IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'G', NEW DELHI

Before Sh. Sudhanshu Srivastava, Judicial Member

Dr. B. R. R. Kumar, Accountant Member

(Through Video Conferencing)

ITA No. 5230/Del/2015 : Asstt. Year : 2009-10
ITA No. 5231/Del/2015 : Asstt. Year : 2010-11
ITA No. 5232/Del/2015 : Asstt. Year : 2011-12

Petronet LNG Ltd., First Floor, World Trade Centre, Babar Road, Barakhamba Lane, New Delhi-110001	Vs	Deputy Commissioner of Income Tax, Circle-19(2), New Delhi
(APPELLANT)		**(RESPONDENT)**
PAN No. AAACP8148D		

ITA No. 4902/Del/2015 : Asstt. Year : 2009-10
ITA No. 4903/Del/2015 : Asstt. Year : 2010-11
ITA No. 4904/Del/2015 : Asstt. Year : 2011-12

Deputy Commissioner of Income Tax, Circle-19(2), New Delhi	Vs	Petronet LNG Ltd., First Floor, World Trade Centre, Babar Road, Barakhamba Lane, New Delhi-110001
(APPELLANT)		**(RESPONDENT)**
PAN No. AAACP8148D		

Assessee by : Sh. Vishal Kalra, Adv.
Revenue by : Sh. H. K. Choudhary, CIT DR

Date of Hearing: 27.01.2021		**Date of Pronouncement: 18.03.2021**

ORDER

Per Bench:

The present appeals have been filed by the assessee and the revenue against the orders of the ld. CIT(A)-7, New Delhi dated 29.05.2015.

ITA Nos. 5230, 5231 & 5232/Del/2015 (Assessee's appeal)

2. In ITA No. 5230/Del/2015, following grounds have been raised by the assessee:

> *"1. That on the facts and circumstances of the case and in law, the CIT(A) has erred in arbitrarily sustaining the disallowance under section 14A of the Act, made by the Assessing Officer ("AO") by applying the provisions of Rule 8D(2)(iii) of the Income tax Rules, 1962 ("the Rules"), alleging that certain expenditure would have to be incurred by the Appellant to earn the exempt income.*
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> *1.1 That on the facts and circumstances of the case and in law, the CIT(A) has erred in not accepting the claim of the Appellant that only expenditure of Rs.2,30,000 can be said to be incurred for earning the dividend income and in the absence of any nexus existing between the dividend earned and other expenditure claimed by the Appellant, disallowance under section 14A of the Act was not warranted.*
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> *1.2 That on the facts and circumstances of the case and in law, the CIT(A) has erred in upholding, the disallowance made by the AO applying sub-rule (2) of Rule 8D of the Rules without recording any cogent reason regarding his dissatisfaction, on disallowance of Rs.2,30,000/- suo-moto computed by the appellant and offered for taxation, as required by section 14A of the Act read with sub-rule (1) of Rule 8D of the Rules.*
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> *1.3 That, without prejudice to the above, the CIT(A) has erred on facts and in law in upholding the computation of the AO wherein investments held by the Appellant in shares of India LNG Transport Company (No. 3) Limited, Malta has been included while computing the average of value of investment, income from which does not or shall*

not form part of the total income, for the purpose of disallowance under Rule 8D(2)(iii) of the Rules.

1.4 That, without prejudice to the above, the CIT(A) has erred on facts and in law in not considering the allocation of disallowance made under section 14A of the Act towards port, power and regasification undertakings.

2. That on the facts and circumstances of the case and in law, the AO has erred in charging interest under section 234C of the Act."

3. In ITA No. 5231/Del/2015, following grounds have been raised by the assessee:

"1. That on the facts and circumstances of the case and in law, the CIT(A) has erred in arbitrarily sustaining the disallowance under section 14A of the Act, made by the Assessing Officer ("AO") by applying the provisions of Rule 8D(2)(iii) of the Income tax Rules, 1962 ("the Rules"), alleging that certain expenditure would have to be incurred by the Appellant to earn the exempt income.

1.1 That on the facts and circumstances of the case and in law, the CIT(A) has erred in not accepting the claim of the Appellant that no expenditure was incurred for earning the dividend income and in absence of any nexus existing between the dividend earned and other expenditure claimed by the Appellant, disallowance under section 14A of the Act was not warranted.

1.2 That on the facts and circumstances of the case and in law, the CIT(A) has erred in upholding, the disallowance made by the AO applying sub-rule (2) of Rule 8D of the Rules without recording any cogent reason regarding his dissatisfaction on the claim of the Appellant, that no expenditure was incurred in earning the dividend income, as required by section 14A of the Act read with sub-rule (1) of Rule 8D of the Rules."

1.3 That, without prejudice to the above, the CIT(A) has erred on facts and in law in upholding the computation of the AO wherein investments held by the Appellant in Central Government securities and shares of India LNG Transport Company (No. 3) Limited, Malta has been included while computing the average of value of investment, income from which does not or shall not form part of the total income, for the purpose of disallowance under Rule 8D(2)(iii) of the Rules.

1.4 That, without prejudice to the above, the CIT(A) has erred on facts and in law in not considering the allocation of disallowance made under section 14A of the Act towards port, power and regasification undertakings.

4. In ITA No. 5232/Del/2015, following grounds have been raised by the assessee:

"1. That on the facts and circumstances of the case and in law, the CIT(A) has erred in arbitrarily sustaining the disallowance under section 14A of the Act, made by the Assessing Officer ("AO") by applying the provisions of Rule 8D(2)(iii) of the Income tax Rules, 1962 ("the Rules"), alleging that certain expenditure would have to be incurred by the Appellant to earn the exempt income.

1.1 That on the facts and circumstances of the case and in law, the CIT(A) has erred in not accepting the claim of the Appellant that only expenditure of Rs 3,69,800 can be said to be incurred for earning the dividend income and in the absence of any nexus existing between the dividend earned and other expenditure claimed by the Appellant, disallowance under section 14A of the Act was not warranted.

1.2 That on the facts and circumstances of the case and in law, the CIT(A) has erred in upholding, the disallowance made by the AO applying sub-rule (2) of Rule 8D of the Rules without recording any cogent reason regarding his dissatisfaction, on the suo-moto disallowance of Rs 3,69,800 made by the appellant in the return of income, as required by section 14A

of the Act read with sub-rule (1) of Rule 8D of the Rules.

1.3 That, without prejudice to the above, the CIT(A) has erred on facts and in law in upholding the computation of the AO wherein investments held by the Appellant in shares of India LNG Transport Company (No. 3) Limited, Malta has been included while computing the average of value of investment, income from which does not or shall not form part of the total income, for the purpose of disallowance under Rule 8D(2)(iii) of the Rules.

1.4 That, without prejudice to the above, the CIT(A) has erred on facts and in law in not considering the allocation of disallowance made under section 14A of the Act towards port, power and regasification undertakings.

2. That on the facts and circumstances of the case and in law, the CIT(A) has erred in arbitrarily upholding the disallowance of expenditure on account of Corporate Social Responsibility ("CSR") amounting to Rs 51,05,000 incurred by the Appellant, under section 37 of the Act, alleging that the same has not been incurred for the purposes of business.

2.1 That on the facts and circumstances of the case and in law, the CIT(A) has erred in not accepting the contention of the Appellant that undertaking public welfare activities and socio-economic development activities is one of the business objects of the Appellant and is clearly articulated in its Memorandum of Association and forms an integral part of its business operations.

3. That on the facts and circumstances of the case and in law, the AO has erred in charging interest under section 234C of the Act."

ITA Nos. 4902, 4903 & 4904/Del/2015 (Revenue's appeal)

5. In ITA No. 4902/Del/2015, following grounds have been raised by the revenue:

> *"1. i. On the facts and in the circumstances of the case, the Id. CIT(A) has erred in disallowing the disallowance of Rs. 1,09,65,21,389/- made by Assessing Officer by ignoring the provision of sub section 5 of section 801A of the Income tax Act, 1961.*
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> *ii. On the facts and in the circumstances of the case, the Id C1T(A) has erred in disallowing the disallowance of Rs. 10,29,12,855/- made by Assessing Officer by ignoring the provisions of section 80IA(4)(iv)(a) of the Income tax Act, 1961.*
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> *2. On the facts and in the circumstances of the case, the Id C1T(A) has erred in law and on the facts in deleting the disallowance of Rs. 7,91,95,087/- under Rule 8D(2)(ii) by ignoring the mandatory provisions of Rule 8D w.r.s. 14A of the Income tax Act, 1961."*

6. In ITA No. 4903/Del/2015, following grounds have been raised by the revenue:

> *"1. On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in disallowing the disallowance of Rs.33,31,00,400/- made by Assessing Officer by ignoring the provision of sub section 5 of section 801A of the Income tax Act, 1961.*
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> *2. On the facts and in the circumstances of the case, the ld CIT(A) has erred in law and on the facts in deleting the disallowance of Rs. 1287.32 lakhs under Rule 8D(2)(ii) by ignoring the mandatory provisions of Rule 8D w.r.s. 14A of the Income tax Act, 1961."*

7. In ITA No. 4904/Del/2015, following grounds have been raised by the revenue:

> *"1. On the facts and in the circumstances of the case, the Id. CIT(A) has erred in allowing the deduction of Rs.55,78,92,170/- instead of on the eligible profit of Rs.39,66.06.865/- worked out by Assessing Officer thereby deleting the addition of Rs. 16,12,85,305/- by ignoring the provision of sub section 5 of section 801A of the Income tax Act, 1961.*
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> *2. On the facts and in the circumstances of the case, the Id CIT(A) has erred in law in deleting the disallowance of Rs. 469.01 lakhs under Rule 8D(2)(ii) by ignoring the mandatory provisions of Rule 8D w.r.s. 14A of the Income tax Act, 1961.*
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> *3. i. On the facts and in the circumstances of the case, Id CIT(A) has erred in law in deleting the addition of Rs. 27.58,705/- treating the Notification No 56/2012 dated 31-12-2012 effective from 01-01-2013 for the deduction of tax payment to India Bank under the Income tax Act, 1961 as merely a clarificatory in nature.*
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> *ii. On the facts and in the circumstances of the case, Id CIT(A) has erred in law in deleting the addition of Rs. 8,90,700/- and Rs.27,58,705/- by accepting the plea of the assessee that the said amount not charged to Profit and loss account without giving the Assessing Officer an opportunity to rebut the same."*

8. The assessee is a company engaged in the business of operation of port, purchase of LNG etc having port at Dahej in Gujarat. The port undertaking of the assessee commenced operations from the F.Y. 2004-05. In the first year of operation the assessee incurred substantial losses. In A.Y.'s 2006-07, 2007-08 & 2008-09, the assessee made profits and the profits

were set off against the losses. In the relevant A.Y. 2009-10, the assessee also had profits and claimed a deduction u/s 80IA.

ITA No. 4902/Del/2015 (Revenue's Appeal):

Disallowance u/s 80IA:

9. The AO disallowed deduction claimed stating that the assessee does not have any profits available for claiming deduction. The business losses/deprecation of earlier years, which have been set off against the income have been notionally brought forward and set off against the profits for the relevant assessment year thereby reducing the profits.

10. The assessee stated that for the purpose of computing deduction u/s 80IA, unabsorbed depreciation of earlier years already set off against income of the assessee in the preceding years should not be notionally brought forwarded and set off u/s 80IA(5) for determining claim of deduction.

11. The ld. CIT (A) deleted the addition on the grounds that the action of the Assessing Officer to bring losses again notionally cannot be accepted.

12. Heard the arguments of both the parties and perused the material available on record.

13. The profits and the brought forward and carried forward losses from A.Y. 2005-06 till the current assessment year as per the AO are given below:

Assessment Years	Port Unit
2006-07 B/F Losses Taxable profits for A.Y06-07 Carry forward balance losses to AY 07-08	 (310,09,69,047) 6,86,05,536 (303,23,63,511)
Deduction u/s 80IA	Nil
2007-08 B/F Losses Taxable profits for A.Y 07-08 Carry forward balance losses to AY 08-09	 (303,23,63,511) 54,39,28,860 (248,84,34,651)
Deduction u/s 80IA	Nil
2008-09 B/F Losses Taxable profits for A.Y 08-09 Carry forward balance losses to AY 09-10	(248,84,34,651) 89,75,27,557 (159,09,07,094)
Deduction u/s 80IA	Nil
2009-10 B/F Losses Taxable profits for A.Y 09-10 Carry forward balance losses to AY 10-11	(159,09,07,094) 109,65,21,389 (49,43,85,705)
Deduction u/s 80IA	109,65,21,389

14. Similar is the case for the profits of the Power Unit. The grounds before us pertain to deduction u/s 80IA. Hence, there is no need to dwell into the issue of production/ generation of power *per se.*

15. The claim of the assessee in the current year leads the examination of two issues.

a. Whether the assessee is entitled to consider the "Year-4" of the operation as the initial assessment year for computation of deduction under eligible business or not.
b. Whether the revenue was right in notionally carrying forward the losses and unabsorbed depreciation of the

earlier years to be taken into consideration for computing deduction u/s 80IA.

c. Whether the brought forward losses needs to be set off against the profits earned during the year before claiming the deduction u/s 80IA or not.

16. With regard to the issue mentioned at point (a.) above, we have perused the provisions of Section 80IA(5) which are as under:

> *"(5) Notwithstanding anything contained in any other provision of this Act, the profits and gains of an eligible business to which the provisions of subsection (1) apply shall, for the purposes of determining the quantum of deduction under that subsection for the assessment year or any subsequent assessment year, be computed as if such eligible business were the only source of income of the assessee during the previous year relevant to the* ***initial assessment year*** *and to every subsequent assessment year up to and including the assessment year for which the determination is to be made."*

17. Owing to the non-specificity of the "initial assessment year" which lead to conflicting interpretations, CBDT has clarified as to what constitutes initial assessment year with reference to Section 80IA(5) vide Circular No. 1 of 2016 dated 15.02.2016. Since, the Circular is clarificatory in nature, it is treated as applicable from the year, the statute came into force.

Circular No. 1 /2016

Government of India
Ministry of Finance
Department of Revenue
Central Board of Direct Taxes

North Block, New Delhi, the 15th February, 2016

Subject: Clarification** of **the term 'initial assessment year' in section 80IA (5) of the Income-tax Act, 1961

Section 80IA of the Income-tax Act, 1961 ('Act'), as substituted by the Finance Act, 1999 with effect from 01.04.2000, provides for deduction of an amount equal to 100 % of the profits and gains derived by an undertaking or enterprise from an eligible business (as referred to in sub-section (4) of that section) in accordance with the prescribed provisions. Sub-section (2j of section 80IA further provides that the aforesaid deduction can be claimed by the assessee, at his option, for any ten consecutive assessment years out of fifteen years (twenty years in certain cases) beginning from the year in which the undertaking commences operation, begins development or starts providing services etc. as stipulated therein. Sub-section (5) of section 80IA further provides as under:-

"Notwithstanding anything contained in any other provision of this Act, the profits and gains of an eligible business to which the provisions of sub-section (1) apply shall, for the purposes of determining the quantum of deduction under that sub-section for the assessment year immediately succeeding the initial assessment year or any subsequent assessment year, be computed as if such eligible business were the only source of income of the assessee during the previous year relevant to the initial assessment year and to every subsequent assessment year up to and including the assessment year for which the determination is to be made".

In the above sub-section, which prescribes the manner of determining the quantum of deduction, a reference has been made to the term 'initial assessment year'. It has been represented that some Assessing Officers are interpreting the term 'initial assessment year' as the year in which the eligible business/ manufacturing activity had commenced and are considering such first year of commencement/operation etc. itself as the first year for granting deduction, ignoring the clear mandate provided under sub-section (2) which allows a choice to the assessee for deciding the year from which it desires to claim deduction out of the applicable slab of fifteen (or twenty) years.

The matter has been examined by the Board. It is abundantly clear from sub-section (2) that an assessee who is eligible to claim deduction u/s 80IA has the option to choose the initial/ first year from which it may desire the claim of deduction for ten consecutive years, out of a slab of fifteen (or twenty) years, as prescribed under that sub-section. It is hereby clarified that once such initial assessment year has been opted for by the assessee, he shall be entitled to claim deduction u/s 80IA for ten consecutive years beginning from the year in respect of which he has exercised such option subject to the fulfillment of conditions prescribed in the section. Hence, the term 'initial assessment year' would mean the first year opted for by the assessee for claiming deduction u/s 80IA. However, the total number of years for claiming deduction should not transgress the prescribed slab of fifteen or twenty years, as the case may be and the period of claim should be availed in continuity.

The Assessing Officers are, therefore, directed to allow deduction u/s 80IA in accordance with this clarification and after being satisfied that all the prescribed conditions applicable in a particular case are duly satisfied. Pending litigation on allowability of deduction u/s 80 IA shall also not be pursued to the extent it relates to interpreting 'initial assessment year' as mentioned in sub-section (5) of that section for which the Standing Counsels/D.R.s be suitably instructed.

The above be brought to the notice of all Assessing Officers concerned.

Sd/-
(Deepshikha Sharma)
Director to the Government of India

(F.No. 200/31/2015-ITA-I)

18. Straight to the issue- Taking into consideration, the above Circular of the CBDT, we hold that the assessee is entitled to claim the deduction from the assessment year 2009-10 as the "*initial assessment year"* u/s 80IA(5) even though this is the fourth year of operation of the activities u/s 80IA. We clarify that the "initial assessment year" for the "claim of deduction" need not be the "first year" of the "commencement of operations" of the assessee.

19. The second issue is to be examined is

b. Whether the revenue was right in notionally carrying forward the losses and unabsorbed depreciation of the earlier years to be taken into consideration for computing deduction u/s 80IA.

20. In the instant case, the AO has calculated the profits available for the year after setting off the brought forward losses from the assessment years 2006-07 to 2008-09. The Assessing Officer has computed the losses against the profits of the similar unit year wise. The moot argument of the ld. Counsel for the assessee was that the brought forward losses and depreciation of the assessee have already been set off against the total profits earned hitherto in the previous assessment years. It was argued that the losses and depreciation cannot be recomputed notionally.

21. In this context, we have gone through the Section 80-IA(5) of the Act, which is as under:

> *"(5) Notwithstanding anything contained in any other provision of this Act, the profits and gains of an eligible business to which the provisions of sub-section (1) apply shall, for the purposes of determining the quantum of deduction under that sub-section for the assessment year immediately succeeding the initial assessment year or any subsequent assessment year, be computed as if such eligible business were the only source of income of the assessee during the previous year relevant to the initial assessment year and to every subsequent assessment year up to and including the assessment year for which the determination is to be made."*

22. This Section doesn't provide for notional losses or carry forward thereof. The provisions of Section 80IA Sub-Section (5)

and Sub-Section (7) to (12) so far as may be apply to the eligible business under the Section 80IB also. Considering that the initial assessment year for the purpose of Section 80IA different from the initial commencement year lead to a fiction of setting off of the brought forward loss of the "eligible business".

23. This issue has been examined by the ITAT Ahmadabad in ACIT Vs Goldmine Shares & Finance (P.) Ltd. [2008] 113 ITD 209 (Ahm.) wherein it was held that the Section is a legal fiction and though losses were set off against other sources income, they are to be assumed as not set off in absence of existence of another source and for computing the profit and gains for the purposes of determination of the quantum of deduction one has to once again notionally bring back already set off losses, etc. and set off the same against the profits and gains in a year in the deduction is claimed. This view is supported in the case of ITO Vs. Sicgil India (P.) Ltd. [2009] 119 ITD 184 (CHENNAI), which gave a finding that in view of the specific provisions of Section 80-IA(5) of the Income-tax Act, 1961, the profit from the eligible business for the purpose of determination of the quantum of deduction under Section 80-IA of the Act has to be computed after deduction of the notional brought forward losses and depreciation of eligible business even though they have been allowed set off against other income in earlier years.(Ack-inputs from Open Article –Robin Rawal Addl.CIT)

24. Subsequent to clarification by the Circular of the CBDT, since the initial year of deduction is allowed to be different from the initial year of commencement, the profits have to be computed from the initial year of deduction on standalone basis for each eligible unit. While doing so, the carried forward losses of the eligible unit which have already been set off

against regular profits cannot be brought again in determination of profits eligible for deduction. The loss of the year commencing from the initial assessment year alone is to be carried forward and set off against the profits. Since, the provision allows the benefit to further 10 years down the line one need not look behind to see what has happened in the years earlier to the claim of deduction. Similar view has been expressed by the Co-ordinate Bench of ITAT of Madras in the case of Mohan Breweries v. ACIT, 116 ITD 241.

25. In the case of VS Mills Pvt. Ltd. Vs ACIT, the Hon'ble Apex Court held that the cumulative consideration of the principles set out in the case wherein admittedly the entire depreciation allowance and development rebate for the past assessment years were fully set off against the total income of the assessee for those assessment years and no further depreciation allowance or development rebate remain unabsorbed, then nothing could be deducted in respect of the set off while determining the deduction u/s 80I of the Act.

26. With regard to the deduction, we are guided by the provisions of Section 80IA (1) and (4) which is reproduced as under:

(1) Where the gross total income of an assessee includes any profits and gains derived by an undertaking or an enterprise from any business referred to in sub-section (4) (such business being hereinafter referred to as the eligible business), there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction of an amount equal to hundred per cent of the profits and gains derived from such business for ten consecutive assessment years.

(2) The deduction specified in sub-section (1) may, at the option of the assessee, be claimed by him for any ten consecutive assessment years out of fifteen years beginning from the year in which the undertaking or the enterprise develops and begins to operate any infrastructure facility or starts providing telecommunication service or develops an industrial park or develops a special economic zone referred to in clause (iii) of sub-section (4) or generates power or commences transmission or distribution of power or undertakes substantial renovation and modernisation of the existing transmission or distribution lines :

Provided *that where the assessee develops or operates and maintains or develops, operates and maintains any infrastructure facility referred to in clause (a) or clause (b) or clause (c) of the Explanation to clause (i) of sub-section (4), the provisions of this sub-section shall have effect as if for the words "fifteen years", the words "twenty years" had been substituted.*

(2A) Notwithstanding anything contained in sub-section (1) or sub-section (2), the deduction in computing the total income of an undertaking providing telecommunication services, specified in clause (ii) of sub-section (4), shall be hundred per cent of the profits and gains of the eligible business for the first five assessment years commencing at any time during the periods as specified in sub-section (2) and thereafter, thirty per cent of such profits and gains for further five assessment years.

(3) This section applies to an undertaking referred to in clause (ii) or clause (iv) of sub-section (4) which fulfils all the following conditions, namely :—

(i) it is not formed by splitting up, or the reconstruction, of a business already in existence :

Provided *that this condition shall not apply in respect of an undertaking which is formed as a result of the re-establishment, reconstruction or revival by the assessee of the business of any such undertaking as is referred to in section 33B, in the circumstances and within the period specified in that section;*

(ii) it is not formed by the transfer to a new business of machinery or plant previously used for any purpose:

Provided *that nothing contained in this sub-section shall apply in the case of transfer, either in whole or in part, of machinery or plant previously used by a State Electricity Board referred to in clause (7) of section 2 of the Electricity Act, 2003 (36 of 2003), whether or not such transfer is in pursuance of the splitting up or reconstruction or reorganisation of the Board under Part XIII of that Act.*

Explanation 1.—For the purposes of clause (ii), any machinery or plant which was used outside India by any person other than the assessee shall not be regarded as machinery or plant previously used for any purpose, if the following conditions are fulfilled, namely :—

(a) such machinery or plant was not, at any time previous to the date of the installation by the assessee, used in India;

(b) such machinery or plant is imported into India from any country outside India; and

(c) no deduction on account of depreciation in respect of such machinery or plant has been allowed or is allowable under the provisions of this Act in computing the total income of any person for any period prior to the date of the installation of machinery or plant by the assessee.

Explanation 2.—Where *in the case of an undertaking, any machinery or plant or any part thereof previously used for any purpose is transferred to a new business and the total value of the machinery or plant or part so transferred does not exceed twenty per cent of the total value of the machinery or plant used in the business, then, for the purposes of clause (ii) of this sub-section, the condition specified therein shall be deemed to have been complied with.*

(4) This section applies to—

(i) any enterprise carrying on the business of (i) developing or (ii) operating and maintaining or (iii) developing, operating and maintaining any infrastructure facility which fulfils all the following conditions, namely :

(a) it is owned by a company registered in India or by a consortium of such companies or by an authority or a board or a corporation or any other body established or constituted under any Central or State Act;

(b) it has entered into an agreement with the Central Government or a State Government or a local authority or any other statutory body for (i) developing or (ii) operating and maintaining or (iii) developing, operating and maintaining a new infrastructure facility;

(c) it has started or starts operating and maintaining the infrastructure facility on or after the 1st day of April, 1995:

***Provided** that where an infrastructure facility is transferred on or after the 1st day of April, 1999 by an enterprise which developed such infrastructure facility (hereafter referred to in this section as the transferor enterprise) to another enterprise (hereafter in this section referred to as the transferee enterprise) for the purpose of operating and maintaining the infrastructure facility on its behalf in accordance with the agreement with the Central Government, State Government, local authority or*

statutory body, the provisions of this section shall apply to the transferee enterprise as if it were the enterprise to which this clause applies and the deduction from profits and gains would be available to such transferee enterprise for the unexpired period during which the transferor enterprise would have been entitled to the deduction, if the transfer had not taken place:

***Provided further** that nothing contained in this section shall apply to any enterprise which starts the development or operation and maintenance of the infrastructure facility on or after the 1st day of April, 2017.*

Explanation.—For the purposes of this clause, "infrastructure facility" means—

(a) a road including toll road, a bridge or a rail system;

(b) a highway project including housing or other activities being an integral part of the highway project;

(c) a water supply project, water treatment system, irrigation project, sanitation and sewerage system or solid waste management system;

(d) a port, airport, inland waterway, inland port or navigational channel in the sea;

(ii) any undertaking which has started or starts providing telecommunication services, whether basic or cellular, including radio paging, domestic satellite service, network of trunking, broadband network and internet services on or after the 1st day of April, 1995, but on or before the 31st day of March, 2005.

Explanation.—For the purposes of this clause, "domestic satellite" means a satellite owned and operated by an Indian company for providing telecommunication service;

(iii) any undertaking which develops, develops and operates or maintains and operates an industrial park or special economic zone notified by the Central Government in accordance with the scheme framed and notified by that Government for the period beginning on the 1st day of April, 1997 and ending on the 31st day of March, 2006:

Provided *that in a case where an undertaking develops an industrial park on or after the 1st day of April, 1999 or a special economic zone on or after the 1st day of April, 2001 and transfers the operation and maintenance of such industrial park or such special economic zone, as the case may be, to another undertaking (hereafter in this section referred to as the transferee undertaking), the deduction under sub-section (1) shall be allowed to such transferee undertaking for the remaining period in the ten consecutive assessment years as if the operation and maintenance were not so transferred to the transferee undertaking :*

Provided further *that in the case of any undertaking which develops, develops and operates or maintains and operates an industrial park, the provisions of this clause shall have effect as if for the figures, letters and words "31st day of March, 2006", the figures, letters and words "31st day of March, 2011" had been substituted;*

(iv) an undertaking which,—

(a) is set up in any part of India for the generation or generation and distribution of power if it begins to generate power at any time during the period beginning on the 1st day of April, 1993 and ending on the 31st day of March, 2017;

(b) starts transmission or distribution by laying a network of new transmission or distribution lines at any time during the period beginning on the 1st day of April, 1999 and ending on the 31st day of March, 2017:

Provided *that the deduction under this section to an undertaking under sub-clause (b) shall be allowed only in relation to the profits derived from laying of such network of new lines for transmission or distribution;*

(c) undertakes substantial renovation and modernisation of the existing network of transmission or distribution lines at any time during the period beginning on the 1st day of April, 2004 and ending on the 31st day of March, 2017.

Explanation.—For the purposes of this sub-clause, "substantial renovation and modernisation" means an increase in the plant and machinery in the network of transmission or distribution lines by at least fifty per cent of the book value of such plant and machinery as on the 1st day of April, 2004;

(v) an undertaking owned by an Indian company and set up for reconstruction or revival of a power generating plant, if—

(a) such Indian company is formed before the 30th day of November, 2005 with majority equity participation by public sector companies for the purposes of enforcing the security interest of the lenders to the company owning the power generating plant and such Indian company is notified before the 31st day of December, 2005 by the Central Government for the purposes of this clause;

(b) such undertaking begins to generate or transmit or distribute power before the 31st day of March, 2011;

(vi) [***]

27. Various other judgments have been perused with regard to the deduction vis-à-vis set off of losses. To mention a few,

28. The ITAT, Bangalore in the case of Anil Lad Vs DCIT [2011] held that loss and depreciation of eligible unit prior to "initial assessment year", if

set-off against other income, then it is not to be notionally carried forward. The facts of the case were that in AY 2006-07 the assessee installed a windmill, the profits of which were eligible for 100% deduction under Section 80-IA. Owing to depreciation and loss, the assessee did not claim s. 80-IA deduction in AY 2006-07 & 2007- 08 and set-off the loss and depreciation against other income. In AY 2008-09, the assessee earned profits from the windmill and claimed deduction under Section 80-IA. The AO & CIT (A) relied on the Special Bench decision in ACIT vs. Gold Mines Shares & Finance 116 TTJ (Ahd) (SB) 705 and held that in view of Section 80IA(5), the loss and unabsorbed depreciation of the eligible unit, though set-off against the other income, had to be "notionally" carried forward for set-off against the profits of the eligible undertaking. Allowing the appeal the ITAT held that, though in Gold Mines Shares & Finance 116 TTJ (Ahd) (SB) 705 it was held that in view of Section 80IA(5), the eligible unit had to be treated as the only source of income and the profits had to be computed after deduction of the notionally brought forward losses and depreciation of the eligible business even though they were in fact set-off against other income in the earlier years

29. The Hon'ble Court of Madras in the case of VS Mills Pvt. Ltd. Vs ACIT 340 ITR 477 held that the eligible business was the only source of income, during the previous year relevant to initial assessment year and every subsequent assessment years, when the assessee exercises the option, the only losses of the years beginning from initial assessment year alone are to be brought forward and no losses of earlier years which were already set off against the income of the assessee. Looking forward to a period of ten years from the initial assessment is contemplated. It does not allow the Revenue to look backward and find out if there is any loss of earlier years and bring forward notionally even though the same were set off against other income of the assessee and the set off against the

current income of the eligible business. Once the set off is taken place in earlier year against the other income of the assessee, the Revenue cannot rework the set off amount and bring it notionally.

30. In the present case, there is no dispute that the losses incurred by the assessee were already been set off and adjusted against the profits of the earlier years. During the relevant assessment year, the assessee has exercised the option of claiming deduction u/s 80IA. There is no unabsorbed depreciation or loss of the eligible undertaking and the same were already absorbed in the earlier years. There is a positive profit during the year. The Assessing Officer's calculation of treating the each unit independently and setting off the profits against the losses of the unit which have already been set off against by the profits of the assessee in the earlier years cannot be held to be legally valid. The set off of the losses as presented by the ld. AR is as under:

2005-06	3,100,969,047	689,870,548	3,014,357,554	6,805,197,149			
2006-07	68,605,536	55,752,510	2,171,418,084	2,184,271,109	6,805,197,149	2,184,268,109	4,620,929,040
2007-08	543,928,860	22,570,463	3,690,462,244	4,256,961,567	4,620,929,040	4,256,961,567	363,967,473
2008-09	897,527,557	81,147,825	5,709,774,904	6,688,450,286	363,967,473	363,967,473	

31. The AO is directed to verify the same for accuracy of the figures from the returns filed for the earlier assessment years. The appeal the revenue on this issue is dismissed.

32. The third issue is to be examined is

c. Whether the brought forward losses need to be set off against the profits earned during the year before claiming the deduction u/s 80IA or not.

33. In view of the discussion above, on a concurrent reading of what constitutes on initial assessment year and the provision

for brought forward of losses, the eventual conclusion derives from such reading is that in case the assessee has existing brought forward losses which were either could not be set off against the profits and if the assessee considers any year as the initial assessment year for the benefit of Section 80IA in such cases, the eligible profits would be determined only after setting off of the losses/ unabsorbed depreciation carried forward in the year the deduction is claimed.

34. This ratio applies to ground nos. 1 & 2 of the departmental appeal for the assessment years 2009-10, 2010-11 and ground no. 1 for the assessment year 2011-12.

Deduction u/s 14A:

The appeal of the revenue on Rule 8D(2)(ii)
The appeal of the assessee on Rule 8D(2)(iii)

35. During the year, the assessee has earned dividend income of Rs.29,86,43,660/-(amount varies from year to year) from investment in mutual funds. The dividend income earned was claimed as exempt from tax u/s 10(34) of the Act. The assessee argued that they have not incurred any expenditure during the assessment year in connection with earning of said dividend income. The assessee has offered an amount of Rs.2,30,000/- u/s 14A of the Act for taxation during the course of assessment proceedings. The AO disallowed an amount of Rs.10,04,84,577/- u/s 14A of the Act applying the provisions of Rule 8D of the Income Tax Rules, 1962. The ld. CIT (A) confirmed the addition to the tune of Rs.2,12,89,490/- under Rule 8D(2)(iii) and

deleted the amount of Rs.7,91,95,087/- made under Rule 8D(2)(ii).

36. Aggrieved both the assessee and the revenue are in appeal in this issue.

37. During the hearing before us, the ld. AR relied on submissions made before the authorities below and also on the letter dated 22nd September 2011 (PB 121) wherein it was submitted that the assessee has not incurred any expenditure in connection with the earning of dividend income which is exempt from tax under the provisions of the Act. The assessee has also offered an amount of Rs.2,30,000/- for disallowance which was based on third party quotation received on charges of an external advisor, attributing 5 to 10% of the salary cost of the employees who may have interacted with the subject matter. Further, replies have been given to the revenue while letter dated 29.11.2011 (PB 183) and 07.12.2011 (PB 190). The assessee has also given the computation in accordance with Section 14A. (PB 188) The ld. AR argued that the AO did not note any satisfaction in respect of disallowance made u/s 14A r.w. Rule 8D(ii). He relied on the various case laws:

- *CIT Vs Syntex Industries Ltd. (2017) 82 taxmann.com 171 (Guj.)*
- *Indian Sugar Exim Corporation Ltd. (2012) 206 taxmann.com 242 (Del.)*
- *CIT Vs Microlabs Ltd. (2017) 79 Taxmann.com 365 (Kar.)*
- *Gujarat Flurochemicals Ltd. Vs DCIT (2018) Taxmann.com 10 (Ahd.)*
- *Ultratech Cement Ltd. Vs ACIT (2017) 88 taxmann.com 907 (Mum. Trib.)*

- *Axis Bank Ltd. Vs ACIT (2017) 79 taxmann.com 187 (Ahd. – Trib.)*
- *ACIT Vs A.U. Financiers India Ltd. (2019) 175 ITD 245 (Jaipur)*
- *Goyal & Co. (Const.) Pvt. Ltd. Vs DCIT (2020) 180 ITD 280 (Ahd.)*

38. The ld. AR further argued that the dividend income earned was from debt oriented mutual funds which are akin to fixed deposits of the bank not requiring any constant monitoring or analysis of investment portfolio unlike equity oriented funds. The ld. AR relied on various case laws as mentioned below:

- *CIT Vs Walfort Share & Stock Brokers (P) Ltd. (2010) 326 ITR 1 (SC)*
- *Godrej & Boyce Manufacturing Company Ltd. (2017) 394 ITR 449 (SC)*
- *HT Media Ltd. Vs Pr. CIT (2017) 85 taxmann.com 113 (Del.)*
- *CIT Om Prakash Khaitan (2015) 376 ITR 390 (Del.)*
- *ACIT Vs Eicher Ltd. (2007) 101 TTJ 369 (Del.)*
- *Maruti Udgyog Ltd. Vs DCIT (2005) 92 ITD 119 (Del.)*
- *CIT Vs Hero Cycles (2010) 323 ITR 518 (P&H)*
- *DCIT Vs Nestle India Ltd. in ITA No. 2020/Del/2014*

39. The ld. AR further argued that the assessee has not earned any dividend from certain investments which may not be taken into consideration while computing the disallowance.

40. On the other hand, the ld. DR totally supported the order of the Assessing Officer on all aspects.

41. These facts on record and the arguments of both the parties culminate in:

- Whether the Assessing Officer have recorded any cogent reason for his dissatisfaction or not.

- Whether the ld. CIT (A) was correct in deleting the amount of Rs.7,91,95,087/- under Rule 8D(2)(ii) or not.
- Whether the ld. CIT (A) was correct in confirming the amount of Rs.2,12,89,490/- under Rule 8D(2)(iii) or not.

Q-1) Whether the Assessing Officer have recorded any cogent reason for his dissatisfaction or not.

42. With regard to the satisfaction of the AO, we have gone through the order of the Assessing Officer pertaining to disallowance of expenses u/s 14A which is as under:

"32. A perusal of assessee's balance sheet reveals that assessee had investment of Rs. 30,426.21 lacs in shares and mutual funds and has received dividend income of Rs. 2986.44 lacs on it. Assessee was asked to explain why expenses in relation to income which does not form part of total income may not be disallowed as per provisions of Section 14A of the Act. The assessee vide its reply filed on 13.09.2011 submitted that the company did not incur any expenditure in connection with earning dividend income and therefore, no disallowance was made by it u/s 14A of the Act. The assessee further submitted that it had not appointed any specific employees for the purpose of making investment decision and managing the investment portfolio. The assessee's reply dt. 29.11.2011 in this regard is re-produced below-

- *Our detailed submissions dated 13 September 2011 that PLL has not incurred any expenditure in connection with the earning of dividend which is exempt from tax under the*

provisions of the Act and accordingly, no disallowance under section 14A of the Act read with Rule 8D of the Rules is warranted in the instant case.

- *Our submissions dated 22 September 2011 offering suo-moto disallowance of Rs 230,000 under section 14A of the Act to buy peace of mind having regard to the unwarranted litigation on the similar issue by the Revenue authorities.*

33. Assessee's reply is duly considered. Assessee has made investment to the tune of Rs.54731.74 lacs and has earned income on it of Rs. 1862.94 lacs which does not form part of total income. Assessee' submission that it has not employed any specific person to take investment decisions or to manage such investments may be correct but it cannot be accepted that in the process of making decision for such huge investments none of its senior managerial person was involved and it has not used its official machinery for supervision and management of its investment portfolio. Investments are not automatic activities which do not require any human decision or supervision. These decisions are very important decision and are taken at the highest level of management. Investment requires constant supervision. Assessee has to properly account for various investments as well as resultant income from it. All these activities require use of its manpower and official machinery. In view of this, it is not acceptable that no expenditure was incurred in this regard. Since, use of official machinery cannot be denied; part of expenses should have been apportioned to the income which does not form part of total income. Thus, I am not satisfied with the correctness of assessee's claim that

no expenditure was incurred for making investment or for earning exempt income."

43. On going through the Assessment Order, we find that the Assessing Officer has duly examined the issue in detail. Having not satisfied the fact that the assessee has not disallowed any amount for earning tax free income of Rs.10.4 Cr., the AO has enquired into and adequate opportunity was accorded to the assessee to reply as to how the contention of the assessee is acceptable. The assessee replied on 13.09.2011, on 22.09.2011 and on 29.11.2011 and the deliberations went on during hearing show the application of mind of the AO with regard to the dissatisfaction as per the provisions of Section 14A. The Assessing Officer has given reasoning at para 33 of the Assessment Order which has been reproduced above as to how and why the assessee's contention is not acceptable. Relying on the decision of Hon'ble Punjab & Haryana High Court in the case of Punjab Tractors Vs CIT in ITA No. 458 of 2015 dated 03.02.2017, we hold that it is not necessary for the Assessing Officer to decide the extent or quantum of the incorrect claim. However, he has to correctly conclude and satisfied that the claim of the assessee is incorrect. It is necessary for the Assessing Officer to rightly come to the conclusion that the claim of the assessee is incorrect.

44. The Hon'ble Chief Justice held that the language of Section 14(2) is "is not satisfied with the correctness of the claim" and not "reasonably doubts it" or "has reason to doubt the correctness of the claim".

45. The relevant extract of the decision of the Hon'ble Delhi High Court in the case of India Bulls Financial Services Vs DCIT, ITA No. 470 of 2016 dated 21.11.2016 is reproduced as under:

> *"7. Undoubtedly, the language of Section 14A presupposes that the AO has to adduce some reasons if he is not satisfied with the amount offered by way of disallowance by the assessee. At the same time Section 14A (2) as indeed Rule 8D(i) leave the AO equally with no choice in the matter inasmuch as the statute in both these provisions mandates that the particular methodology enacted should be followed. In other words, the AO is under a mandate to apply the formulae as it were under Rule 8D because of Section 14A(2). If in a given case, therefore, the AO is confronted with a figure which, prima facie, is not in accord with what should approximately be the figure on a fair working out of the provisions, he is but bound to reject it. In such circumstances the AO ordinarily would express his opinion by rejecting the disallowance offered and then proceed to work out the methodology enacted."*

46. The Hon'ble Court with regard to the satisfaction of the AO as per Section 14(2) and (3) held that law doesn't envisage express recording of satisfaction. It held that if the AO examine the issue with regard to the provisions of Section 14A, Rule 8D and having held deliberations with the assessee as to the disallowance and not expressly recording dissatisfaction would *per se* doesn't amount to non-recording of satisfaction.

47. The relevant extract is as under:

> *"8. In this instance the elaborate analysis carried out by the AO - as indeed the three important steps indicated by him in the order, shows that all these elements were present in his mind, that he did not expressly record his dissatisfaction in these circumstances, would not per se justify this Court in concluding that he was not satisfied or did not record cogent reasons for his dissatisfaction to reject the AO's conclusion. To*

insist that the AO should pay such lip service regardless of the substantial compliance with the provisions would in fact destroy the mandate of Section 14A."

48. In the instant case, the AO cannot be faulted for not being satisfied with the claim of the assessee. The AO is justified in presuming that the assessee has incurred expenditure towards administrative activities necessary to earn the exempt income. Once, the inference of the AO is found to be correct, the provisions of Rule 8D sets in. Owing to the decisions of the Hon'ble Courts and the facts of the instant case, we hold that the Assessing Officer has rightly not satisfied with the contentions of the assessee and the disallowance.

Q.2) Whether the ld. CIT (A) was correct in deleting the amount of Rs.7,91,95,087/- under Rule 8D(2)(ii) or not?

49. The AO disallowed Rs.7,91,95,087/- under Rule 8D(2)(ii). The ld. CIT (A) deleted the addition, however no reasons have been given.

50. We have gone through the arguments and submissions of both the parties. We find that as per the page no. 190 of the paper book vide letter dated 07.12.2011, the assessee submitted that they did not invest any part of the borrower funds in the mutual funds and there was no dividend income earned on borrowed funds. This fact has not been disputed by the revenue authorities. In this context, the relevant provisions are hereby perused.

51. The provisions of the Rule 8D(2)(ii) are as under:

"(2) The expenditure in relation to income which does not form part of the total income shall be the aggregate of following amounts, namely:—

(i) .....

(ii) in a case where the assessee has incurred expenditure by way of interest during the previous year which is not directly attributable to any particular income or receipt, an amount computed in accordance with the following formula, namely:-

$$A \times \frac{B}{C}$$

Where A = amount of expenditure by way of interest other than the amount of interest included in clause (i) incurred during the previous year;

B = the average of value of investment, income from which does not or shall not form part of the total income, as appearing in the balance sheet of the assessee, on the first day and the last day of the previous year;

C = the average of total assets as appearing in the balance sheet of the assessee, on the first day and the last day of the previous year;"

52. From the above provisions, we hold that in the absence of incurring of any expenditure of interest by the assessee to any party on account of interest with regard to the amounts invested, we hold that the provisions of Section 8D(2)(ii) cannot be attracted. Hence, we hereby decline to interfere with the action of the ld. CIT (A).

Q.3) Whether the ld. CIT (A) was correct in confirming the amount of Rs.2,12,89,490/- under Rule 8D(2)(iii) or not?

53. The Assessing Officer disallowed Rs.2,12,89,490/- under Rule 8D(2)(iii) and the same has been confirmed by the ld. CIT (A). The Assessing Officer has disallowed ½% of the average of the value of investment, income from which did not form part of the total income. The ld. AR argued that since the Assessing Officer has not recorded satisfaction, no disallowance ought to have been made and there was no nexus of the expenditure with the corresponding income has been established by the revenue.

54. In the preceding paras the issue of satisfaction has already been adjudicated. Hence, the provisions Rule 8D(2)(ii) and 8D(2)(iii) sets in motion. We have already adjudicated on the facts of applicability of Rule 8D(2)(ii) wherein it was held that the provisions have not been attracted with regard to the assessee on the specific facts of the case.

55. With regard to Rule 8D(2)(iii), the provisions read as under:

> *"(2) The expenditure in relation to income which does not form part of the total income shall be the aggregate of following amounts, namely:—*
>
> *(i) .....*
> *(ii) .....*
>
> *(iii) an amount equal to one-half per cent of the average of the value of investment, income from which does not or shall not form part of the total income, as appearing in the balance sheet of the assessee, on the first day and the last day of the previous year."*

56. In this aspect, we are guided by the judgments of the Hon'ble Jurisdictional High Court and the Hon'ble Apex Court quoted by the ld. CIT (A) with regard to Section 14A and the disallowances thereof.

> *(a) The mandate of Section 14A is to prevent claims for deduction of expenditure in relation to income which does not form part of the total income of the assessee;*
> *(b) Section 14A(1) is enacted to ensure that only expenses incurred in respect of earning taxable income are allowed;*
>
> *(d) The basic principle of taxation is to tax net income. This principle applies even for the purposes of Section 14A and expenses towards non-taxable income must be excluded;*
>
> *(e) Once a proximate cause for disallowance is established - which is the relationship of the expenditure with income which does not form part of the total income - a disallowance has to be effected. All expenditure incurred in relation to income which does not form part of the total income under the provisions of the Act has to be disallowed under Section 14A. Income which does not form part of the total income is broadly adverted to as exempt income as an abbreviated appellation."*
>
> *(f) Sub-section (2) of Section 14A of the said Act refers to the method of determination of the amount of expenditure incurred in relation to exempt income.*
>
> *(g) The expression used is - "such method as may be prescribed". We have already mentioned above that by virtue of Notification No.45/2008 dated 24/03/2008, the Central Board of Direct Taxes introduced Rule 8D in the said Rules.*
>
> *(h) The said Rule 8D also makes it dear that where the AO, having regard to the accounts of the assessee of a previous year, is not satisfied with (a) the*

correctness of the claim of expenditure made by the assessee; or (b) the claim made by the assessee that no expenditure has been incurred in relation to income which does not form part of the total income under the said Act for such previous year, the AO shall determine the amount of the expenditure in relation to such income in accordance with the provisions of sub-rule (2) of Rule 8D.

(i) Rule 8D(1) places the provisions of Section 14A(2) and (3) in the correct perspective.

(j) The condition precedent for the AO to determine the amount of expenditure is that the AO must record dissatisfaction with the correctness of the claim of expenditure made by the assessee or with the correctness of the claim made by the assessee that no expenditure has been incurred.

(k) It is only when this condition precedent is satisfied that the AO is required to determine the amount of expenditure in relation to income not includable in total income in the manner indicated in sub-rule (2) of Rule 8D.

(l) Determination of the amount of expenditure in relation to exempt income under Rule 80 would come into play when the AO rejects the claim of the assessee in this regard.

(m) The method for determining the expenditure in relation to exempt income has three components. The first component being the amount of expenditure directly relating to income which does not form part of the total income. The second component being computed on the basis of the formula given therein in a case where the assessee incurs expenditure by way of interest which is not directly attributable to any particular income or receipt. The formula essentially apportions the amount of expenditure by way of interest [other than the amount of interest included in clause (i) incurred during the previous year in the ratio of the average value of investment, income from which does not or shall not form part of the total

income, to the average of the total assets of the assessee. The third component is an artificial figure - one half percent of the average value of the investment, income from which does not or shall not form part of the total income.

57. During the year, the assessee has received Rs.29.86 Cr. and claimed that no expenditure has been incurred for earning this income. During the assessment proceedings before the AO, the assessee has offered Rs.2,30,000/- as approximate expenditure incurred. As per the settled position and on the facts of the case as mentioned above, the provisions of Rule 8D(2)(iii) are invited to the facts of the case. Hence, the action of the AO determining of percentage of the average investments for disallowance as per Rule 8D(2)(iii) cannot be faulted with.

58. The assessee has submitted the computation before the AO as Annexure-A to letter dated 29.11.2011 which is as under:

Computation in accordance with section 14A of the income Tax Act 1961 read with Rule 8D of the income Tax Rules, 1962

	Amount	
Amount of expenditure directly relating to income which does not form part of total income	-	*(See note 1)*
Interest expenditure	-	*(See note 2)*
1/2% of average of the value of investment, income from which does not form part of total income	*21,289,490*	*(See note 3)*
Total	*21,289,490*	

1 *Notes*
No direct expenditure is incurred

relating to income which does not form part of total income.

2	*Expenditure by way of interest during the previous year which is not directly attributable to any particular income or receipt is Nil*	
3	*Average value of Investments*	
	Investments as on 01.04.2009	*5,473,174,534*
	Investments as on 31.03.2010	*3,042,621,639*
		8,515,796,173
	Average of above	*4,257,898,087*
	1/2 % of above	***21,289,490***

59. Under the facts and circumstances of the instant case, the action of the revenue authorities disallowing an amount of Rs.2,12,89,490/- is hereby sustained.

60. During the arguments, the ld. AR has taken a plea that the average investments included in Adani Petornet (Dahej) Port Pvt. Ltd. of Rs.2660.50 lacs and Rs.0.13 lacs in India LNG Transport Ltd., Malta which have not yielded any exempt income during the assessment year. The details have been given at page no. 247 of the paper book which is Schedule 6 of the balance sheet under the head "investments" which have been duly perused.

61. The Hon'ble Delhi High Court in the case of PCIT Vs. HT Media in ITA 281/2019 & CM APPL. 14304/2019 vide order dated 29.03.2019 held that "*the question urged by the Revenue in its appeal is with respect to the correctness of the remand made by the ITAT in its impugned order; the remand was on two aspects i.e. the calculation of average investments (confined to the*

income generating part thereof) and the exclusion of tax exempt income derived from strategic investments.

The observation of the ITAT on the latter aspect, i.e. ***exclusion of tax exempt income derived from a strategic investments, is not a correct view in the light of the decision of the Supreme Court in Maxopp Investment Ltd. Vs. Commissioner of Income Tax, (2018) 402 ITR 640.*** *Accordingly, the observations of the ITAT on this aspect are set aside.* ***However, its observations with respect to the calculation of disallowance under Section 14A being confined to investments that derived tax exempt income are valid*** *in the light of the Division Bench ruling in ACB India Ltd. v. ACIT, (2015) 374 ITR 108 (Del).*

62. Thus, the Hon'ble Jurisdictional High Court reiterated that the disallowance should be confined to the investments yielding exempt income. Hence, the ground of the assessee on this aspect is accepted. The revenue is hereby directed to re-compute the disallowance taking into account only those investments that have yielded exempt income.

A.Y. 2011-12 (Revenue)

TDS Payment:

63. The revenue raised objection against the deletion in respect of disallowance u/s 40(a)(ia) on the ground that no TDS was deducted on the guarantee commission paid to the bank.

64. During the year the assessee had incurred a sum of Rs.18,68,005/- towards charges for issuing bank guarantee.

65. The AO quoted notification of the CBDT dated 31.12.2012. Further, the AO quoted section 194A and stated that TDS was required to be deducted on payments to bank.

66. The said Notification No. 56/2012 dated 31.12.2012 is quoted below:

"Section 197A of the income-tax Act, 1961 - Deduction of tax at source - no deduction in certain cases - Specified payment under section 197A(1f).

In exercise of the powers conferred by sub-section (1F) of section 197A of the Income-tax Act, 1961 (43 of 1961), the Central Government hereby notifies that no deduction of tax under Chapter XVII of the said Act shall be made on the payments of the nature specified below, (in case such payment is made by a person to a bank listed in the Second Schedule to the Reserve Bank of India Act, 1934 (2 of 1934), excluding a foreign bank, namely:-

(i) bank guarantee commission;

(ii) cash management service charges;

(iii) depository charges on maintenance of DEMAT accounts;

(iv) charges for warehousing services for commodities;

(v) underwriting service charges;

(vi) clearing charges (MICR charges);

(vii) credit card or debit card commission for transaction between the merchant establishment and acquirer bank.

This notification shall come into force from the 1st day of January 2013.

67. The notification clarifies that no tax will be deducted at source w.e.f. 01.01.2013. Thiscannot imply that deduction of tax will be done prior to 01.01.2013. This is a clarificatory notification. The clarifications issued by the Board pertain to the statute in force from the date of insertion. Circulars cannot be treated as amendments which generally have a prospective effect unless specified as retrospective.

68. In our view the assessee was not required to deduct TDS on bank guarantee commission as there is a conspicuous absence of principle - agent relationship envisaged under Section 194H. There is no principle- agent relationship between a bank and its customers. Further, the amount charged by a bank, not in the nature of a commission as per Act.

69. The assessee has submitted before the ld. CIT (A) that Rs.8,90,700/- was not charged in the P&L account. In view of the above discussion, we decline to interfere with the reasoned action of the ld. CIT (A) in deleting the disallowance made by the Assessing Officer u/s 40(a)(ia).

A.Y. 2011-12 (Assessee)

Disallowance on account of CSR:

70. The assessee had incurred an expenditure of Rs.51,05,000/-which it stated was a business expenditure incurred for welfare activities. The expenditure incurred is as under:

Particulars	Amount (Rs. in Lacs)
Medical Relief Camp in U.P.	46.49
Education Promotion : Set of	1.00

Computer Lab	
Afforestation Drive: Brahmavetta Shree Devaraha Hans Baba Trust	2.50
Chatralaya – All India Movement (AIM) for Seva	1.00
Others	0.06
Grand Total	51.05

71. The AO disallowed the expenditure claimed stating it was not incurred wholly and exclusively for the purpose of business of the assessee.

72. The ld. CIT (A) supported the order of the Assessing Officer holding that the Corporate Social Responsibility expenditure is an application of income. An application of income is not an allowable deduction for computing taxable income of any company. It was not incurred for the purpose of business. Reliance was placed on the following decisions by the ld. CIT (A):

- *Sri Venkata Satyancrayana Rice Mills Contractors Co. vs. CIT (223 ITR 101) SC.*
- *CIT & Anr. vs. Infosys Technologies Ltd. (2014) 360 ITR 714.*
- *Krishna Sahakari Sakhar Karkhana Ltd. v. CIT (229 ITR 577).*
- *Surat Electricity Co. Ltd. vs. ACIT, 125 ITD 227 (Ahd.).*
- *Addl. CIT vs. Rajasthan Spinning and Weaving Mills, 274 ITR 463 (Raj.)*
- *Mehsana District Cooperative Milk Producers Union Ltd., 205 ITR 601 (Guj.)*

73. The ld. CIT (A) relied that the Courts have held that contributions made by the assessee which are directly connected or related with the carrying on of the, business or

which results in benefit to the business showed be regarded as allowable u/s 37(1) but not the expenses incurred for CSR.

74. The ld. CIT (A) held that in this regard, neither specific provisions nor any circular provides for allowing Corporate Social Responsibility expenditure as an allowable business expenditure.

75. Before us the ld. AR argued that the revenue has not disputed the genuineness of the claim of CSR expenditure and only the dispute is with regard to its allowability and the allegation that it is application of income. It was argued that the Explanation 2 to Section 37 was inserted w.e.f. 01.04.2015, hence not applicable to the instant assessment year.

76. Heard the arguments of both the parties and perused the material available on record.

77. As per section 37:

"37. General—(1) Any expenditure (not being expenditure of the nature described in sections 30 to 36 and not being in the nature of capital expenditure or personal expenses of the assesses), laid out or expended wholly and exclusively for the purposes of the business or profession shall be, allowed in computing the income chargeable under the head "Profits and gains of business or profession".

"Explanation 1. —For the removal of doubts, it is hereby declared that any expenditure incurred ..... no deduction or allowance shall be made in respect of such expenditure."

Explanation 2 – For removal of doubts, it is hereby declared that for the purposes of sub-section (1), any expenditure incurred by an assessee on the activities relating to corporate social responsibility referred to in section 135 of the Companies Act, 2013 (18 of 2013) shall not be deemed to be an expenditure incurred by the assessee for the purposes of the business or profession.
Explanation 2 to the provision inserted by Finance (No.2) Act w.e.f. 01.04.2015. The provision 37(1) was inserted w.e.f. 01.04.2015.

78. We have also gone through the provisions of Section 135 Companies Act, 2013 dealing with CSR. The same are as under:

135. Corporate Social Responsibility
(1) Every company having net worth of rupees five hundred crore or more, or turnover of rupees one thousand crore or more or a net profit of rupees five crore or more during any financial year shall constitute a Corporate Social Responsibility Committee of the Board consisting of three or more directors, out of which at least one director shall be an independent director.

(2) The Board's report under sub-section (3) of section 134 shall disclose the composition of the Corporate Social Responsibility Committee.

(3) The Corporate Social Responsibility Committee shall,—

(a) formulate and recommend to the Board, a Corporate Social Responsibility Policy which shall indicate the activities to be undertaken by the company as specified in Schedule VII;

(b) recommend the amount of expenditure to be incurred on the activities referred to in clause (a); and

(c) monitor the Corporate Social Responsibility Policy of the company from time to time.

(4) The Board of every company referred to in sub-section (1) shall,—

(a) after taking into account the recommendations made by the Corporate Social Responsibility Committee, approve the Corporate Social Responsibility Policy for the company and disclose contents of such Policy in its report and also place it on the company's website, if any, in such manner as may be prescribed; and (b) ensure that the activities as are included in Corporate Social Responsibility Policy of the company are undertaken by the company.

(5) The Board of every company referred to in sub-section (1), shall ensure that the company spends, in every financial year, at least two per cent. of the average net profits of the company made during the three immediately preceding financial years, in pursuance of its Corporate Social Responsibility Policy:

Provided that the company shall give preference to the local area and areas around it where it operates, for spending the amount earmarked for Corporate Social Responsibility activities:

Provided further that if the company fails to spend such amount, the Board shall, in its report made under clause (o) of sub-section (3) of section 134, specify the reasons for not spending the amount.

Explanation.—For the purposes of this section "average net profit" shall be calculated in accordance with the provisions of section 198.

79. The Companies Act mandates expenditure of 2% of average net profit of the financial year to be spent on CSR activities. The expenditure by corporate on CSR activities are not allowed as deduction from the profit of the company. The expenditure on CSR is considered as appropriation of profit.

80. We have gone through the extract from Budget Memorandum, *CSR expenditure, being an application of income is not incurred wholly and exclusively for the purpose of carrying on business— if such expenses are allowed as tax deduction, this would result in subsidizing of around one third of such expenses by Government by way of tax expenditure..
*it is proposed to clarify that for the purpose of section 37(1) any expenditure–in section 135 of the Companies Act, 2013 shall not be allowed as deduction under section 37. However , the CSR expenditure which is of the nature described in Sections 30 to 36 of the Income Tax Act, 1961 shall be allowed deduction under section 37(1)

NOTE: ANY EXPENDITURE QUALIFYING AS CSR EXPENDITURE UNDER PROVISIONS OF SECTION 135 OF THE COMPANIES ACT, 2013, WHICH OF THE NATURE DESCRIBED IN SECTIONS 30 TO 36 OF THE INCOME TAX ACT, 1961 SHALL BE ALLOWED AS DEDUCTION.

81. Thus, the expenditure on CSR activities is non-deductible for tax purposes unless falling within provisions of Sections 30 to 36 of the Income Tax Act, 1961.

82. The expenditure incurred by the assessee is in no way connected with the business of the assessee or earning of the income. As per section 37 therefore the expenditure has not

been incurred wholly and exclusively for the purpose of the business and cannot be allowed as a deduction. We have also gone through the arguments of the assessee that the explanation is prospective in nature. Since, we are of the view that the explanations are only with regard to the main provisions of the Act, the explanation are brought in to pact the provisions and to avoid any confusion in interpretation. The effect of the explanation shall be from the date of insertion of the provision. The explanations gives clarity to the statute as it is and as it was meant to be.

83. Hence, keeping in view the clear provisions of the Section 37(1), Explanation thereof, Section 135 of the Companies Act, and keeping in view the fact that the CSR expenses are a charge on the profits and the expenses incurred by the assessee are not expenditure allowed as per Sections 30 to 36, we dismiss the appeal of the assessee on this ground. The addition of Rs.51,05,000/- is hereby confirmed.

Additional Grounds:

84. The assessee has filed application under Rule 11 of the Income Tax(Appellate Tribunal) Rules, 1963 for admission of additional grounds of appeal on 09.10.2020. The additional grounds read as under:

> *"That on the facts and circumstances of the case and in law, the education ("SHEC") on Income Tax and Fringe Benefit Tax is an allowable expenditure for computing total income as per the provisions of the Income Tax Act, 1961 ("Act")."*

85. The ld. AR relied on the judgment of Hon'ble Apex Court in the case of National Thermal Power Co. Ltd. Vs CIT (1998) 229 ITR 383. Admission of the additional ground has been opposed in principle by the ld. DR. The relevant portion of the said judgment is as under:

> "5. *Under Section 254 of the Income-tax Act, the Appellate Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit. The power of the Tribunal in dealing with appeals is thus expressed in the widest possible terms. The purpose of the assessment proceedings before the taxing authorities is to assess correctly the tax liability of an assessee in accordance with law. If, for example, as a result of a judicial decision given while the appeal is pending before the Tribunal, it is found that a non-taxable item is taxed or a permissible deduction is denied, we do not see any reason why the assessee should be prevented from raising that question before the tribunal for the first time, so long as the relevant facts are on record in respect of that item. We do not see any reason to restrict the power of the Tribunal under Section 254 only to decide the grounds which arise from the order of the Commissioner of Income-tax (Appeals). Both the assessee as well as the Department have a right to file an appeal/cross-objections before the Tribunal. We fail to see why the Tribunal should be prevented from considering questions of law arising in assessment proceedings although not raised earlier.*
>
> *6. In the case of Jute Corporation of India Ltd. v. C.I.T. this Court, while dealing with the powers of the Appellate Assistant Commissioner observed that an appellate authority has all the powers which the original authority may have in deciding the question before it subject to the restrictions or limitations, if any, prescribed by the statutory provisions. In the absence of any statutory provision, the appellate authority is vested with all the plenary powers which the subordinate authority may have in the matter. There is no good reason to justify curtailment of the power of the Appellate Assistant Commissioner in entertaining an additional ground raised by the assessee in seeking modification of the order of assessment passed by the Income-tax Officer. This Court further observed that there may be several factors justifying the raising of a new plea in*

an appeal and each case has to be considered on its own facts. The Appellate Assistant Commissioner must be satisfied that the ground raised was bona fide and that the same could not have been raised earlier for good reasons. The Appellate Assistant Commissioner should exercise his discretion in permitting or not permitting the assessee to raise an additional ground in accordance with law and reason. The same observations would apply to appeals before the Tribunal also.

7. The view that the Tribunal is confined only to issues arising out of the appeal before the Commissioner of Income-tax (Appeals) takes too narrow a view of the powers of the Appellate Tribunal [vide, e.g., C.I.T, v. Anand Prasad (Delhi), C.I.T. v. Karamchand Premchand P. Ltd. and C.I.T. v. Cellulose Products of India Ltd. . Undoubtedly, the Tribunal will have the discretion to allow or not allow a new ground to be raised. But where the Tribunal is only required to consider a question of law arising from the facts which are on record in the assessment proceedings we fail to see why such a question should not be allowed to be raised when it is necessary to consider that question in order to correctly assess the tax liability of an assessee.

8. The reframed question, therefore, is answered in the affirmative, i.e., the Tribunal has jurisdiction to examine a question of law which arises from the facts as found by the authorities below and having a bearing on the tax liability of the assessee. We remand the proceedings to the Tribunal for consideration of the new grounds raised by the assessee on the merits."

86. Respectfully, following the above judgment of the Hon'ble Apex Court, the additional grounds taken up by the assessee are hereby admitted.

87. With regard to the issue of 'Education Cess' taken up by the ld. AR, we find that this issue has been adjudicated in the following cases:

- *Chambal Fertilisers and Chemicals Ltd. Vs JCIT in ITA No.52/2018 dated 31.07.2018 (Raj. HC)*

- *ITC Vs ACIT in ITA No. 685/Kol/2014 dated 27.11.2018*
- *Peerless General Finance & Investment Co. Ltd. Vs DCIT in ITA No.937 & 938/Kol/2018 dated 24.03.2019*
- *DCIT Vs M/s. Agrawal Coal Corporation Pvt. Ltd ITA Nos. 801 to 803/Indore/2018.*
- *Atlas Copco India Ltd. Vs ACIT in ITA No. 736/Pune/2011*
- *Tata Autocomp Hendrickson Vs DCIT in ITA No. 2486/Pune/2017*
- *Symantec Software India Pvt. Ltd. Vs DCIT in ITA No. 1824/Pune/2018*
- *Sicpa India Pvt. Ltd. Vs ACIT in ITA No. 704/Kol/2015*
- *Philips India Ltd. Vs ACIT in ITA No. 2612/Kol/2019*
- *DCIT Vs The Peerless General Finance & Investment & Co. Ltd. in ITA No. 1469/Kol/2019.*
- *ACIT Vs ITC Infotech in ITA No. 220/Kol/2017*
- *Reckitt Benckiser India Pvt. Ltd. Vs DCIT (2020) 117 taxmann.com 519 (Kol.)*
- *Crystal Crop. Protection Pvt. Ltd. Vs JCIT in ITA No. 1539/Del/2016*
- *Midland Credit Management India Vs ACIT in ITA No. 3892/Del/2017*
- *Voltas Ltd. Vs ACIT in ITA No. 6612/Mum/2018*
- *Sesa Goa Ltd. Vs JCIT (2020) 117 taxmann.com 96 (Bom.)*

88. No contrary judgments have been brought before us. Hence, keeping in view the provisions of the Act pertaining to Section 40(a)(ii) and Section 115JB, Circular of the CBDT No. 91/58/66-ITJ(19), the orders of Co-ordinate Benches of ITAT and judicial pronouncements of the Hon'ble High Court of Bombay and Hon'ble High Court of Rajasthan, we hereby direct the revenue to allow the claim of deduction of the 'Education Cess' and 'FBT' as per the provisions of Section 37 of the Income Tax Act.

89. To conclude,

- ❖ On the issue of Section 80IA, appeal of the assessee is allowed.
- ❖ On the issue of Rule 8D(2)(ii), appeal of the revenue is dismissed.
- ❖ On the issue of Rule 8D(2)(iii), appeal of the assessee is dismissed.
- ❖ On the issue of exempt income yielding investments, appeal of the assessee is allowed.
- ❖ On the issue of TDS, appeal of the assessee is allowed.
- ❖ On the issue of CSR, appeal of the assessee is dismissed.
- ❖ On the issue of Education Cess, the appeal of the assessee is allowed.

90. As a result, the appeal of the assessee is partly allowed and that of the revenue is dismissed.

Order Pronounced in the Open Court on 18/03/2021.

Sd/- Sd/-

(Sudhanshu Srivastava) **(Dr. B. R. R. Kumar)**
Judicial Member **Accountant Member**

Dated: 18/03/2021
Subodh
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR