallowing the assessee's claim for deduction for the expenditure incurred on repairs and replacement of plants and machinery, which was relied upon by the learned CIT(A), has been subsequently set aside by the Hon'ble Calcutta High Court. Thus, he submitted that the ld. AO and ld. CIT(A) arrived at the wrong finding and were not justified in disallowing the claim of deduction.

27. After considering the relevant finding given in the impugned order and after hearing both the parties, it is seen that the sole ground for making disallowance of Rs.66,38,184/- in respect of repairs and replacement of plants and machinery that it is capital in nature and that assessee

has capitalised the same in the books of accounts. Simply because assessee has capitalised expenditure in the books of accounts but later on in the computation has claimed it as revenue expenditure, then what is required to be seen is whether these falls in the ambit and scope of current repairs u/s. 31. **Hon'ble Supreme Court in the case of Commissioner of Income Tax vs. Saravana Spinning Mills (P) Ltd. (2007) 293 ITR 201 (SC)** held that under Section 31(i) of the Act, needs to be seen whether the expenditure incurred by the assessee is for "current repairs". It is irrelevant to consider whether the expenditure is revenue or capital in nature. The relevant extract of the judgement is reproduced hereinbelow:

12. The Legislature intended to stress that under Section 31(i) the permissible deduction admissible is only for current repairs, therefore, the question as to whether the expenditure incurred by the assessee conceptually is revenue or capital in nature is not relevant for deciding the question as to whether such an expenditure comes within the etymological meaning of the expression "current repairs". In other words, even if the expenditure is revenue, it may not fall in the connotation of "current repairs" in Section 31(i). The test formulated above applies to cases where the assessee claims allowance under Section 31(i). In the present case, the High Court has lost sight of the test to be applied for an expenditure to fall under Section 31(i) as "current repairs". It has embarked on the test which was not applicable, viz, whether the expenditure is revenue or capital in nature...

28. If this principle is to be followed, then, what is required to be seen what is the nature of repair and maintenance which neither the ld. AO nor ld. CIT(A) have analysed. Further, it has been pointed out that in assessee's own case

for A.Y. 2001-02 ITAT Mumbai Bench in ITA No.1373/K/2009 and ITA No.4930/Mum/2009 remanded the matter of the claim of deduction expenditure incurred of repairs and maintenance of plants and machinery back to the ld. AO for verification. However, from the perusal of the details as in the paper book, it is seen that these are small repairs and replacement of part of plant and machinery which is to be allowed u/s. 31 of the Act irrespective whether it is a capital or Revenue in nature. Thus, ld. AO is directed to examine the details in line with the decision of the Hon'ble Supreme Court in the case of IT vs. Sarvana Spinning Mills (supra). Accordingly, this ground is allowed subject to verification by the ld. AO.

29. In the result, ground No.4 raised by the assessee is allowed.

30. Ground of Appeal No.5 with respect to the claim of deduction of amount paid as service charges to BMCL

5. That the Commissioner of Income Tax (Appeals) erred on facts and in law in confirming the action of the assessing officer in disallowing the sum of Rs.5,63,69,000 paid by the appellant to Birla Management Corporation Limited (BMCL) as service charges, alleging that the appellant has failed to furnish evidence of the services rendered by BMCL to substantiate that the said expenditure was incurred for the purpose of the business of the appellant.

31. The company has contributed a sum of Rs. 5,63,69,000/- as cost contribution for various services rendered by BMCL for Financial Year 2002-03. BMCL is a Company limited by

guarantee, incorporated for providing common management and administrative services to member Companies. It is a mutual organization as contributors and participants are same. Assessee contends that the assessee being part of Aditya Birla Group is also part of BMCL.

32. A sum of Rs. 5,63,69,000/- has been debited to profit and loss account on account of BMCL as service charges. During the course of assessment proceeding assessee submitted that the expenses have been incurred for availing and sharing common facilities and the resources afforded by Birla Management Corporation Ltd. (BMCL) in respect of cost reduction, corporate restructuring, human resource development etc. The assessing officer did not allow the expenses in absence of an agreement with BMCL. Further Ld. AO observed that no evidence with respect to services rendered by BMCL was submitted, therefore, Ld. AO disallowed the expenses.

33. Ld. CIT (A) observed that the assessee filed evidence in nature of documents evidencing arrangement between the assessee and the BMCL and basis of payment made to BMCL. However, Ld CIT (A) did not allow the claim of expenditure on the ground that no evidence of services to justify any payment and relying on the decision of the ITAT Kolkata Bench for A.Y.2002-03 disallowing the assessee's claim.

34. After considering the facts and submissions made by the parties, first of all, it has been pointed out that the decision of the

ITAT Kolkata Bench for A.Y.2002-03 disallowing the assessee's claim relied upon by the ld. CIT (A) has been subsequently set aside by the Hon'ble Calcutta High Court. It has been contended before us that BMCL raises monthly debit notes on its member companies. The services charges payable by each company are worked out on the basis of a predetermined formula which is clearly laid down in the cost sharing agreement with BMCL. As per the cost sharing arrangement, the common expenses are shared amongst all the members on the basis of the average of the following, after considering the weighted factor for each ratio as under:

Weighted Factor

1. Ratio of Cash profit	30
2. Ratio of Gross revenue	26
3. Ratio of Net worth	22
4. Ratio of Net Block	22
	100

35. It has been further contended that the BMCL is only recovering the cost of services and it does not charge any mark-up which is evident from the Profit & Loss account of BMCL. The assessee had also filed detailed written submission in this regard before us.

36. First of all it is not in dispute that BMCL is only recovering the cost of services and it does not charge any mark-up for providing net management and administrative

services to the member companies. The assessee had submitted all the evidences that expenses have been incurred for availing and sharing common facilities and the sources afforded by BMCL. Before us additional evidence paper book in form of evidence of services which has been furnished at pages number 49 to 63. In subsequent assessment year i.e., AY 2004-05 on the basis of similar evidence of services CIT (A) has granted relief on this ground after considering ITAT order for AY 2002-03 in assessee's own case. Though in 2002-03, this Tribunal had dismissed claim for allowance of BMCL expense for lack of proof of services, but that finding too has been set aside by Hon'ble High Court. If the services have been rendered and proof of services have been given, we do not find any reason as to why disallowance should be made in the corporate world that for the common services and common maintenance and entity for the same group provides centralized services and here in this case, BMCL has not even charged mark-up and BMCL is assessed at Nil on the principle of mutuality.

37. We find that Hon'ble Bombay High Court in the case of **PCIT v. M/s Merck Ltd. (Income Tax Appeal No. 726 of 2017)** had an occasion to deal with similar issue. Relevant paragraph of the judgment is reproduced herein below:

"4. Regarding question (b):

(a) The respondent had made a payment of Rs. 3 crores to its one AE viz. M/s. Merck KGaA in terms of consultancy agreement between the above AE and itself. The agreement provided that the AE will give technical consultancy in various areas to the

respondents for the above consideration. The TPO on facts found that the respondent did not avail of any services under the above agreement and thus determined the ALP at Nil.

(b) The impugned order of the Tribunal holds that under the consultancy agreement, the respondent was entitled to receive a package of services on as and when required basis. Thus, even if the assessee may not have received all the services, yet the respondent has a right to receive these services. Thus, relying upon a decision of its co-ordinate bench in AWB India Ltd. Vs. DCI (2015) 152 ITD 570 it held that if a package of services is made available on requirement basis, the value of services cannot be taken as Nil, so long as the agreement is not a sham.

(c) It is an agreed position between the parties that in the respondent's own case for Assessment Year 2003-04, a similar issue had arisen viz. package of services being available under the agreement on as and when required basis. This Court by an order dated 2nd August, 2016 (CIT Vs. Merck Ltd. Writ Petition No.272 of 2014) held the fees paid for on bouquet of services as and when required, would be similar to retainer agreement. It is agreed by the Revenue that the above order dated 8th August, 2016 of this Court in the respondent's own case will equally apply to the present facts.

(d) In the above view, the question as proposed does not give rise to any substantial question of law. Thus, not entertained."

The assessee further contends that in present case also there is right to receive services from BMCL. Without prejudice to the stand that services has been availed from BMCL, even if no services has been taken in previous year relevant to assessment year, the charges paid to BMCL on this account is deductible as per judgment of Bombay High Court in the case of Merck India Ltd. The assessee further Contend that in present case, the assessee not only had right to receive various managerial services from BMCL but also have availed the services for which sample evidence is furnished by way of additional evidence as stated above. The assessee further relies upon following various judgement in support of his contention:

i. CIT Vs Spencers & Co Ltd 49 taxmann.com 318

ii. Phillips Carbon Black Ltd. [2011] 133ITD 189/16 taxmann.com 64

iii. CIT vs. Oriental Carpet Manufactures (India) P. Ltd. [86 ITR 543(P & H)]

iv. Dresser Rend India (P) Ltd vs. ACIT [61 DTR 265 Mumbai]

v. Duncan Industries Ltd. vs. ACIT – (ITA No. 905 of 2003)

vi. DCIT vs. M/s Eveready Industries (India) Ltd.(ITA No. 455/kol/2003)

The assessee had submitted a detailed legal note for the consideration of Hon'ble Bench. The assessee would like to bring to the notice that in subsequent assessment year i.e AY 2004-05, CIT(A) on submission of sample evidence of services has allowed the deduction on account of BMCL charges. The relevant operative part on which assessee relies is reproduced herein below:

> *" I find force in the argument of the AR as the main reason of disallowance in earlier years as the main reason of disallowance was non furnishing of evidence, the case in present year is different and distinguishable on facts as evidence of services rendered were furnished with A.O. in the year under appeal. The quantum of payment cannot be disputed as the sum was actually paid by appellant company to BMCL and no disallowance can be invoked u/s 40A(2) on account of quantum of payment as section 40A(2) is not applicable in present case.*

The fact of appellant case and that of Duncan industries ITA 905/KOL/2003 as well as M/s Eveready Industries India Ltd are similar wherein Kolkata ITAT has decided the case in favour of appellant. Appellant's own case with ITAT for AY 2002-03 is clearly distinguishable on facts as Hon'ble ITAT had disallowed deduction of BMCL charges mainly on ground of non furnishing of evidence of services whereas in the year under appeal such evidence were furnished with AO at the time of assessment proceedings. Therefore, relying on the case of Duncan Industries and Eveready Industries India Ltd. as stated above and being convinced that payment to BMCL were made for business purpose of appellant I allow the ground of appeal in favour of appellant. A.O. is directed to delete the disallowance made on account BMCL service charges."

38. Thus, if the services have been taken in the relevant assessment year, the charges paid by BMCL on this account as per the Hon'ble Bombay High Court in the aforesaid case, then same are allowable. Further here in this case, assessee not only received sundry managerial services from BMCL but also availed the services for which sample evidence of service has been furnished by way of additional evidence before us. Similar evidences were filed in AY 2004-05 wherein the First Appellate Authority had accepted the rendering of services and allowability of deduction after detailed examination of the evidences. Thus, for this year also, we hold that payment made to BMCL for rendering service cannot be disallowed by invoking Section 40A (2). Thus, we direct the ld.AO to allow the payment made to BMCL for rendering of services.

39. Accordingly, the ground No.5 raised by the assessee is allowed.

40. GROUND OF APPEAL NO. 6 with respect to the claim of deduction of amount spent by the assessee as community development expense.

1. That the Commissioner of Income Tax (Appeals) erred on facts and in law in disallowing an expenditure of Rs 27,88,975/- incurred by the assessee on account of community development expenses holding the same to be charitable expenditure not incurred for the purposes of the appellant's business.

41. The assessee has debited 27,88,975/- under the head 'community development'. Before the assessing officer, assessee has explained that the expenses were incurred for

assistance with respect to drinking water supply, educational support etc in the neighbouring areas of mine. The ld.AO disallowed the expenses treating it as donation in nature being not connected with business of the assessee. The ld. CIT(A) confirmed the finding of ld.AO at page 81. CIT (A) also relied on assessee's own case for AY 2002-03 where Tribunal has confirmed the said addition.

42. It has been contended that decision of the Tribunal for A.Y.2002-03 has been set aside by the Hon'ble Calcutta High Court. Further, assessee is in the business of manufacturing of aluminium which causes pollution in the nearby surrounding areas. These expenses were incurred for assistance for drinking water supply, women and child welfare, medical services, educational support, etc. in the neighboring area of the mines. The expenses incurred were backed by commercial exigency so as to be in harmony with the villagers in the areas surrounding the mines. The ld. AO did not appreciate the fact that these expenses were necessary for the purpose of ensuring smooth running of the factories and were primarily driven for avoiding industrial problems.

43. It has been submitted that taking into account the totality of facts as stated above, it is an established fact that these expenses were wholly and exclusively for the purpose of business, and had direct business nexus. Hence, the said community development expenses can under no stretch of

imagination be treated as philanthropic or being in the nature of donation.

44. After considering the finding given in the assessment order, ld. CIT(A) and ld. AO has disallowed the expenses treating it as a donation in the nature being not credited with the business of the assessee. This issue stands covered by the Hon'ble Madras High Court in the case of **Commissioner of Income Tax v. Madras Refineries Ltd. (2004) 266 ITR 170 (Mad)** wherein under similar circumstances, the assessee therein had incurred community development expenses of the same nature, and the said expenses were finally held to be non-philanthropic in nature, incurred wholly for the purpose of business. The relevant extract of the judgement is reproduced hereinbelow:

5. The concept of business is not static. It has evolved over a period of time to include within its fold the concrete expression of care and concern for the society at large and the people of the locality in which the business is located in particular. Being known as a good corporate citizen brings goodwill of the local community, as also with the regulatory agencies and the society at large, thereby creating an atmosphere in which the business can succeed in a greater measure with the aid of such goodwill. Monies spent for bringing drinking water as also for establishing or improving the school meant for the residents of the locality in which the business is situated cannot be regarded as being wholly outside the ambit of the business concerns of the assessee, especially where the undertaking owned by the assessee is one which is to some extent a polluting industry.

45. Similarly, the **Hon'ble Bombay High Court in the case of Commissioner of Income Tax v. M/s Nicholas Piramal (India)**

Ltd. in ITA No. 1586 of 2013 has also placed reliance on Madras Refineries Ltd. (supra). The relevant extract is reproduced hereinbelow:

6. The Tribunal while following the decision of the Madras High Court in Commissioner of Income Tax v/s. Madras Refineries Ltd., 266 ITR 170 held that the concept of business is not static and over a period of time, it would include within its fold the care and concern for the society at large which would result in a goodwill being created in its favour leading to better business. The Madras High Court in Madras Refineries (supra) had allowed expenditure incurred on drinking water facilities and aid to the school. Therefore, in the present case also, expenditure incurred for community is for the purpose of business. This is in effect, a finding of fact and the Revenue is unable to show, it is perverse. Thus, no fault can be found with the order of the Tribunal.

46. Thus, we hold that expenses incurred of sundry development are treated as expenditure incurred wholly and exclusively for the purpose of business. Accordingly, ground No.6 is allowed.

47. Ground No. 7 with respect to the claim of deduction in respect of advertisement expenses incurred by the assessee and ground no. 10 and 11 are also not pressed in view of the smallness of amount. Accordingly, ground No.7,10 and 11 are treated as dismissed.In the result, ground No.7,10 & 11 are dismissed.

48. Ground No. 12 with respect to claim of deduction of the entrance fees paid to clubs.

12. That the Commissioner of Income Tax (Appeals) erred on facts

and in law in confirming the action of the assessing officer in disallowing contribution made by the appellant to Bengal Club, Kolkata amounting to Rs 14,38,666 holding that the aforesaid expenditure was not incurred for the purpose of the business of the appellant.

49. The assessee's claim of deduction on account of Rs 14,38,666/- paid for membership of Bengal Club, Kolkata was disallowed by the learned ld.AO on the basis that such expenses were personal in nature and on behalf of the employees, thus disqualifying them from being treated as business expenditure. This was upheld by the ld. CIT(A). As per the ld. CIT(A), the expense cannot fall in the category of an expenditure incurred wholly, necessarily and exclusively for the purpose of business.

50. Now this issue stands covered by the decision of the **Hon'ble Bombay High Court** in the case of **OTIS Elevators Company India limited vs comm. of Income tax IT ref. no. 497 of 1977**, Sayaji Iron & Engg. Co. vs. Commissioner of Income Tax, (2002) 253 ITR 749 (Guj). Further, full Bench decision of the Punjab & Haryana High Court in the case of **Commissioner of Income Tax v. Groz Beckert Asia Limited (2013) 351 ITR 196 (P&H) (FB)** before the Hon'ble High Court of Punjab and Haryana, a similar claim of membership fees of a club paid by the assessee-company was declined by the AO on the ground that they were personal expenses of the MD and other employees. The Hon'ble High Court however held that such expenses were for running the

business with a view to produce benefits to the assessee-company. The relevant extract is reproduced hereinbelow:

16. In the present case, the corporate membership of Rs.6 lacs was for a limited period of 5 years. The corporate membership was obtained for running the business with a view to produce profit. Such membership does not bring into existence an asset or an advantage for the enduring benefit of the business. It is an expenditure incurred for the period of membership and is not long lasting. By subscribing to the membership of a club, no capital asset is created or comes into existence. By such membership, a privilege to use facilities of a club alone, are conferred on the assessee and that too for a limited period. Such expenses are for running the business with a view to produce the benefits to the assessee. Consequently, it cannot be treated as capital asset. Therefore, the reasoning given by Delhi, Bombay and Gujarat High Courts in respect of members of Clubs is based upon correct enunciations of the principles of law as delineated above in the judgments of the Supreme Court.

51. Therefore, it cannot be said that the assessee's expenditure on subscription to the club for its employees is for the personal use. Instead, the welfare of the employees gained out of the said expense goes towards running the business of the assessee and producing business benefits. Thus, ground No.12 is allowed.

52. ***GROUND OF APPEAL NO. 13*** *.That the Commissioner of Income Tax (Appeals) erred on facts and in law in not holding that on the facts of the appellant's case, the action of the assessing officer in not allowing set off of short term capital loss on sale of investments against profit on sale of investments was erroneous; instead in holding that the aforesaid loss on sale of investments was not allowable in view of the provisions* of section 94(7) of the Act.

13.1.That the Commissioner of Income Tax (Appeals) erred on facts

and in law in not appreciating that provision of Section 94(7) of the Act had no application on the facts of the appellant's case."

53. The assessee company has reported profit on sale of investment to the tune of Rs. 34,93,14,559/- in its profit and loss account. However, in computation of income, only Rs. 2,00,45,757/- was shown after deducting short term capital loss of Rs. 33,09,97,762/- and was offered to tax. Assessing officer did not accept loss claimed in computation of income and assessed short term capital gain at 34,93,14,550/- without considering loss claimed in computation. Before the CIT (A), vide letter dated 21.02.2006, an explanation was submitted for profit on sale of investment to be taken at Rs. 2,00,45,757/-. The assessee before CIT(A) explained the loss arising out of bonus plan and dividend plan was explained.

54. However, the CIT (A) has treated the entire loss as arising out of bonus plan as covered by section 94(7) which only deals with mischief of dividend stripping. Further the loss arising out of dividend plan was not considered at all.

55. Before us, assessee filed detailed written submissions wherein it has been submitted that with respect to K Bond 99 dividend plan, an accounting profit of Rs 2,23,12,232/- was shown whereas loss of Rs. 7,96,30,763/- was claimed under computation. It has been submitted that these units were purchased for Rs. 44,33,00,000/- on 13.03.2002. Subsequently a dividend of Rs. 9,60,21,660/- was received on 13.03.2002. Post receipt of dividend, NAV of the units came down

substantially. Therefore, in accounts write down of investment was made for Rs.10,19,42,996/- on this account. Because of such write down of investment, the original cost of the unit was brought down from Rs. 44,33,00,000/- to Rs. 34,13,57,004/-. The Assessee further clarified that the said write down of investment amounting to Rs. 10,19,42,996/- was offered to tax in the return of income of AY 2002-03 because write down of investment is not a permissible deduction.

56. In subsequent year (the current assessment year), the said investments were sold for Rs. 36,36,69,236/- which resulted into profit in the accounts to the tune of Rs. 2,32,12,230/-, as cost of the units as per books were brought down to Rs. 34,13,57,004/- because of provision of write down. However, as per income tax calculation, the original cost was taken as actual historical cost i.e., Rs. 44,33,00,000/- giving loss of Rs. 7,96,30,763/-. The assessee further contended that mischief of 94(7) is not applicable in this case as holding period of these units were for a period were long enough to come out of mischief of 94(7). Thus lower authorities have completely disregarded these facts.

57. Further, assessee submitted that a loss on account of K bond wholesale plan bonus option should have been allowed. On 07.01.2003, 4,31,55,208 units were purchased for Rs. 68,19,77,442/-. Subsequently, on 10.01.2003, bonus in the ratio of 2:1 was given. In the books of account, the cost for original units was averaged between bonus and original units. Thereafter original units (4,31,55,208 units) were sold for Rs.

45,92,29,226/- incurring loss of Rs. 17,28,952/- in the accounts. Whereas, as per income tax law, short term capital loss was reported to the tune of Rs. 22,90,54,766/-. This loss was as per section 55(2)(aa) which provides that in case of issue of bonus unit, the cost for original units remains the same. The assessee contended that loss of Rs. 22,90,54,766/- was computed as per section 55(2)(aa). The assessee further contended with respect to bonus plan, provision of section 94(7) as applied by Commissioner is not applicable at all. The correct provision to cure mischief of bonus stripping is section 94(8) came into effect only from 01.04.2005 and was not applicable for current assessment year. The assessee also relied upon the judgement of DCIT vs Ghanshyam Dass Seth (ITAT 121 TTJ 805) and Supreme Court judgment in the case of Walfort share and Stock broker (233 ITR 42), and Shambhu Mercantile Ltd (SC) (224 CTR 499). These judgments support the legal position that provision of bonus striping contained in section 94 (8) which is enacted w.e.f. 01.04.2005 cannot be invoked retrospectively.

58. The assessee's contention before us is that a sum of Rs. 22,90,54,766/- was incurred as loss as per section 55 of Income Tax Act on sale of original units of K Bond Wholesale plan bonus option. This loss has not arisen in books of account as the cost incurred for acquisition of original unit of k-bond wholesale plan was apportioned also to units received as bonus. Therefore, when original unit of K bond was sold, as per section 55(2)(aa), the cost of original unit remains the

same at which the original units were acquired and sale of original units resulted in Loss of Rs. 22,90,54,766/-

59. Thus, Ld CIT (A) has wrongly applied provision of dividend stripping contained in 94(7) on transaction in the nature of bonus stripping covered by section 94(8) which were not in existence in previous year 2002-03.

60. After considering the aforesaid submissions we feel that this matter should be restored back to the ld. AO to examine whether the losses of bonus stripping should be allowed as there is no application of section 94(8) in year under appeal. So far as loss on account of dividend striping is concerned, the ld. AO will examine the holding period of units and decide the issue to examine the issue of losses because Section 94(7) is not attracted due to adequate holding period. Accordingly, this ground is partly allowed for statistical purposes.

61. In the result, ground No.13 is partly allowed for statistical purposes.

62. GROUND OF APPEAL NO. 14 with respect to the expenditure incurred on maintenance and depreciation of aircraft

> *"14.That the Commissioner of Income Tax (Appeals) erred on facts and in law in sustaining the disallowance of Rs 36,00,000 and Rs 1,05,39,094 relating to expenditure on maintenance and depreciation respectively of the aircraft jointly owned by the appellant, holding that the same was not used for the purpose of the business of the appellant."*

63. The ld. AO had disallowed the assessee's claim of depreciation on aircraft and expenditure incurred on

maintenance of aircraft on account of absence of any proof of its acquisition and failure to furnish any evidence with respect to commissioning of aircraft. Before the ld. CIT (A) the use of aircraft as trainee flight were furnished as additional evidence. Upon furnishing of additional evidence by the assessee during appellate proceedings, matter was sent back to AO for remand report. The ld. AO in his remand report took a stand that the airplane was put to use in the business of the assessee only in the subsequent year. The flights in the concerned year were all categorized as trainee flights, and accordingly the ld.AO suggested disallowing the claim on the ground that training was not the business of the assessee.

64. The ld. CIT (A) confirmed the action of the ld.AO and held that the ld. AO's finding that the airplane was not brought into the business use of the assessee in the previous year had not been rebutted by the assessee.

65. We have heard both the parties and perused the finding given by the authorities below. Initially ld. AO disallowed the claim of depreciation on aircraft and expenditure incurred on maintenance of aircraft on account of absence of any proof of its acquisition and failure to furnish any evidence with respect to commissioning of aircraft. Upon furnishing of additional evidences by the assessee, ld. AO has given his remand report and his main contention is that the airplane was put to use in the business of the assessee only in the subsequent year. The flights in the concerned year were all categorized as trainee flights and on this ground disallowance has been made. It has

been contended that even it is a trial run of machinery, still it makes it eligible for claim of depreciation u/s 32 of Act. In support of this, the decision of **Hon'ble Gujarat High Court has been relied upon in the case of Assistant Commissioner of Income Tax v. Ashima Syntex Ltd. (2001) 251 ITR 133 (Guj),** wherein trial run of machines was held to be "being used for the purpose of business" as specified under Section 32 of the Act. The relevant extract of the judgment is reproduced herein below*:*

> *"37. Thus, it is clear that the settled position in law is that it is not necessary that the machinery must be used for a particular number of days so as to entitle it to depreciation, but it requires that it should be used for the purpose of business or profession or vocation. The trial run of the machinery is obviously for the purpose of business and not for any other purposes. What is required to be seen that the machinery must be "used" for the purpose of the business and keeping in mind the wider meaning ascribed by various decisions of various courts to the term "use", even trial production of a machinery would fall within the ambit of "used for the purpose of business". Further, as the statute does not prescribe a minimum time limit for "use" of the machinery, the assessee cannot be denied the benefit of depreciation on the ground that the machinery was used for a very short duration for tria*l run."

66. Thus, the trial run is held as use for the purpose of business, then the maintenance expenses should also be allowed as deductible. The assessee had also furnished flight details for the year under consideration which has been enclosed at pages 50 to 53 of paper book which clearly shows that it was a trial run and for training of the flights. Thus, depreciation and

maintenance at the aircraft is held to be allowed. In the result, ground No.14 is allowed.

67. Ground No.15 relating to disallowance on adhoc basis of Rs.10,00,000/- u/s.40A(2)(b) in respect of amount paid and reimbursed by the assessee to M/s. Hindalco Industries Ltd. has not been pressed due to smallness of amount. Accordingly, same is dismissed as not pressed. In the result, ground No.15 is dismissed.

68. Assessee has also raised various additional grounds which we will deal hereinafter.

69. Additional grounds 1: Deduction u/s 80HHC has to be computed on the basis of adjusted book profit under section 115JB and not on the basis of the profits computed under regular provisions of law applicable to computation of profits and gains of business. The brief facts are that The company had claimed a deduction of Rs. 6,04,02,369/-, u/s 80HHC while calculating book profit u/s 115JB. The said claim was made as per Form 10CCAC. The quantum of the claim was determined on the basis of business profit computed as per as per normal computation of income and not as per adjusted Book Profit u/s 115JB. The assessee contended that the issue is squarely covered by ***Bhari Information Technology (245 CTR 1) (SC)*** wherein, it was held that deduction u/s 80HHE from Book Profit for the purpose of MAT should be computed based on Book Profits as per profit and loss account and not based on

business income computed as per section 28 to 44D. Therefore, same ratio shall equally apply for the deduction u/s 80HHC. For sake of convenience, the head note of the decision is reproduced herein below:

"Company—Book profit under s. 115JA—Deduction under s. 80HHE—Deduction claimed by the assessee under s. 80HHE has to be worked out on the basis of adjusted book profit under s. 115JA and not on the basis of the profits computed under regular provisions of law applicable to computation of profits and gains of business."

70. The assessee further contended that case is also covered by Madras High Court decision in case of **CPS textiles (P.) Ltd. (20 taxmann.com 372).**

71. After considering the aforesaid facts and contentions of ld. Counsel it is seen that company had claimed deduction of Rs.6,04,02,369/-u/s.80HHC by calculating book profit u/s.115JB which was made as per Form 10CCAC. The quantum of the claim has been determined on the basis of business profit computed as per normal computation of income and not as per adjusted book profit. Now, this issue as noted above stands covered by the decision of the Hon'ble Supreme Court which was rendered in the context of deduction u/s.80HHC wherein the Court held that deduction from book profit for the purpose of MAT should be computed based on book profit as per profit and loss account and not based on business income as per Section 28(D) to 44D. Since assessee has not given any working and neither such claim

was made before the ld. AO because assessee had computed the book profit under MAT and not under normal provision of computation of income, therefore, this issue is remanded back to the ld. AO to be decided in accordance with law in line with the decision of the Hon'ble Supreme Court in the case of Bhari Information Technology (supra).

72. Additional Ground No.2 raised by the assessee is as under:-

"That for calculating book profit u/s 115JB, 100% of the eligible profit is to be deductible u/s 80HHC."

73. The assessee company while calculating deduction u/s 80HHC, from book profit under MAT, only 50% of eligible profit was claimed. The assessee relied upon the judgement of Hon'ble Supreme Court in the case of Ajanta Pharma Ltd. vs. Commissioner of Income Tax wherein the Hon'ble Court held that deduction on account of 80HHC for the purpose of computing book profit under MAT shall be 100% of the profit eligible for deduction u/s 80HHC and not to be computed as per phased out percentage as prescribed in sub section (3) of Section 80HHC.

74. Now in light of the judgement of Hon'ble Supreme Court, assessee was asked to submit a revised work of 80HHC deductible from the book profit for computation of tax under MAT, which was given in the following manner:-

COMPUTATION OF PROFITS OF THE BUSINESS IN TERMS OF EXPLANATION (baa) TO SECTION 80HHC OF THE INCOME-TAX ACT,1961 FOR THE ASSESSMENT YEAR 2003-2004

BOOK PROFIT ITEMS *1,31,31,06,388.00*

LESS: ADJUSTABLE

SALE OF IMPORT LICENSE	25,55,86,368.00
RENT	24,11,015.00
INTEREST	4,26,70,496.00
DIVIDEND	3,56,691.00
TOTAL	30,10,24,570.00

90% THEREOF 27,09,22,113.00

ADJUSTED BUSINESS PROFIT

1,04,21,84,275.00

Particulars	**Amount(Rs.)**
Profits of the business as per Explanation(baa) to section 80HHC(3) of the Act. (A)	1,04,21,84,275
Export Turnover (B)	3,91,63,22,757
Total Turnover (C)	13,25,10,39,637
Deduction under section 80 HHC(3) of the Act	30,80,15,832

90% of the profit on sale of DEPB credits to be added in the ratio of export turnover to total turnover as per third proviso to section 80HHC(3) of the Act. (D)	23,00,27,731
(D) in the ratio of export turnover to total turnover **[Y]**	6,79,84,314
Total admissable deduction under section 80 HHC of the Act **[X+Y]**	37,60,00,145

75. Accordingly, this issue is remanded back to the ld. AO to examine the computation of the revised working of 80HHC which is deductible from the book profit which is in light of the decision of the Hon'ble Supreme Court in the case of Ajanta Pharma Ltd. vs CIT (supra). Accordingly, additional Ground No.2 is allowed.

76. Additional Ground Nos.3 & 4 reads as under:-

"Additional Ground No. 3 "That deduction under sec. 80HHC has to be re computed after taking into account the netting of the interest received with interest paid for the purpose of calculating eligible business profit as per clause baa to the explanation u/s 80HHC".

Additional Ground No. 4 "That the assessee is eligible for 100% deduction of profit derived from Hirakund power plant as per amended provision of Section 80IA(1) instead of 30%, as originally claimed in the return of income."

77. These grounds have not been pressed before us and it has been requested that a liberty should be given to further rectification of application u/s.154 of the Act. Thus, the additional ground Nos.3&4 are dismissed as not pressed.

78. In Revenue's appeal wherein following grounds have been raised:-

1.(a) That on the facts and in the circumstance of the case Ld. C.I.T.(A) has erred in allowing relief to the assessee by adopting the price of electricity expenses of Rs.2.63 per unit against adopted by A.O. of Rs. 0.77 per unit in calculating deduction us. 801A of 1.T.Act 1961.

1.(b) That on the fact and in the circumstance of the case Ld. C.LT.(A) has erred in accepting the sale price of power @ Rs. 2.63 per unit as against selling price of power to Grid Corporation of Orissa Ltd @ Rs. 0.77 per unit

1(c) That on the fact and in the circumstance of the case Ld. C.LT. (A) has erred in accepting assessee's determination of power price @ Rs. 2.63. per unit in the case consumption of power by it's own unit as against selling price of power to Grid Corporation of Orissa Ltd.

79. The assessee company has made a claim of deduction u/s 80IA in respect of its power plant at Hirakud, Orissa amounting to Rs. 17,86,56,581. This is a matter of fact that power generated by power plant is substantially consumed by the aluminum unit of the assessee and small part of power generated was sold to Grid Corporation of Orissa Ltd.

80. Assessee company has adopted rates charged by Orissa State electricity board to its industrial consumer which was taken at Rs. 2.63 per unit as Transfer price to Aluminium unit for computing deduction u/s 80(IA). Assessing officer denied the entire claim of deduction u/s 80IA by adopting the Transfer price at which small part of power generated was sold

to Grid Corporation of Orissa Ltd. which was at 77 paisa per unit.

81. Ld CIT(A) observed that price charged from Grid Corporation of India was dictated and not free price as the price has inbuilt compensation therein for the assessee because without agreeing to such pricing conditions, the permission for setting up of power unit would not have been granted. Ld. CIT(A) directed ld.AO to adopt price charged by Orissa Electricity board to industrial consumer which is taken at 2.63 per unit. Ld. CIT(A) also directed the ld.AO to look into expenses relating to these particular unit.

82. At the outset, assessee contended that this issue is squarely covered by assessee's own case in AY 2001-02 by ITAT order contained at page 701 of evidence paper book 2. However, assessee also clarifies that the tribunal order for AY 01-02 based its finding also on ITAT order for AY 02-03 on assessee's own case. It is also brought to the notice that the entire ITAT order for AY 2002-03 has been set aside by Hon'ble High court of Calcutta.

83. Now, this issue stands covered by the decision of the Hon'ble Supreme Court in the case of **CIT vs. Jindal Steels & Power Ltd. (2023) 157 Taxmann.com 207**. As noted from the books of accounts, has adopted rates charged by Orissa State electricity board to its industrial consumer which

was taken at Rs. 2.63 per unit as Transfer price to Aluminium unit for computing deduction u/s 80(IA). Assessing officer denied the entire claim of deduction u/s 80IA by adopting the Transfer price at which small part of power generated was sold to Grid Corporation of Orissa Ltd. which was at 77 paisa per unit.

84. Hon'ble Supreme Court after analyzing the provision of Section 80IA(8) held the concept of 'open market' as used in explanation that "market value" in relation to any goods, means the price that such goods would ordinarily fetch on sale in the open market observed and held as under:-

15.6 Sub-section (8) says that where any goods held for the purposes of the eligible business are transferred to any other business carried on by the assessee or where any goods held for the purposes of any other business carried on by the assessee are transferred to the eligible business but the consideration for such transfer as recorded in the accounts of the eligible business does not correspond to the market value of such goods as on the date of the transfer. then for the purposes of deduction under section 80-IA, the profits and gains of such eligible business shall be computed as if the transfer had been made at the market value of such goods as on that date. The proviso says that if the assessing officer finds exceptional difficulties in computing the profits and gains of the eligible business in the manner specified in sub-section (8), then in such a case, the assessing officer may compute such profits and gains on such reasonable basis as he may deem fit. The explanation below the proviso defines "market value" for the purpose of sub-section (8) It says that market value in relation to any goods means the price that such goods would ordinarily fetch on sale in the open market.

15.7 Thus, section 801A (8) provides that where goods or services held for the purposes of eligible business are transferred to any

other business carried on by the assessee, the price charged for such transfer should correspond to the market value of such goods or services as on the date of transfer if the price of goods or services transferred is overstated in comparison to the market value, the assessing officer has the competence to recompute the profit by substituting the market value of such goods. The explanation below sub-section (8) defines the expression "market value" to mean the price that such goods or services would ordinarily fetch in the open market. That takes us to the expression "open market" which is however not defined.

15.8 Since the expression "open market" is not defined, we will analyze the said expression in conjunction with the expression "market value", though at a subsequent stage of the judgment.
****

22. Reverting back to sub-section (8) of Section 80-IA, It is seen that if the assessing officer disputes the consideration for supply of any goods by the assessee as recorded in the accounts of the eligible business on the ground that it does not correspond to the market value of such goods as on the date of the transfer, then for the purpose of deduction under section 80-1A, the profits and gains of such eligible business shall be computed by adopting arm's length pricing. In other words, if the assessing officer rejects the price as not corresponding to the market value of such good, then he has to compute the sale price of the good at the market value as per his determination. The explanation below the proviso defines market value in relation to any goods to mean the price that such goods would ordinarily fetch on sale in the open market. Thus, as per this definition, the market value of any goods would mean the price that such goods would ordinarily fetch on sale in the open market.

23. This brings to the fore as to what do we mean by the expression "open market" which is not a defined expression

24. Black's Law Dictionary, 10th Edition, defines the expression "open market" to mean a market In which any buyer or seller may trade and in which prices and product availability are determined by free competition. P Ramanatha Alyer's Advanced Law Lexicon has also defined the expression "open marker" to mean a market in

which goods are available to be bought and sold by anyone who cares to. Prices in an open market are determined by the laws of supply and demand.

25. Therefore, the expression "market value" in relation to any goods as defined by the explanation below the proviso to sub-section (8) of Section 80-1A would mean the price of such goods determined in an environment of free trade or competition. "Market value" is an expression which denotes the price of a good arrived at between a buyer and a seller in the open market ie, where the transaction takes place in the normal course of trading. Such pricing is unfettered by any control or regulation: rather, it is determined by the economics of demand and supply

26. Under the electricity regime in force, an industrial consumer could purchase electricity from the State Electricity Board or avail electricity produced by its own captive power generating unit. No other entity could supply electricity to any consumer. A private person could set up a power generating unit having restrictions on the use of power generated and at the same time the tariff at which the said power plant could supply surplus power to the State Electricity Board was also liable to be determined in accordance with the statutory requirements. In the present case, as the electricity from the State Electricity Board was inadequate to meet power requirements of the industrial units of the assessee, it set up captive power plants to supply electricity to its industrial units. However, the captive power plants of the assessee could sell or supply the surplus electricity (after supplying electricity to its industrial units) to the State Electricity Board only and not to any other authority or person. Therefore, the surplus electricity had to be compulsorily supplied by the assessee to the State Electricity Board and in terms of Sections 43 and 43A of the 1948 Act, a contract was entered into between the assessee and the State Electricity Board for supply of the surplus electricity by the former to the latter. The price for supply of such electricity by the assessee to the State Electricity Board was fixed at Rs. 2.32 per unit as per the contract. This price is, therefore, a contracted price. Further, there was no room or any elbow space for negotiation on the part of the assessee. Under the statutory regime in place, the assessee had no other alternative but to sell or supply the surplus electricity to the State Electricity Board. Being in a dominant position, the

State Electricity Board could fix the price to which the assessee really had little or no scope to either oppose or negotiate. Therefore, it is evident that determination of tariff between the assessee and the State Electricity Board cannot be said to be an exercise between a buyer and a seller in a competitive environment or in the ordinary course of trade and business Le, in the open market. Such a price cannot be said to be the price which is determined in the normal course of trade and competition.

27. Another way of looking at the issue is, if the industrial units of the assessee did not have the option of obtaining power from the captive power plants of the assessee, then in that case it would have had to purchase electricity from the State Electricity Board. In such a scenario, the industrial units of the assessee would have had to purchase power from the State Electricity Board at the same rate at which the State Electricity Board supplied to the industrial consumers i.e.. Rs. 3.72 per unit.

28. Thus, market value of the power supplied by the assessee to its industrial units should be computed by considering the rate at which the State Electricity Board supplied power to the consumers in the open market and not comparing it with the rate of power when sold to a supplier le, sold by the assessee to the State Electricity Board as this was not the rate at which an industrial consumer could have purchased power in the open market. It is clear that the rate at which power was supplied to a supplier could not be the market rate of electricity purchased by a consumer in the open market. On the contrary, the rate at which the State Electricity Board supplied power to the industrial consumers has to be taken as the market value for computing deduction under section 80-IA of the Act.

29. Section 43A of the 1948 Act lays down the terms and conditions for determining the tariff for supply of electricity. The said provision makes it clear that tariff is determined on the basis of various parameters. That apart, it is only upon granting of specific consent that a private entity could set up a power generating unit. However, such a unit would have restrictions not only on the use of the power generated but also regarding determination of tariff at which the power generating unit could supply surplus power to the concerned State Electricity Board.

Thus, determination of tariff of the surplus electricity between a power generating company and the State Electricity Board cannot be said to be an exercise between a buyer and a seller under a competitive environment or a transaction carried out in the ordinary course of trade and commerce. It is determined in an environment where one of the players has the compulsive legislative mandate not only in the realm of enforcing buying but also to set the buying tariff in terms of the extant statutory guidelines. Therefore, the price determined in such a scenario cannot be equated with a situation where the price is determined in the normal course of trade and competition. Consequently, the price determined as per the power purchase agreement cannot be equated with the market value of power as understood in the common parlance. The price at which the surplus power supplied by the assessee to the State Electricity Board was determined entirely by the State Electricity Board in terms of the statutory regulations and the contract. Such a price cannot be equated with the market value as is understood for the purpose of Section 801A (8). On the contrary, the rate at which State Electricity Board supplied electricity to the industrial consumers would have to be taken as the market value for computing deduction under section 80-IA of the Act.

30. Thus on a careful consideration, we are of the view that the market value of the power supplied by the State Electricity Board to the industrial consumers should be construed to be the market value of electricity. It should not be compared with the rate of power sold to or supplied to the State Electricity Board since the rate of power to a supplier cannot be the market rate of power sold to a consumer in the open market. The State Electricity Board's rate when it supplies power to the consumers have to be taken as the market value for computing the deduction under section 80-1A of the Act.

85. Thus, following the ration and the principle laid down by the Hon’ble Supreme Court we hold that rates charged by Orissa State electricity board to its industrial consumer which was taken at Rs. 2.63 per unit as Transfer price to Aluminum

unit is accepted to be at Market rate. Accordingly, ground No.1 raised by the Revenue is dismissed.

86. Ground No.2 relating to restricting the disallowance to Rs.28,49,914/- against Rs. 3,98,32,604/- made by A.O on account of commission paid to different parties. This issue has already been decided in assessee's appeal and also in the remand report, ld. AO himself has accepted the payments under the head 'commission' which has been accepted by the ld. CIT(A), accordingly ground No.2 raised by the Revenue is dismissed.

87. Ground 3 raised by the Revenue reads as under:-

"3(a) That on the fact and in the circumstance of the case Ld. C.I.T.(A) has erred in deciding appeal in favour of assessee for statistical purposes by directing the AO to allow deduction after allowing opportunity to the assessee to prove the factum of payment to the Dy. Conservator of Forest amounting to Rs.11,47,000/- when the A/R of the assessee has expressed his inability to produce any evidence of such payment before the AO.

3(b) That on the fact and in the circumstance of the case Ld. C.I.T.(A) has erred in allowing the appeal in assessee's favour for statistical purposes on the above issue in accepting the assessee's contention placed before him through copies of covering letters claiming to enclose the demand draft sent to the Forest Authority for issue of passes towards dispatch of Aluminium Laterite/Bauxite.

In giving appeal effect the AO has disallowed the same, assessee did not object to it, hence, this ground has become infructuous."

88. Ld. AO has already disallowed the same hence, the ground No.3 becomes infructuous.

89. Ground No. 4 in Revenue's appeal reads as under:-

4(a) That on the fact and in the circumstance of the case Ld. C.I.T.(A) has erred in deleting the AO's disallowance of Rs.2,49,35,900/- @ 5% on total claim on account of repairs & maintenance by not appreciating that the assessee has failed to submit any details/evidence of such total claim of Rs.49,87,18,000/- before the AO.

4(b) That on the fact and in the circumstance of the case Ld. C.I.T.(A) has erred in allowing the appeal in favour of assessee on the above account where the assessee has filed details during appellate proceedings for Rs.39,89,15,000/- and failed to file details of the remaining amount of Rs.9,98,03,000/- which remained unverified before the AO 85 well as during appellate proceedings.

90. The assessee company has debited Rs. 49,87,18,000/- as repairs and maintenance expenses in profit and loss account. Ld AO disallowed 5% of expenses because at the time of scrutiny proceeding only unit wise details has been submitted. During the course of hearing before commissioner appeal, bills of Plant & Machinery to the tune of Rs. 39.89 crores fully given to the satisfaction of Ld. A.O.

91. Considering the remand report and the evidence, ld. CIT (A) held that expenses on account of building and others was substantiated and accordingly, ld. CIT(A) has deleted the estimated disallowance of 5%. In any case, the entire repair expenses have been charged to profit and loss account and there is no allegation that they are capital in nature. Assessee had filed voluminous bills and invoices on account of repairs of plant and machinery before the authorities below and accordingly, no disallowance is called for on estimated basis.

Thus, order of the ld. CIT(A) is confirmed and ground No.4 is dismissed.

92. The ground No.5 raised by the Revenue reads as under:-

"That on the fact and in the circumstance of the case Ld. C.I.T.(A) has erred in allowing the appeal in favour of assessee by directing the AO to verify the contention of the assessee that the assessee has already offered for taxation Rs.4,26,31,807/- u/s.43B of the IT Act in assessment years 1995-96 to 2002-03 on account of Sales Tax, Octroi, Bonus & provison for Excise Duty without any supporting evidence."

93. The assessee company has claimed a sum of Rs. 5,19,77,835/- as amount written back in profit and loss account for statutory and other dues covered by section 43B and were not allowed in earlier years. AO made an addition of Rs. 4,26,31,807/- as amount written back on the ground that write back of an amount does not amount to payment of statutory liability. Therefore, as per the assessing officer, the same is not allowable deduction. Before the CIT(A), the assessee contended that Rs. 4,26,31,807/- had been offered for taxation in AY 1995-96 to AY 2002-03 on account of sales tax, octroi, bonus for excise duty been provided in account but not paid. CIT(A) directed AO to verify whether amount aggregating to Rs. 4,26,31,807 were offered to tax in earlier assessment year and, if yes, to allow the deduction in current year. The AO after due verification has allowed the same the appeal effect of which is contained at Page 605 of paper book 2. The assessee contended that the ground has become infructuous as AO himself after verifying the sum has already

offered to tax in earlier years u/s 43B, hence allowed deduction of write back from taxable income while giving appeal effect. Thus, provision which were already offered to tax in earlier years and they are written back in subsequent years, the same cannot be taxed in subsequent years.

94. Since, ld. AO himself has verified and same has been offered to tax in earlier years u/s.43B, he has accepted deduction from write back from taxable income while giving appeal effect and the provision which was already offered to tax in the earlier years, they have been returned back in the subsequent years, therefore, the same cannot be taxed in subsequent years, accordingly, there is no substance raised by the department and the same is dismissed.

95. Accordingly, the ground No.5 is dismissed.

96. In ground No.6, the Revenue has raised following ground:-

"That on the fact and in the circumstance of the case Ld. CIT(A) has erred in allowing the appeal in favour of assessee by directing the AO to verify the contention of the assessee that the assessee has already added back the amount of Rs. 12,61,00,000/-in its return of income as the assessee failed to prove so during the assessment proceedings as well as during the appellate proceedings for the year.

AO disallowed Rs. 12,61,00,000/- on account of employee management pension fund being not paid by assessee company. During the course of hearing before CIT(A), assessee had pleaded that it has already added back the sum of Rs. 12,61,00,000/-in the Income Tax Return, So, there is double addition of same amount."

97. In ground No.6, ld. CIT (A) directed the ld. AO to verify the deduction of the assessee and take necessary action. The ld. AO while giving effect has upheld the addition and accordingly, assessee's contention while giving effect to the ld. CIT(A) has been given, then this ground raised by the Revenue is infructuous. Accordingly, same is dismissed.

98. In the result, ground No.6 is dismissed.

99. In the result, appeal of the assessee is partly allowed and appeal of the Revenue is dismissed.

Order pronounced on 4th July,2024.

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

Mumbai; Dated 04/07/2024
KARUNA, *sr.ps*

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

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

//True Copy// BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai