

IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH "B", KOLKATA
BEFORE SH. P.M.JAGTAP, VICE PRESIDENT &
SH. S.S.VISWANETHRA RAVI, JUDICIAL MEMBER

ITA Nos.2150 to 2154/KOL/2017
(ASSESSMENT YEARS-2009-10, 2010-11, 2012-13, 2013-14 & 2014-15)

ACIT, Central Circle-1(1), Aayakar Bhawan, 110, Shantipally, 3 rd Floor, Kolkata-700107.	vs	M/s. Orissa Manganese & Minerals Ltd. 1. 14, N.S.Road, 2 nd Floor, Kolkata-700001. PAN-AAACO3635J
(Appellant)		(Respondent)
Appellant by		Md. Usman, CIT DR & Robin Choudhury, Addl. CIT, Sr.DR
Respondent by		A.K.Tulsyan, FCA & Shikha Agarwal, ACA
Date of Hearing		27.09.2018
Date of Pronouncement		20.12.2018

ORDER

PER S.S. VISWANETHRA RAVI, JUDICIAL MEMBER

All these above five appeals by the Revenue against the separate orders dated 27.07.2017 passed by CIT(A)-20, Kolkata for AY 2009-10, 2010-11, 2012-13, 2013-14 and 2014-15 respectively.

2. First we take up appeals in ITA No.2150 & 2151/Kol/2017 for Ays 2009-10 & 2010-11 wherein the appellant Revenue raised sole ground challenging the order of CIT(A) in deleting the addition made on account of additional depreciation on Plant & Machinery. We find the facts are identical in both the appeals and also issue raised thereon. Therefore, we take up facts and circumstances in ITA No.2150/Kol/2017 for AY 2009-10 as base case.

ITA No.2150/Kol/2017 (AY 2009-10)

3. Heard both parties and perused the material available on record. The brief facts of the case are that the assessee is a company and engaged in the business of extraction of minerals and other mining activities. The

assessee claimed additional depreciation on mining equipment. The AO disallowed on the ground that extraction of mining is not manufacturing activity and thereby disallowed the claim of the assessee to the extent of Rs.70,01,271/-. The CIT(A) held that the assessee has mines in the states of Jharkhand & Orissa and the equipment on which the assessee claimed depreciation help in the extraction process conducted during the process of extraction of iron ore and manganese ore. The CIT(A) also placed reliance in the case of Sesa Goa Ltd. of Hon'ble Supreme Court, in the case of G.S. Atwal & Co. of Hon'ble High Court of Calcutta and in the case of Integrated Coal Mining Ltd. of Co-ordinate Bench of the Kolkata, ITAT and allowed the additional depreciation. The relevant portion of which is reproduced hereunder below:-

5. *“Appeal on Ground No. 2 is against making addition on account of additional depreciation of Rs. 70,01,271/- on mining equipments acquired and installed during the year under consideration on the allegation that mining is not a manufacturing activity. I have perused the rectification order and the submission of the appellant. Facts of the case are that the assessee is engaged in the business of mining. The company has mines at Ghatkuri in the State of Jharkhand and at Koira in the State of Odisha. The main business activity of the company is exploration, development, mining and processing of mineral assets. The process includes extraction of iron ore and manganese ore and selling it in the open market. The assessee acquired various types of equipments and machineries to facilitate the extraction of ores from the mines. These machineries help in the extraction process conducted by the assessee. Therefore, there is no dispute of the fact that the machineries are used in the production purpose. I find that the AO has not disputed this fact. I also find that the AO has allowed normal depreciation on the Plant & machinery used in the mines but has not allowed the additional depreciation on the pretext that the assessee is not engaged in the manufacturing activity.*

6. *The AR has brought on record many case laws decided by the Hon'ble Supreme Court, Jurisdictional Calcutta High Court and Jurisdictional Kolkata bench of ITAT on this issue.*

The Hon'ble Supreme Court in the case of CIT v. Sesa Goa Ltd. [2004] 271 ITR 331 held that "The definition was adopted from the meaning ascribed to the word in the Oxford English Dictionary as meaning "amongst other things that which is produced; a thing that results from any action, process or effort, a product; a product of human activity or effort". From the wide definition of the word "production", it has to follow that mining activity for the purpose of production of mineral ores would come within the ambit of the word "production" since ore is "a thing", which is the result of human activity or effort. It has also been held by this Court in CIT vs. N. C. Budharaja & Co. & Anr. (1993) 114 CTR (SC) 420 : (1993) 204 ITR 412 (SC) that the word

"production" is much wider than the word "manufacture". Calcutta High Court has time and again reiterated its view that the mining activity amounts to production and additional depreciation and investment allowance could not be denied on the machinery used for production in the mines.

In the case of CIT v Is G.S. Atwal & Co. in [2003] 67 Taxman 520 (Supra) the Hon'ble High Court at Calcutta held that if assessee owns machinery and such machinery is used for production in the mines, then section 32A applies.

Further in the case of Integrated Coal Mining Ltd. vs DCIT in [2016] 67 taxmann.com 260, the Honble Kolkata ITAT held as under.

"Mining of coal is production of coal and assessee engaged in mining of coal would be entitled to additional depreciation Oil survey instrument acquired during year Section 32 of the Income Tax Act, 1961. Depreciation - Additional depreciation - Assessment year 2008-09 - Whether coal mining is production of coal and, therefore, assessee engaged in mining of coal, would be entitled to additional depreciation on survey instrument acquired by it during relevant year - Held, yes [Para 6.3.] [In favour of assessee]"

7. I find that in the instant case the assessee is engaged in the business of mining of Manganese ore & Iron ore and mining is constructed as a manufacturing activity. I respectfully following the decision of the Hon'ble Supreme Court in the case of CIT v. Sesa Goa Ltd(Supra), Hon'ble jurisdictional High Court in case of CIT v/s G.S. Atwal & Co (Supra) and Hon'ble Jurisdictional ITAT, Kolkata in the case of Integrated Coal Mining Ltd. vis DCIT (Supra), I held that the appellant is engaged in the business of mining which amounts to manufacturing and hence entitled for additional depreciation u/s 32(1) (iii) of the I.T.Act. Thus appeal on this ground is allowed ."

4. In view of the finding of CIT(A) and discussion made herein above by us in the afore-mentioned paragraph No.3, we find no infirmity in the order of CIT(A) and it is justified. Thus, Ground Nos.1,2 & 3 raised by the Revenue are dismissed.

5. In the result, the appeal of the Revenue is dismissed.

ITA No.2151/Kol/2017 (AY 2010-11)

6. As discussed above, we find the appellant-Revenue raised similar issue on identical facts to the issues raised in ITA No.2150/Kol/2017 for AY 2009-10. Since we have taken a view in confirming the order of CIT(A) in allowing additional depreciation to the assessee, therefore, the same

finding is applicable to grounds raised in this appeal. Thus, Ground Nos. 1, 2 & 3 raised by the Revenue are dismissed.

7. In the result, the appeal of the Revenue is dismissed.

ITA No.2152/Kol/2017 (AY 2012-13)

8. Ground No.1 raised by the Revenue is relating to challenging the action of CIT(A) in filing Rule 46A of Income Tax Rules, 1962. We find no evidence brought on record by the Ld.DR that the CIT(A) admitted any new evidence by the assessee. Therefore, we find no substance in this Ground. Accordingly, Ground No.1 raised by the Revenue is dismissed.

9. Ground No.2 raised by the Revenue challenging the action of CIT(A) in directing the AO to verify the claim of depreciation on land & site development. The relevant portion of which is reproduced hereunder below:-

5. *“Appeal on Ground No. 2 is against making addition on account of depreciation of Rs. 2,18,81,723/- on Land & Site Development Expenses on the allegation that it does not fall under the schedule of depreciable assets. I have perused the rectification order and the submission made by the A/ R on this Issue. In the order, the AO contended that the depreciation claimed in Land and site development does not fall under the schedule of depreciation assets. The A/R submitted that the company is having its mining sites at Ghatkuri in the State of Jharkhand and at Koira in the State of Odisha. Some mines are also located at Sanpothli, Tentuldih and Kusumdih. The main business of the company is exploration, development, mining and processing of mineral assets. It includes extraction of iron ore and manganese ore and its sale in the open market. The Company has its land taken on lease where the mines are located and conduct the mining activities there only. He further submitted that for the purpose of mining, first the land has to be prepared so that the mining activities can be conducted there. The assessee company incurred the expenses for building roads and boundary walls around the land taken on lease and capitalized the same under the head Land & Site development Expenses. Construction of roads were important to facilitate the business activity of the assessee i.e. mining. Construction of Roads and boundary walls included various components like excavation of land, Leveling of land, Laying of R.C.C Hume pipes, Boulder Soiling and Morum Filing etc. For all these, the assessee incurs certain expenditure which were duly capitalized by the assessee and it claimed depreciation on the same. He also explained that the nature of the expenses incurred are ancillary to the main business activity of the assessee i.e. mining. Hence, he argued that without incurring the ancillary expenditure, it was not possible to carry out the main activity of the assessee. Also, the assessee acquired*

various types of equipments and machineries to facilitate the extraction of ores from the mines. Naturally these machineries help in the extraction process conducted by the assessee. Roads are very much vital for easy access of man and machinery to the mining site.

6. *I find the assessee company has incurred expenses for building roads and boundary walls around the mines taken on lease and capitalized the same under the head "Land & Site development Expenses". The AIR has admitted that inadvertently, the assessee has capitalized the said expenses under the nomenclature of "land & site development expenses" instead of "Building" and different rate of depreciation has been applied on "land & site development expenses" instead of @ 10% as applicable on "Building" as per the Income Tax Rules.*

7. *I find that as per the Appendix -I of the Income Tax Rules, the "Building" includes roads, bridges, culverts, wells and tube wells. The AIR also brought on record many case laws in which it has been held that roads and boundary walls are part and partial of "Building". The Hon'ble Supreme Court in the case of CIT Vs Gwalior Rayon Silk Manufacturing Co. Ltd., (1992) 196 ITR 149 (SC) has held that roads constructed by assessee in factory premises forms part of building. Similar view has been held by Hon'ble High Court of Karnataka in case of CIT Vs HMT Ltd. (1993) 199 ITR 235 (Karnt), that "Road", "walls" and "Fences" are regarded as part of building and entitled to depreciation at the rate applicable to 'Building'.*

8. *I find that the AIR of the assessee has also submitted a detailed chart showing depreciation claimed and depreciation allowable to the assessee. I find that the assessee has claimed excess depreciation on "land & site development expenses". Hence the same need to be verified and excess depreciation claimed should be disallowed. Thus AO is directed to verify the claim of the depreciation, thereby allowing the depreciation at the rate as applicable to "Building" and disallow the excess claim of depreciation made by the assessee. Accordingly, assessee's appeal on this ground is partly allowed. "*

10. Heard both parties and perused the material available on record. During the course of first appellant proceedings, the assessee submitted a detailed chart showing depreciation claimed. According to CIT(A) that the assessee has claimed excess depreciation on land & site expenses and requires further verification by the AO. Accordingly, he directed the AO to verify the claim of the assessee. It is noted that the assessee has incurred expenses for building, roads and boundary walls around the mines which were taken on lease. According to CIT(A), the assessee is entitled to depreciation @ 10% by holding the building as contemplated in Appendix I of Income Tax Rules including roads, bridges, culverts, wells and

tubewells. The CIT(A) placed reliance in the case of Gwalior Rayon Silk Manufacturing Co. Ltd. reported in 196 ITR 149(SC) which held that roads constructed by the assessee in factory premises forms of part of building. The CIT(A) further placed reliance in the case of *HMT Ltd. 199 ITR 235 (Karnataka)* of Hon'ble High Court of Karnataka which held that roads, walls and fences are regarded as part of building. Therefore, taking into consideration the law laid down by the Hon'ble Supreme Court and Hon'ble High Court of Karanataka, we find no infirmity in the order of the CIT(A) in holding that the assessee is entitled to claim depreciation on land and site development expenditure. Therefore, we find no infirmity in the order of CIT(A) in remanding the issue to the file of AO for its verification.

11. Ground No.3 is relating to deletion of addition made on account of expenditure in earning exempt income u/s 115JB of the Income Tax Act, 1961 (in short "Act").

12. Heard both parties and perused the material available on record. The CIT(A) placed reliance on the decision of Co-ordinate Bench of this Tribunal in assessee's own case for AY 2012-13 in IT (S.S.) No.11/Kol/2016 vide its order dated 03.03.2017 wherein it is noticed that Co-ordinate Bench of this Tribunal upheld the decision of the CIT(A) in deleting the addition made u/s 14A of the Act. The relevant portion of which is reproduced herein below:-

9. *"Appeal on Ground No. 3 is addition of Rs. 91,55,500/- u/s 14A while computing Book Profits u/s 115JB of the Act. During the appellate proceedings, the AR has brought on record the order of the jurisdictional ITAT vide IT(SS)A No. 110/Kol/2016 dated 03.03.2017 in the case of the assessee for the AY 2012-13 itself, where the Hon'ble ITAT has upheld the appellate order deleting the addition of Rs.91,55,500/- made u/s 14A of the Act. Therefore, this addition being consequential to the original addition made u/s 14A of the Act, the addition is deleted. Appeal on this ground is therefore, allowed."*

13. In view of the above, we find no infirmity in the order of CIT(A) and it is justified. Thus, Ground No. 3 raised by the Revenue is dismissed.

14. In the result, the appeal of the Revenue is dismissed.

ITA No.2153/Kol/2017 (AY 2013-14)

15. Ground Nos 1 & 2 raised by the Revenue are similar and identical to the Ground No. 1 raised by the Revenue in ITA No.2150/Kol/2017. Thus, the view taken by us in Ground No.1 in ITA No.2150/Kol/2017 is applicable to these grounds also. Therefore, Ground Nos. 1 & 2 raised by Revenue are dismissed.

16. Ground No.3 raised by the Revenue are similar and identical to the Ground No.2 raised by the Revenue in ITA No.2152/Kol/2017 including depreciation on land & site development. Thus, the view taken by us in Ground No.2 in ITA No.2152/Kol/2017 is applicable to this grounds also. Therefore, Ground No.3 raised by Revenue is dismissed.

17. Ground No.4 raised by the Revenue is relating to deletion of expenses incurred on club entrance fees and subscriptions.

18. Heard both parties and perused the material available on record. The contention of the Ld. AR is that the assessee incurred club expenses in respect of partnership of Directors in various clubs to entertain the customers and also to meet various people to make them prospective customers of the business. But, however, it is observed from the impugned order that the CIT(A) did not make any reference to evidence produced by the assessee in respect of incurring such expenses for the development of assessee's business. In the absence of which, we cannot support the finding given by the CIT(A). For ready-reference, we reproduced the relevant portion herein below:-

12. "Appeal on Ground No. 4 is against disallowance of Rs. 28,81,900/- on account of Club Entrance Fees and subscription of Rs. 12,902/- on account of cost for club service and facilities on the alleged ground that the said expenses are personal in nature. On this issue, the A/R has submitted that assessee has incurred expenditure on membership & subscription to the club for the purpose of promoting its business. The object of such expenses is that its directors by remaining members in clubs / social organization, will be able to meet various kind of people in calm and cool atmosphere of the club and because of the meeting they would develop business relationship, benefiting the assessee. The

expenditure incurred will help assessee to develop friendly relations with its clients and also will enable the assessee to make prospective customers. Thus, there is a nexus of such expenditure in furtherance to business.

The A/R has also brought on record various decisions wherein it has been held that membership fees/ club expenses are Business Expenses. I find that, the assessee has incurred club expenses which were duly explained by him were for the purpose of promoting the business. The directors becomes member of various clubs to entertain the customers and also to meet various people to make them the prospective customers of the business. I also find that various courts have held that membership fees / Club expenses are business expenditure.

The Hon'ble High Court of Madras in the case of CIT vs. Sundaram Industries Ltd. (1999) 240 ITR 335 (Mad), has held that club membership fees of director incurred to promote and foster the company's business are allowable as business expenditure.

Similar view has been held by the Hon'ble High Court of Delhi in the case of CIT vs. Nestle India Ltd. (2008) 296 ITR 682 and Hon'ble Jurisdictional ITAT, in the case of ACIT vs. Britannia Industries Ltd. in ITA- 1789/Kol/2008.”

19. Ld.AR did not bring on record any evidences before us atleast to show that the said expenditure incurred by the assessee for the purpose of development of its business. Therefore, in the absence of any evidence, we set aside the order of CIT(A) and uphold the view of the AO in making the said addition. Accordingly, Ground No.4 raised by the Revenue is allowed.

20. Ground Nos. 5 & 6 raised by the Revenue relating to disallowance u/s 14A with Rule 8D will not apply where no exempt income is received or receivable during the relevant previous year ignoring the provision of Rule 8D. The relevant portion of the impugned order is reproduced herein below:-

13. “Appeal on Ground No. 5 is against the addition of Rs. 1,57,04,882/ u/s 14A read with rule 8D. In the assessment order the AO has made this disallowance on the basis of his calculation under rule 8D read with section 14A of the I T Act, 1961. During the appellate proceedings the AR has filed a written submission and case laws on this issue. I have considered the finding of the AO and the written submission filed by the AR during the appellate proceedings. The AR has brought it on record that during the AY 2013-14 the assessee had not earned any exempted income. The AR also has brought on record the jurisdictional Kolkata bench of ITAT order in the case of REI Agro Ltd

(supra) in which the Hon'ble Kolkata bench of ITAT has held that in the absence of any tax free income earned by the assessee, disallowance u/s 14A could not be made. The AR has further brought on record the case law of CIT vs Cheminvest Ltd (supra) in which the Hon'ble Delhi High has categorically held that there should be an actual receipt of income which is not includable in total income for the calculation and its applicability u/s 14A. It has been further held that section 14A will not apply where no exempt income is received or receivable during the relevant previous year.

I have considered the submission filed by the AR and the ratio decided by different judicial authorities on this issue. Respectfully following the ratio decided by Kolkata bench of ITAT which was upheld by the Hon'ble Calcutta High Court in the case of REI Agro Ltd (supra), assessee's appeal on Ground No. 5 is allowed."

21. Heard both parties and perused the material available on record. The CIT(A) taking into consideration the submissions of the assessee and found satisfied that the assessee did not earn any exempt income during the year under consideration. Therefore, placing reliance on the decision of REI Agro Ltd. (supra) held that when there is no tax free income, no disallowance could be made. Therefore, we find no infirmity in the order of CIT(A) and it is justified. Thus, Ground Nos. 5 & 6 raised by the Revenue are dismissed.

22. Ground No.7 raised by the Revenue is relating to the delayed payment of employees contribution towards PF & ESI by invoking provision of section 43B of the Act.

15. "Appeal on Ground no. 7 is against the action of the AO in making disallowances of Rs. 50,32,450/- on account of delayed payment of employee's contribution towards PF & ESI by invoking the provisions of section 2(24)(x) read with section 36(1)(va) of the Act. In the assessment order the AO has made the aforesaid disallowances for the reason that the payments were made after the due date of deposit.

16. During the course of appellate proceedings it is submitted by the appellant that the AO was not justified in making the disallowance of Rs.50,32,450/- on account of delayed deposit of amounts of employee's contribution towards PF & ESI. It is contended by the appellant that on perusal of the assessment order it may be observed that the entire amount of PF was deposited before the due date of filing of return of income and, hence, no disallowance is called for. The reliance is placed on the decision in the case of CIT vs. M/s Coal India Ltd. ITA of 12 2015 dated 12.08.2015; CIT vs. Alom Extrusion Ltd., 319 ITR 306 (SC); CIT vs. Vinay Cement Ltd. (2009) 313 ITR (St.) 1 (SC) and CIT vs. AIMIL Ltd., (2010) 321 ITR 508 (Delhi). In view of above, the appellant pleaded that the AO be directed to delete the disallowances made by him on account of delayed deposit of PF."

23. It is noted from the impugned order that CIT(A) found satisfied that the employee's contribution was relating to PF & ESI was deposited before due date of filing of return of income. Therefore, we find no infirmity in the order of CIT(A) and it is justified. Thus, Ground No.7 raised by the Revenue is dismissed.

24. In the result, the appeal filed by the Revenue is partly allowed.

ITA No.2154/Kol/2017 (AY 2014-15)

25. Ground Nos. 1, 2, 3 & 4 are similar and identical to the Ground No.7 raised by the Revenue in ITA No.2153/Kol/2017 relating to delayed payment of employees contribution towards PF & ESI. Thus, the view taken by us in Ground No.7 in ITA No.2153/Kol/2017 is applicable to these grounds also. Therefore, Ground Nos. 1, 2, 3 & 4 raised by Revenue are dismissed.

26. Ground Nos. 5, 6 & 7 are similar and identical to the Ground No.2 raised in ITA No.2152/Kol/2017 relating to depreciation of lease hold land. Thus, the view taken by us in Ground No.2 raised by the Revenue in ITA No.2152/Kol/2017 is applicable to these grounds also. Thus, Ground Nos. 5, 6 & 7 raised by the Revenue are dismissed.

27. Ground No.8 raised by the Revenue in this appeal is similar and identical to the Ground Nos. 5 & 6 raised by the Revenue in ITA No.2153/Kol/2017 relating to disallowance made u/s 14A of the Act. Thus, the view taken by us in Ground No.5 & 6 raised by the Revenue in ITA No.2153/Kol/2017 is applicable to this ground also. Thus, Ground No.8 raised by the Revenue is dismissed.

28. In the result, four appeals i.e. ITA No.2150, 2151, 2152 & 2154/Kol/2017 filed by the Revenue are dismissed and ITA No.2153/Kol/2017 filed by the Revenue is partly allowed.

Order pronounced in the open court on 20.12.2018.

**Sd/-
(P.M.JAGTAP)
VICE PRESIDENT**

**Sd/-
(S.S.VISWANETHRA RAVI)
JUDICIAL MEMBER**

*Date:- 20.12.2018
*Amit Kumar**

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2. Respondent- M/s. Orissa Manganese & Minerals Ltd. 14, N.S.Road, 2nd Floor, Kolkata-700001.
3. CIT-Kolkata
4. CIT(Appeals)-Kolkata
5. DR: ITAT -Kolkata Benches

By order

AR/H.O.O
ITAT, KOLKATA