

IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH KOLKATA

**SHRI SANJAY GARG, JUDICIAL MEMBER
SHRI SANJAY AWASTHI, ACCOUNTANT MEMBER**

**I.T.A. No. 2092/Kol/2014
Assessment Year: 2011-12**

Essel Mining & Industries Limited,
Industry House, 18th Floor, 10
Camac Street, Kolkata - 700017
[PAN: AAACE6607L] **Appellant**

vs.

**Deputy Commissioner of Income Tax
Circle-5, Kolkata**
Aayakar Bhawan, P-17,
Chowringhee Square,
Kolkata - 700069 **Respondent**

**I.T.A. No. 2430/Kol/2016
Assessment Year: 2012-13**

Essel Mining & Industries Limited,
Industry House, 18th Floor, 10
Camac Street, Kolkata - 700017
[PAN: AAACE6607L] **Appellant**

vs.

**Deputy Commissioner of Income Tax
Circle-1(4), Mumbai**
9th Floor, Old CGO Building,
MK Road, Mumbai - 400020 **Respondent**

**I.T.A. No. 373/Mum/2015
Assessment Year: 2011-12**

&

**I.T.A. No. 480/Mum/2017
Assessment Year: 2012-13**

DCIT, Central Circle-1(4), Mumbai,
Room No. 902, Pratistha Bhavan,
9th Floor, Old CGO Bldg. Annexe,
Mumbai - 400020 **Appellant**

vs.

M/s Essel Mining & Industries Limited,
Industry House, 18th Floor, 10
Camac Street, Kolkata - 700017
[PAN: AAACE6607L] **Respondent**

Appearances by:

Assessee represented by : Akkal Dudhwewala, FCA
 Department represented by : Subhendu Datta, CIT-DR

Date of concluding the hearing : 23.12.2024
 Date of pronouncing the order : 23.01.2025

ORDER**PER SANJAY AWASTHI, ACCOUNTANT MEMBER:**

1. These are a batch of 4 appeals pertaining to the same assessee divided into sets of two each pertaining to Assessment Years (AYs) 2011-12 and 2012-13. While ITA Nos. 2092/Kol/2014 and 2430/Kol/2016 are filed by the assessee for the AYs 2011-12 and 2012-13 respectively; ITA Nos. 373/Mum/2015 and 480/Mum/2017 have been filed by the Revenue for AYs 2011-12 and 2012-13 respectively. For the sake of convenience, the appeals pertaining to AY 2011-12 of both the revenue and the assessee are taken up as lead cases.

1.1 The 4 appeals arise from order u/s 250 of the Income Tax Act, 1961 (hereafter "the Act"), passed by the Ld. Commissioner of Income Tax (Appeals) [hereafter "the Ld. CIT(A)"] vide order dated 31.10.2014 (for AY 2011-12) and order dated 26.10.2016 (for AY 2012-13). These appellate orders arise from assessment orders dated 24.01.2014 (AY 2011-12) and order dated 10.06.2014 (AY 2012-13), passed u/s 143(3) of the Act.

2. The basic issues may be mentioned for an appreciation of the controversy involved:

(i) In relation to the disallowance made u/s 14A of the Act: facts are that the appellant had earned dividend income of Rs. 17,56,25,488/- and Rs 6,58,21,843/- during the AYs 2011-12 & 2012-13 respectively which was claimed as exempt from tax. The appellant, in this regard, had suo-moto made disallowances of Rs 6,70,212/- & Rs.8.40,773/- in the return of income filed for the AY 2011-12 & 2012-13 respectively. On perusal of the

same, it is observed that the appellant had made a disallowance of the salary of few employees and also made disallowance of administrative and establishment expenses, all on proportionate basis. The AO in the impugned assessment order rejected the basis of disallowance offered by the appellant and invoked Rule 8D. Under Rule 8D(2)(ii) the disallowance of interest of Rs. 14,52,77,606/- & Rs. 14,89,88,550/- in AYs 2011-12 & 2012-13 respectively has been made. The AO also made disallowance of Rs.2,48,03,080/- & Rs. 3,22,49,365/- u/s 14A r.w. Rule 8D(2)(iii), being 0.5% of the average value of all investments appearing in the balance sheet for the years ending on 31.03.2011 & 31.03.2012.

Aggrieved by the disallowance made the AO, the appellant preferred an appeal before the Ld. CIT(A), who partially deleted the disallowance u/s 14A of the Act. The Ld. CIT(A) inter alia directed the AO to net off the interest income of Rs.2677.87 lacs from interest expense of Rs 20,52,9 42 lacs while calculating the disallowance u/s 14A r.w. Rule 8D(2)(ii) for the AY 2011-12. The Ld. CIT(A) also directed the AO to exclude the investment of Rs.2996.96 lacs in subsidiary on the basis that no dividend income was earned from such subsidiary. Aggrieved by the order of Ld. CIT(A), both the assessee and the Revenue are in appeal on this issue.

(ii) Regarding the issue of remuneration paid to directors and auditors: It is seen that the appellant had claimed deduction u/s. 10B of the Act in respect of its 100% EOU at Kasia in AY 2011-12 and deduction u/s. 801A of the Act in respect of its two wind power divisions at Maharashtra and one railway siding unit at Orissa in AYs 2011-12 & 2012-13. The AO observed that the appellant has not allocated expenses like Director's remuneration and Auditor's fee while arriving at the profit of the eligible undertakings. According to AO, these expenses were common and, therefore, allocated these expenses on pro-rata basis between the eligible units and other units on the basis of their respective turnover. On appeal, the Ld. CIT(A) following the order passed by his predecessor in the earlier AYs 2009-10 & 2010-11 upheld the allocation of Director's remuneration

and Auditor's remuneration towards the eligible undertakings. Aggrieved by the action of the Ld. CIT(A), the assessee is in appeal on this issue.

(iii) Regarding the issue of allocation of legal & professional fee, travelling and conveyance expenses towards income of eligible units for claiming deduction u/s 10B and 80-IA of the Act: These grounds raised by the Revenue are against the Ld. CIT(A)'s action of deleting the allocation of legal & professional fees and travelling & conveyance expenses made by the AO towards the income of the eligible units. The AO, in the assessment order, has observed that these expenses were common in nature and therefore related to the eligible units as well and accordingly allocated the same on turnover basis to the eligible units. On appeal, the Ld. CIT(A) following the decision of his predecessor in the earlier AY 2009-10 deleted the allocation of legal & professional fees and travelling and conveyance expenses on the basis that the same had been separately identified by the assessee and debited in the stand-alone accounts of the eligible undertakings.

(iv) Regarding the issue of disallowance of fine paid to Vishakhapatnam Port Trust pertaining to Revenue's appeal for AY 2011-12: The appellant had debited an amount of Rs. 29,46,975/- in the P&L account on account of penalty and fines which inter alia included an amount of Rs. 16,13,694/- paid to Vishakhapatnam Port Trust for non-adherence to certain conditions of contract. The AO in the assessment order alleged that the impugned payment was in the nature of penalty paid for infringement of law and disallowed the same. On appeal, the Ld. CIT(A) following the order of his predecessors in the earlier AYs 2009-10 & 2010-11 and deleted the disallowance.

(v) It is seen that the assessee has claimed deduction for education cess for both the years through additional grounds of appeal. However, right at the outset, the Ld. AR fairly mentioned that they were not pressing these grounds. Accordingly, the additional grounds No. 1.1 to 1.2 (AY 2011-12) and additional ground No. 1.1 to 1.2 (for AY 2012-13) are dismissed, as not being pressed.

3. As mentioned earlier the grounds of appeal for assessee's appeal (ITA No. 2092/Kol/2014) and Revenue's appeal (ITA No. 373/Mum/2015) for AY 2011-12 are being adjudicated first and the same may be reproduced as under:

ITA No. 2092/Kol/2014 (assessee's appeal)

"1. That the Commissioner of Income-tax (Appeals) was wrong in confirming the Assessing Officer's action in applying Rule 8D for the purpose of making disallowance u/s 14A.

2. That without prejudice to the contention raised in Ground No. 1 above, the Commissioner of Income-tax (Appeals) failed to appreciate that the Assessing Officer had not duly complied with the requirements of Section 14A(2) and thus, he erred in confirming the action of the Assessing Officer in applying Rule 8D.

3. That without prejudice to the contentions raised in Ground Nos. 1 and 2 above, the Commissioner of Income-tax (Appeals) was wrong in not holding that there could not be any disallowance under Rule 8D(2)(ii) out of interest paid by the appellant.

4. That without prejudice to the contentions raised in Ground Nos. 1 and 2 above, the Commissioner of Income-tax (Appeals) was wrong in not holding that there could not be any disallowance under Rule 8D(2)(iii).

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

ITA No. 373/Mum/2015 (Revenue's appeal)

"(i) Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) was justified in directing to consider net interest for computing disallowance u/s.14A read with Rule 8D, ignoring the fact that there is no provision to consider net interest expenditure under the provisions of Rule 8D to arrive at quantum of disallowance u/s.14A?"

(ii) "Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) was justified in directing not to consider investment in subsidiary company for the purpose of computing disallowance u/s.14A read with Rule 8D, ignoring the fact that there is no such provision under the provisions of the Rule 8D to arrive at quantum of disallowance u/s.14A?"

(iii) "Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) was justified in holding that disallowance u/s.14A was not warranted in the situation where the assessee has not maintained separate books of accounts for the purpose of exempt income and failed to establish one to one co-relation between the funds available and the funds deployed?"

(iv) "Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) was justified in holding that disallowance of penalty expenditure of Rs.16,13,694/- was not warranted ignoring the fact that such penalty was on account of violation of statutory law of Vishakhapatnam Port Trust?"

(v) "Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) was justified in holding that reworking of deduction u/s.801A and u/s.10B were not warranted, ignoring the fact that such reduction was made on the basis that

proportionate expenses incurred on account of legal and professional fees, travelling & conveyance expenses was not found to be properly allocated among the units?"

3.1 Apart from these grounds, the assessee has filed an additional ground of appeal for AY 2011-12 regarding the allocation of Director's and Auditor's remuneration on proportionate basis against income of units eligible for claiming deduction u/s 10B u/s 80-IA of the Act.

3.2 For the sake of convenience, the two appeals pertaining to AY 2011-12 are being adjudicated on the basis of relevant issues, which cover the grounds of revenue as well as of the assessee.

4. The first issue is discussed as under:

Disallowance u/s 14A of the Act

In this regard, the Ld. AR pointed out that the disallowance of interest under Rule 8D(2)(ii) deserves to be deleted in full as the assessee used its own surplus funds for the said investments. It was also mentioned that the disallowance u/s 14A of the Act read with Rule 8D(2)(iii) of the Rules should be computed only with reference to dividend yielding investments. The Ld. AR relied on the ITAT's order in assessee's own case for AY 2008-09 [ITA No. 786/Kol/2013] and order for AY 2009-10 [ITA No. 1069/Kol/2013] order dated 21.08.2018]. It has been stated that the issue of disallowance u/s 14A of the Act has been decided in favour of the assessee.

4.1 Per contra, the Ld. DR relied on the order of Ld. AO in this regard.

4.2 We have carefully considered the submissions of the Ld. AR/DR and gone through the orders of the authorities below as well as the order of the ITAT in assessee's own case passed for AYs 2009-10 and 2010-11. It would be relevant to extract the concerned portions:

"4. We have heard rival submissions and gone through the facts and circumstances of the case. With regard to the disallowance of proportionate interest of Rs.17,99,25,000/- confirmed by the Ld. CIT(A) u/s. 14A read with Rule 8D(2)(ii) of the Rules the Ld. AR of the assessee contended that investments were made by the assessee company out of its own funds which was sufficient to cover the cost of investments and that no interest bearing funds were utilized to make investments which yielded the exempt income.

5. Our attention was drawn to the decision of this Tribunal in assessee's own case for AY 2008-09 in ITA No. 786/Kol/2013 dated 02.05.2018 wherein on similar facts and circumstances it was held as under:

"4. We have heard the rival submissions and perused the materials available on record....."

6. From the audited accounts we note that the position of the assessee's own funds visà-vis in its investment in shares and units considered for disallowance u/s. 14A of the Act by the Ld. CIT(A) were as under:-

"....."

From the aforesaid chart we note that the assessee in fact had own funds to the tune of Rs.3825 cr. and investment in shares and securities were only Rs.446.60 cr. From these figures we find that the assessee had at its disposal sufficient funds to make the investment which yielded exempt income. Thus, it is noted that the facts of the case are analogous to the facts involved in the earlier AY 2008-09.

7. The Ld. DR appearing on behalf of the Revenue could not point out any change in law or facts concerning the issue regarding disallowance u/s. 14A of the Act. At the time of hearing, the Ld. DR, however, made an alternative argument that the assessee besides investing in shares and units, yielding dividend income, investment were made in debentures, bonds and granted interest free loans to subsidiaries which totalls far more than the assessee's own funds in the form of capital and reserves as reflected in the audited accounts. The Ld. DR, therefore, contended that it was a clear case that the assessee's borrowed funds were infact utilized for non-business purposes and, therefore, disallowance out of interest paid made by the AO and confirmed by the Ld. CIT(A) should be upheld.

8. We however, are not persuaded to agree with the Ld. DR's contention before us relating to disallowance u/s. 14A of the Act which can only be made if the expenditure is incurred in relation to earning of any tax free income. Admittedly, investments in bonds and debentures and advance to subsidiaries could not have produced tax free income and for that reason sec. 14A of the Act was not applicable to it. Furthermore, even the lower authorities have not made out any case that the borrowed funds were relatable to investment in bonds and debentures and advance to subsidiary and that the interest paid thereon was for non-business purposes and hence, disallowable u/s. 36(1)(iii) of the Act. We, therefore, do not deem it fit or appropriate to entertain this argument at this stage as it would tantamount to enhancing the scope of appeal whereas the issue before us concerns only disallowance u/s. 14A of the Act. In view of the above, respectfully following the order of the Tribunal (supra) for AY 2008-09, we direct the AO to delete the disallowance of proportionate interest made u/s. 14A of the Act read with Rule 8D(2)(ii) of the Rules.

9. Next coming to the disallowance of Rs.182.51 lacs made under Rule 8D(2)(iii) of the Rules. We find that this Tribunal in assessee's own case for AY 2008-09 following the decision rendered by the Tribunal in the case of REI Agro Ltd. reported in 143 ITD 141 held that only dividend bearing investment in shares are to be considered for making disallowance u/s. 14A of the Act. Following the same, we remand this issue back to the file of the AO with a direction to consider only investment in shares and units held on the opening and closing date of the previous year which yielded dividend income for the purpose of computing the disallowance u/s. 14A of the Act read with Rule 8D(2)(iii) of the Rules. Needless to say, assessee should be given opportunity of hearing. Therefore, ground nos. 1 to 3 are partly allowed for."

4.3 It has been brought to our notice that the position of surplus funds are respectively Rs. 4,33,504/- and Rs. 4,98,960/- for AYs 2011-12 and 2012-13. These surplus funds adequately covered the cost of investments standing at Rs. 2,93,128/- as on 31.03.2010 and Rs. 3,03,939/- as on 31.03.2011. Accordingly, this contention of the assessee is accepted. Regarding the disallowance under Rule 8D(2)(iii) of the IT Rules which has been dealt with in AYs 2009-10 and 2010-11, as per para 9 of the ITATs order in assessee's own case (supra), we remand the matter back to the file of Ld. AO to consider only investments in shares and units which yielded dividend income, and thereafter, the Ld. AO must compute the disallowance u/s 14A of the Act read with Rule 8D(2)(iii) of the Rules. This discussion would mean that Ground Nos. 1 to 4 of assessee's appeal [ITA No. 2092/Kol/2014] are partly allowed, with relief on account of disallowance computed under Rule 8D(2)(ii) of the Rules and remanding back pertaining to computation of disallowance under Rule 8D(2)(iii) of the Rules. However, the Revenue's Grounds 1 to 3 are dismissed.

4.4 In result, the issues pertaining to Grounds 1 to 3 are allowed and Ground No. 4 is allowed for statistical purposes, matter having been remanded to the Ld. AO.

5. Regarding the issue of allocation of Director's and Auditor's remunerations on proportionate basis against income of units eligible for claiming deduction u/s 10B & 80-IA of the Act, it is seen that this issue has been raised through the additional grounds of appeal. On this issue, the Ld. AR stated that remuneration paid to non-executive Directors cannot be allocated to the income of the eligible units since such Directors do not participate in the day-to-day operations of the undertaking. However, regarding remuneration paid to Managing Director and Auditors, the Ld. AR fairly stated that following the decision in assessee's own case for AYs 2009-10 and 2010-11 by the ITAT (supra), the same deserve to be allocated to eligible units.

5.1 The Ld. DR argued that the distinction between Directors remuneration and others would be artificial one and therefore all such expenses need to be proportionately allocated to the eligible units.

5.2 We have carefully considered the rival submissions and also gone through the orders of authorities below. It needs to be mentioned that the ITAT has already decided the issue through appellate orders for AYs 2009-10 and 2010-11 (supra) as under:

“10. Ground nos. 4 and 5 of the appeal are against the Ld. CIT(A)’s action in confirming the allocation of 7.39% of directors’ remuneration and auditor’s remuneration of Rs.19,55,66,000/- and Rs.29,62,000/- to be considered as deduction in arriving at the profits of the undertakings eligible for deduction u/s. 10B and 80IA of the Act.

11. Briefly stated facts are that during the relevant year the assessee had claimed deduction u/s. 80IA of the Act in respect of its Wind Power Division and u/s. 10B of the Act in respect of its 100% EOU at Khatra. In the assessment order, the AO after examining the audited accounts of the respective undertakings found that in arriving at the profit of the undertaking, the assessee had not allocated certain expenses which in his opinion related to these eligible undertakings as well. The items of the expenses considered for allocation were Directors’ remuneration, Auditor’s remuneration, travelling and conveyance and legal and professional. According to AO, these expenses were common and, therefore, these expenses should have been allocated on pro-rata basis between the eligible units and other units on the basis of their respective turnover. Thereafter, the AO worked out the pro-rata percentage of turnover of the eligible units to the company as a whole at 7.39% and accordingly, apportioned these expenses to respective eligible units. On appeal, the Ld. CIT(A) deleted the adjustment qua the expenditure on account of travelling & conveyance and legal & professional. The Ld. CIT(A), however, confirmed the adjustment qua the Director’s remuneration and Auditor’s fee. Aggrieved by the action of the Ld. CIT(A), the assessee is in appeal before us.

12. We have heard rival submissions and gone through the facts and circumstances of the case. We note that the Director’s remuneration of Rs.1955.66 lacs was paid to the Directors in accordance with sec. 198, 348 and 349 of the Companies Act, 1956 which, inter-alia, included Directors sitting fees and commission totaling to Rs.1459.74 lacs to non-executive directors of Rs.495.92 lacs as remuneration to the Managing Director. The Ld. AR submitted that the non-executive Directors were not involved in monitoring day to day business operation of the assessee company, but were responsible for deciding policy issues and to ensure corporate governance and statutory compliances. The Directors remuneration was paid in accordance with the formula prescribed in the Companies Act and their remuneration was not based on the time and efforts devoted to the day to day functioning of the company. The Ld. AR, therefore, claimed that since remuneration paid to the non-executive directors was based on statutory formula and had no direct relation with operations of the eligible undertakings, in arriving at the profits of the eligible undertakings such expenditure could not be taken into account. The Ld. AR relied on several judgments of the Hon’ble High Courts and the Tribunal to support his contention. On the other hand, the Ld. DR vehemently relied on the orders of the lower authorities and pleaded for no interference from our part.

13. After giving a thoughtful consideration to the facts of the case and the provisions of section 80IA/ 10B of the Act, we note that this incentive linked sections contained

both substantive provisions which are required to be satisfied for claiming deductions/exemption and the computation of profit to arrive at the sum eligible for deduction/exemption. It is noted that for computation purpose this section refer to "profit derived from eligible business". The Hon'ble Courts while interpreting the computation of profits derived from eligible business have held that the word "derived" from is narrower in connotation as compared to the word "attributable to". The Hon'ble Supreme Court in the case of Liberty India Vs. CIT (2009) 317 ITR 218 (SC) held that the expression "derived from" intends to cover sources not beyond the first degree. Meaning thereby the expression "derived from" signifies that only income/expenditure directly and inextricably related to eligible undertaking should be considered in computing profits of the eligible undertakings. Indirect expenditure which has no direct nexus or connection to the profits of industrial undertaking should not be considered in computing deduction u/s. 80IA/ 10B of the Act. We find that the foregoing proposition finds support in the following decisions:

i) Graphite India Ltd. Vs. Addl. CIT, ITA No. 304 to 305/Kol/ 2018,

ii) DCIT Vs. Cativison products Ltd. 142 Taxman 104 (Del.ITAT)

iii) RRB Consultants & Engg. Pvt. Ltd. 112 TTJ 794 (ITAT Del.

) iv) National Fertilizers Ltd. in Re 142 Taxman 5 (AAR New Del.)

14. In view of the above, let us now examine whether the items of expenses in question viz. Directors remuneration and Auditor's remuneration have any first degree nexus or connection with the profits deriving from eligible undertakings. On perusal of the separate audited accounts of the eligible undertakings, we note that no expenses have been debited in respect of the audit conducted on these segmental accounts and in that view of the matter, we hold that the auditor's remuneration debited in P&L Account, inter-alia, comprised of the fees paid to auditors for auditing the separate accounts of the eligible undertakings. In absence of the break-up of fees paid to auditors, we find no infirmity in the order of the lower authorities in allocating the auditor's remuneration to the eligible undertaking on pro-rata basis and hence, the order of the lower authorities to that extent is confirmed.

15. Now coming to the Director's remuneration, we find that the same can be bifurcated into remuneration and sitting fees of Rs.1459.74 lacs paid to non-executive Directors and a sum of Rs. 495.92 lacs paid to the Managing Director. We note that the non-executive Directors do not participate in the day-to-day work of the company nor are in-charge of the operations of the undertakings and hence the remuneration paid to them did not have first degree nexus with the profits of the eligible undertaking. We note that the non-executive directors attended the board meetings and were involved in policy decision making, matters of corporate governance etc. which had no first degree nexus with the operations of the eligible undertaking. The Ld. DR could not controvert this particular fact, therefore, the AO/Ld. CIT(A) erred on facts and in law in allocating sums out of the Director's remuneration to the extent of Rs.1459.74 lacs while arriving at the income eligible for deduction u/s. 80IA/ 10B of the Act and, therefore, we delete the allocation made on this issue.

16. As far as remuneration of Rs.495.92 lacs paid to the Managing Director is concerned, we note that the Managing Director is involved in the day-to-day affairs of the company and is responsible for over-all operations of the company including the eligible undertaking. In the circumstances, the Managing Directors' remuneration indeed have nexus with the functioning of the eligible undertaking and, therefore, we uphold the allocation made out of the Managing Directors' remuneration to the profits of the eligible undertaking. Therefore, ground nos. 4 and 5 are partly allowed."

5.3 Respectfully following the said decision, we direct that the Director's remuneration of Rs. 5,64,12,975/- for AY 2011-12 and Rs. 46,15,580/- for AY 2012-13 is directed to be excluded from any allocation to the eligible units. Similarly, following the order of Hon'ble ITAT for AYs 2009-10 and 2010-11 (supra) the remuneration paid to Managing Director and auditors is directed to be proportionately allocated to the eligible units.

5.4 In result, the additional ground raised by the assessee are partly allowed.

6. The issue pertaining to allocation of legal and professional fee and travelling and conveyance expenses towards income of the units eligible for claiming deduction u/s 10B & 80IA of the Act is agitated through the Revenue's appeal for both of the years exclusively.

6.1 Right at the outset, the Ld. AR pointed out that this issue was squarely covered in favour of the assessee and against the Revenue by the order of ITAT for AY 2009-10 and 2010-11 (supra) in assessee's own case.

6.2 The Ld. DR on the other hand relied on the relevant paragraphs in the Ld. AO's order to canvass the point that it was not clear how such expenses have been allocated towards the standalone accounts of the eligible units.

6.3 We have carefully considered the rival submissions and for the sake of record, the relevant portion from the Hon'ble ITAT order in assessee's own case for AYs 2009-10 and 2010-11 may be extracted as under:

"21. Coming to next ground no. 4 taken by the revenue is against the action of the Ld. CIT(A) in restricting the allocation of expenses on legal and professional and travelling and conveyance to the eligible undertaking u/s. 80IA and 10B of Rs.30,99,000/- and Rs.5,63,000/- as opposed to the total disallowance of Rs.115.82 lacs made by the AO.

22. Briefly stated facts as are already discussed in the foregoing portion of this order, the assessee had claimed deduction u/s. 80IA and 10B of the Act in respect of its Wind Power Division and 100% EOU unit respectively. In the assessment order the AO had identified certain expenses which in his opinion were 'common' and related to this eligible undertaking as well. The items of expenses, inter alia, included expenses on travelling and conveyance and legal and professional fees of Rs.692.27 lacs and Rs. 875 lacs respectively. The AO worked out the pro-rata percentage of turnover of the eligible undertaking to the company as a whole as

7.39% and accordingly, apportioned these expenses to respective eligible units. On appeal, the Ld. CIT(A) found that in Form 10CCB, the auditors had already identified and allocated the amount of Rs.30,99,000/- and Rs.5,63,000/- out of legal and professional fee and travelling and conveyance pertained to the eligible undertakings. According to the Ld. CIT(A), when the details had already been authenticated by the auditors, no further allocation out of these items of expenses were required. Aggrieved by the action of the Ld. CIT(A), the revenue is before us.

23. We have heard the rival submissions and carefully perused the material available on record. In the paper book filed the assessee has enclosed separate audited P&L Account of the eligible undertakings. From perusal of the schedule of expenses forming part of the audited accounts, we find that legal and profession expenses as well as travelling and conveyance expenses incurred by these undertakings were debited to the stand alone account of these eligible undertakings and hence, no further allocation on account of these items of expenses to the eligible undertakings was warranted. The Ld. DR was unable to controvert this fact which is evident from the documents on record. We, accordingly, uphold the order of the Ld. CIT(A) on this score. Therefore, ground no. 4 of revenue's appeal is dismissed.

6.4 Respectfully following this decision of ITAT in assessee's own case, we direct that the addition on this account should be deleted. Accordingly, Ground No. 5 of Revenue's appeal for AY 2011-12 is dismissed.

7. The issue pertaining to disallowance of fine paid to Vishakhapatnam Port Trust arises from Ground No. 4 of revenues appeal for AY 2011-12.

7.1 On this issue, the Ld. DR argued that any penalty levied for breach of any law in force cannot be an allowable expenditure u/s 37(1) of the Act. However, in this regard, the penalty and fine of Rs. 29,46,975/- paid during AY 2011-12 was mentioned in Form 3CD of the Auditor's report. The Ld. AO found that out of this amount Rs. 16,13,694/- was paid to Vishakhapatnam Port Trust. It is recorded that this amount was paid as damages for breach of contract. He therefore, proceeded to disallow this amount claimed as an expenditure u/s 37(1) of the Act. The Ld. DR assailed the action of the Ld. CIT(A) in deleting the said addition.

7.2 The Ld. AR, on the other hand strongly defended the action of Ld. CIT(A) and pointed out that this very same issue was before the Ld. CIT(A) in assessee's own case for AYs 2009-10 and 2010-11 and the same has since attained finality as the Revenue decided not to prefer any appeal on the said matter. The Ld. AR further averred that the said penalty was a breach of contract and not an infraction of law.

7.3 We have carefully considered the rival submissions and gone through the orders of authorities below. We find that for AY 2011-12, the Ld. CIT(A) has recorded the following findings in para 6.2 at page 10 of the impugned order are as under:

"6.2 This issue was also involved in the appellant's case in the earlier year. While deciding appeal No. 269/CIT(A)-VI/Circle-5/11-12 for the assessment year 2009-10 my predecessor had deleted similar disallowance. In the appeal for assessment year 2010-11, I had also, following the order of my Ld. predecessor, deleted disallowance, stating as under.-

"This issue was also involved in the appellant's case in the immediately preceding year ie. AY 2009-10. While deciding appeal no. 269/CIT(A)-VI/Cir-5/11-12 for that year, my predecessor has held as under-

"I have carefully considered the observations of the Assessing Officer in the assessment order and submissions of the appellant. The appellant has exported iron ore through the Vishakhapatnam Port. He is expected to get the size of the ores within limits and in case of any size bigger than the limits, an amount of Rs.1000/- per bolder is charged in the form of penalty. The appellant has filed the letters for the same of the Paper Book at Page No.55-56. The auditor in the Tax Audit Report has mentioned in Col. No.17 (e)(i) that there is no penalty/fine for violation of any law. The payment to the Vishakhapatnam Port Trust is not for violation of any law or for any criminal offence, but it is a regular kind of business payment for non-adhering to particular size of boulders. It is more of an administrative fine for enforcing the size rather than any infringement of law Therefore, these are regular business expenses. In the facts and circumstances the payment of Rs.9,36,000/- is allowed as deduction u/s 37 of the Income-tax Act, 1961."

Thus, it was held in the order for A.Y.2009-10, that the so-called penalty was not for any violation of law and was a regular business expense. The facts of the year under consideration are practically same. I agree with my Ld. predecessor Following the reasoning given in the order for A.Y.2009-10, the disallowance of penalty charges is deleted"

Material facts for the year under consideration are practically identically. Following the reasoning given in earlier years' order, the disallowance of penalty charges of Rs. 16,13,694/-is deleted."

Since there is no contrary view point available before us, we are upholding the action of Ld. CIT(A) in this regard. Accordingly, Ground No. 4 of Revenue's appeal is dismissed.

8. With the above discussion, the appeal for AY 2011-12 has been decided in the following manner:

Ground Nos. 1 to 3 of ITA No. 2092/Kol/2014 are decided in favour of the assessee. Ground No. 4 has been remanded back to the file of Ld. AO and hence it is allowed only for statistical purposes. On the other hand,

Ground No. 3 of Revenue's appeal have been dismissed. Furthermore, the additional ground of appeal on account of remuneration to Auditors and Managing Director has been partly allowed. Also Ground Nos. 4 and 5 of Revenue's appeal pertaining to disallowance of penalty and allocation of legal & professional fees, travelling and conveyance expenses towards eligible units, has been decided against the Revenue. Thus, these grounds have been dismissed. Lastly, the additional ground raised for claim of deduction of education cess by the assessee has been dismissed as not pressed.

9. In light of the findings given for AY 2011-12 for both the assessee and the Revenue, the decisions will apply mutatis mutandis to the appeals for AY 2012-13 being ITA No. 2430/Kol/2016 (assessee's appeal) and ITA No. 480/Mum/2017) (Revenues' appeal). It may be mentioned that the issue of disallowance of penalty pertains to AY 2011-12 only.

10. In the result, the appeals filed by the Revenue are dismissed and appeals filed by the Assessee are partly allowed.

Order pronounced in the court on 23.01.2025

Sd/-
(Sanjay Garg)
Judicial Member

Sd/-
(Sanjay Awasthi)
Accountant Member

Dated: 23.01.2025

AK, P.S.

Copy of the order forwarded to:

1. Essel Mining & Industries Ltd.
2. Deputy Commissioner of Income Tax Circle-5, Kolkata
3. Deputy Commissioner of Income Tax Circle-1(4), Mumbai
3. CIT(A)-
4. CIT-
5. CIT(DR)

//True copy//

By order

Assistant Registrar, Kolkata Benches

