IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH "A" KOLKATA

Before **Shri Waseem Ahmed, Accountant Member** and
Shri S.S.Viswanethra Ravi, Judicial Member

ITA No.306 & 649/Kol/2013
Assessment Years:2009-10

Allahabad Bank 2, N.S. Road, Kokata-700 001 DCIT, Circle-6, Room No. 17, 6th Floor, Aayakar Bhawan, P-7, Chowringhe Square, Kolkata-69	बनाम / V/s. बनाम / V/s.	DCIT, Circle-6, Aayakar Bhawan, P7, Chowringhee Square, Kolkata-69 M/s Allahabad Bank 2, N.S. Road, Kolkata-01
अपीलार्थी /Appellant	..	प्रत्यर्थी /Respondent

आवेदक की ओर से/By Assessee	Shri B.K.Ghosh, FCA
राजस्व की ओर से/By Revenue	Shri Anand Rajeshwar Baiwar, CIT-DR
सुनवाई की तारीख/Date of Hearing	14-12-2016
घोषणा की तारीख/Date of Pronouncement	08-02-2017

आदेश /O R D E R

PER Waseem Ahmed, Accountant Member:-

These cross appeals by assessee and Revenue are against the common order of Commissioner of Income Tax (Appeals)-VI, Kolkata dated 12.12.2012. Assessment was framed by DCIT, Circle-6, Kolkata u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') vide his order dated 29.12.2011 for assessment year 2009-10.

Shri B.K. Ghosh, Ld. Authorized Representative appeared on behalf of assessee and Shri Anand Rajeshwar Baiwiar, Ld. Departmental Representative appeared on behalf of Revenue.

2. At the outset, Ld. DR for the Revenue drew our attention that Revenue's appeal is barred by limitation for just 10 days. The Revenue has filed an affidavit explaining the reasons for the delay and accordingly sought condonation. Ld. AR for the assessee raised no objection in this regard. Hence, we condone the delay and admit the Revenue's appeal for hearing.

3. First we take up assessee's appeal in **ITA No.306/Kol/2013**. The grounds raised by the assessee per its appeal are as under:-

> *"1. That, on facts as well as on law, the Learned Commissioner of Income Tax (Appeal)-VI, Kol has erred in confirming the action of Learned Assessing Officer by restricting the amount of deduction on account of provision for bad and doubtful debts under section 36(1)(viia) to Rs.313,22,98,721,being the amount of provision made in the accounts and disallowing Rs.285,70,89,045 out of Rs.598,93,87,766 as claimed by the appellant bank in the Income Tax Return relating to assessment year 2009-10.*
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> *2. That, on facts as well as on law, the Learned Commissioner of Income Tax (Appeal)-VI, Kol has erred in confirming the disallowances amounting to Rs.285,70,89,045 under section 36(1)(viia) as referred to in Ground No.1 as above in disregard of the decision of the Hon'ble Income Tax Appellate Tribunal, Bangalore Bench in the case of Syndicate Bank (78 ITD 103) and solely relying on the CBDT's Instruction No. 17 of 2008 dated 26.11.2008.*
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> *3. That, on facts as well as on law, the Learned Commissioner of Income Tax (Appeal)-VI, Kol has erred in confirming the application of provision of Rule 8D read with section 14A(2) of the Income Tax Act, 1961 without bringing on record any cogent reasons for disregarding and rejecting the estimate including the manner of making estimate of disallowances amounting to Rs.26,18,441 certified by the Tax Auditors in Form 3CD and offered by the appellant bank itself in the return of income filed by the appellant.*
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> *4. That, on facts as well as on law, the Learned Commissioner of Income Tax (Appeal)-VI, Kol has erred in directing the Learned Assessing Officer to consider Rs.3,29,38,250, being 0.5% of the average investment, as amount disallowable under section 14A read with Rule 8D.*
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> *5. That, on facts as well as on law, the Learned Commissioner of Income Tax (Appeal)-VI, Kol has erred in restricting the deduction of the expenses by way of interest, rent, etc. to Rs.2,14,051 out of Rs.29,00,171 claimed by the*

appellant in the return of income on the basis of payment of TDS in the financial year 2008-09, which had been disallowed in the immediately preceding assessment year under section 40(a)(ia)

*6. That, on facts as well as on law, the Learned Commissioner of Income Tax (Appeal)-VI, Kol has erred in confirming the disallowance of loss amounting to Rs.78,09,87,000 arising due to revaluation of unsettled interest swap contracts on market-to-market by treating the said loss as notional loss based on CBDT Instruction No. 3/2010 dated 23.03.2010 in total disregard of the method of accounting followed by the appellant bank consistently and the decisions of Hon'ble ITAT, Special Bench, Mumbai in Deputy CIT Vs. Bank of Bahrain & Kuwait (**ITA No. 1833/Mum/2004**), Hon'ble ITAT, Mumbai in ABN Amro Securities India Pvt. Ltd. Vs ITO (133 ITD 343), Hon'ble ITAT, Mumbai in ADIT (IIT) Vs. Development Bank of Singapore (46 SOT 122) and Hon'ble ITAT in Indusind Bank Ltd. Vs. ACIT (2012-TIOL-753-ITAT-Mum).*

7. That, on facts as well as on law, the Learned Commissioner of Income Tax (Appeal)-VI, Kol has failed to appreciate and consider that gain on revaluation of unmatured interest swap contract in the financial year 2009-10 (Assessment Year 2010-11) amounting to Rs.44,35,68,709 was offered to tax by the appellant bank in Assessment Year 2010-11, while confirming the disallowance stated in Ground No.6.

8. That, on facts as well as on law, the Learned Commissioner of Income Tax (Appeal)-VI, Kol has erred in relying on the tax accounting standards finalized by the CBDT, which are not part of the statute for the assessment year under appeal, while confirming the disallowance stated in Ground No.6.

9. That, Your appellant begs your leave to urge any additional ground or modify any grounds of appeal at the time of hearing."

4. In this appeal various grounds have been raised out of which ground No.9 is general in nature and does not require any adjudication.

5. First issue raised by assessee in ground No. 1 & 2 in this appeal is that Ld. CIT(A) erred in confirming the order of Assessing Officer by restricting the amount of deduction in respect to the provision for bad and doubtful debts u/s 36(1)(viia) of the Act to the extent provided in the books of account.

6. Briefly, the facts are that assessee in the present case is a Nationalized Bank and engaged in banking business. The assessee in its computation of income has claimed deduction for ₹598,93,87,766/- u/s 36(1)(viia) of the Act in respect to the provision for bad and doubtful debts. However, Assessing Officer observed that

assessee has created provision in its books of accounts for ₹313,22,98,721/- u/s. 36(1)(viia) of the Act. Therefore, the AO opined that assessee has claimed excess deduction by ₹285,70,89,045/- (Rs. 598,93,87,766.00 – 313,229,872) on the reasoning that the same was not provided in its books of account. The AO accordingly, disallowed the excess provision created u/s 36(1)(viia) which was not provided in the books of account for ₹285,70,89,045/- but claimed in the computation of income. The excess provision was added to the total income of assessee.

7. Aggrieved, assessee preferred an appeal before Ld. CIT(A) who upheld the order of AO.

Being aggrieved by this, assessee has come up in appeal before us.

8. Before us Ld. AR for the assessee fairly conceded that the issue involved in the instant ground has already been decided against assessee in its own case in **ITA No. 2175 & 2176/Kol/2009** order dated 16.3.2016. The Ld. DR for the Revenue, on the other hand vehemently relied on the order of Authorities Below.

9. We have heard the rival contentions of both the parties and perused the materials available on record. At the outset, we find that Co-ordinate bench in assessee's own case *(supra)* has decided the issue against the assessee. Respectfully, following the precedent as above we hold that there is no infirmity in the order of the Ld. CIT(A). Accordingly, we uphold the same. This ground of assessee's appeal is dismissed.

10. Next issue raised in ground No. 3 & 4 in this appeal of assessee and that of Revenue's appeal (**ITA No.649/Kol/2013**) in ground No. 2 is that Ld. CIT(A) erred in invoking the provision of Sec. 14A r.w.s. Rule 8D of IT Rules, 1962 without bringing on record any cogent reason.

11. During the year, assessee has earned dividend and interest income which are exempted from tax u/s. 10(34) and 10(15) of the Act respectively. The assessee *suo motu* has disallowed the expense of ₹26,18,441/- u/s. 14A of the Act. The AO during the course of assessment proceedings observed that assessee has disallowed expense u/s. 14A of the Act on the basis of estimation and without any sound basis.

Accordingly, AO invoked the provision of Sec. 14A r.w.s. Rule 8D of the IT Rule and disallowed the expense of ₹37,98,24,093/- and ₹3,29,38,250/- as per the provision of Rule 8D(2)(ii) and 8D(2)(iii) respectively. Accordingly, AO disallowed total sum of ₹41,01,43,902/- and added to the total income of assessee.

12. Aggrieved, assessee preferred an appeal before Ld. CIT(A) whereas assessee submitted that it has already disallowed the expense under the provision of Sec. 14A of the Act which was duly certified by the Auditor. The AO has neglected the working where *suo motu* disallowance was made by the assessee. The AO has also not brought any defect in such working. It was also submitted that none of the borrowed fund was utilized in making such investment of ₹657.24 crores. The assessee's own fund as stood on 31.03.2009 was at ₹5851.94 crores. After considering the same, Ld. CIT(A) deleted the addition made under Rule 8D(2)(ii) of the IT Rules but confirmed the addition of ₹3,03,19,709/- (₹3,29,38,250 - ₹26,18,441) under Rule 8D(2)(iii).

Being aggrieved by this, both assessee and Revenue have come up in appeal before us.

The assessee has come up against the order of Ld. CIT(A) who confirmed the order of AO for disallowance of expense under Rule 8D(2)((iii) of the IT Rules and Revenue has come up against the deletion made by Ld. CIT(A) for ₹37,98,24,903/- under Rule 8D(2)(ii) of the IT Rules.

13. The Revenue has raised the following ground no. 2 in its appeal.

> *2. Whether on the facts & circumstances OF THE CASE, Ld. CIT(A) erred in law in deleting the addition made by AO in respect provisions under Section 14A of the IT Act 1961."*

14. First we take up assessee's issue. Before us Ld. AR filed two paper books which are running pages from 1 to 247 and 1 to 115 respectively and various case laws. The ld. AR reiterated same submissions as made before Ld. CIT(A). The Ld. DR, on the other hand, vehemently relied on the order of Authorities Below.

15. We have heard rival contentions of both the parties and perused the materials available on record. At the outset, we find that in similar facts and circumstances of the case the Hon'ble ITAT in assessee's own case in **ITA No.1199/Kol/2012** for A.Y

2008-09 has allowed the issue in favour of assessee. The relevant extract of the order is reproduced below:-

> "*21. We have given a very careful consideration to the rival submissions. The provisions of section 14A as originally introduced and as amended from time to time as well as the insertion of Rule 8D was subject-matter of several decisions rendered by various Benches of the ITAT as well as the Hon'ble High Courts. The Hon'ble Delhi High Court in the case of Maxopp Investments Ltd. v.-r-CIT 2011) 203 Taxman 364 (Del) and the Hon'ble Bombay High Court in the case of Godrej & Boyce Mfg. Co. Ltd. 328 ITR 81 (Born) have taken a view that Rule 8D of the IT. Rules will apply only for AYs 2008-09 and subsequent assessment years. It has also been laid down that the assessee has to make a claim (including a claim that no expenditure was incurred) with regard to expenditure incurred for earning: income which is not chargeable to tax. Such a claim has to be examined by the AO and only if on an objective satisfaction arrived at by the AO that the claim made by the assessee is not correct, can the AO proceed to apply the computation mode as specified in Rule 8D(2) of the Rules.*
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> *22. In the present case, the assessee has taken a stand that a particular amount has to be disallowed as expenditure incurred in earning exempt dividend income. The AO did not agree with the claim of the Assessee and he estimated the disallowance on a different basis. The question is whether it is mandatory for the AO to apply Rule 8D of the Rules, the moment he rejects the basis of disallowance as made by the AO. We are of the view that even in a case where the AO rejects the claim of the assessee that no expenses were incurred to earn the exempt income, it is not mandatory for him to invoke the method of calculation prescribed by Rule 8D(2) of the Rules and is free to make the disallowance on any reasonable basis. If Rule 8D of the Rules is blindly by the AO sometimes it will lead to absurd results. The AO examining the claim of the assessee regarding expenditure incurred in earning the exempt income, is bound to take note of such absurdities and refrain from invoking the method of disallowance of expenses as prescribed by Rule 8D(2) of the Rules. In other words, it is only when no reasonable and proper parameters for making disallowance can be arrived at, that resort to Rule 8D(2) can be had by the AO. Rule 8D(2) will thus be a last resort when it becomes impossible to arrive at a just conclusion on the amount of expenses that has to be disallowed as attributable or incurred in earning exempt income. The AO, u/s 14A of the Act has the discretion to substitute the computation of disallowance u/s 14A as made by the assessee is under estimation. The satisfaction contemplated u/s14A (2) of the Act is not merely restricted to rejecting the claim made by the assessee and the disallowance to be made u/s 14A of the Act but also includes substituting the claim made by the assessee on any other reasonable basis as the AO deems it fit. In such circumstances the correctness of the AO's judgment can be reviewed but it cannot be said that the AO had no jurisdiction to do so and AO ought to resort only to the provision of Rule 8D of the Rules. In other*

words Rule 8D is not automatic and can be resorted to by the AO only as a measure of last resort.

23. For the reasons given above, we are of the View that the conclusions of the CIT(A) that rule 80 of the rules has to be mandatorily applied in cases relating to AY 2008-09 and subsequent AYs is not correct. We hold accordingly.

24. With regard to the disallowance under Rule 80(2)(ii) of the Rules on interest expenditure, the Revenue does not dispute the facts with regard to availability of own funds of the Assessee i.e. 'aggregate of capital and reserve and surplus as on 31.03.2008 amounting to Rs.5,221.04 crores. The Revenue also does not dispute that the total investment in shares, units of mutual funds and tax free bonds as on 31st March 2008 was only Rs.885.89 crores (i.e. Rs.376.19 crores + Rs.224.12 crores + Rs.285.58 crores). Thus, the investment in tax free instruments was much less than the bank's own fund as on 31.03.2008. Reference in this regard was made to the following decisions for the proposition that overall availability of interest free funds have to be seen before making disallowance u/s.14A of the Act read with Rule 8D(2)(ii) of the rules. (i) CIT Vs. Reliance Utilities and Power Ltd. 313 ITR 340 (Born); (ii) CIT Vs. UTI Bank (2013) 32 Taxmann.com 370 and (iii) CIT Vs. Gujarat Power Corporation 352 ITR 583 (Guj.) laying down identical proposition. In the light of the aforesaid decisions, we are of the view that the disallowance of interest expenses under rule 80(2)(ii) of the Rules of Rs.50,29,36,092 cannot be sustained and the same is directed to be deleted. The conclusions to the contrary by the CIT(A) are not sustainable in view of the judicial pronouncements referred to above.

25. With regard to disallowance under rule 8D(2)(iii) of the Rules is concerned, we find that neither the AO nor the CIT(A) have disputed the correctness of the claim of disallowance as computed by the Assessee but have proceeded to compute the disallowance by applying Rule 80(2)(iii) of the Rules without objectively examining the claim made by the Assessee. The AO without doing so, disregarded the claim of the assessee and in invoked Rule 80 of the IT Rules without recording the satisfaction as required by Sec.14A(2) of the Act. The law is well settled own that with regard to expenditure in relation to exempt income, AO has to indicate cogent reasons as to why the claim of the Assessee is being disregarded. In CIT Vs. Ashish Jhunjhunwala in G.A. No.2990 of 2013 in ITAT No. 157 of 2013 dated 08.01.2014 rendered by Hon'ble Calcutta High Court, the Hon'ble court upheld order of the IT AT which held that disallowance under Sec.14A of the Act made by the AO without rejecting claim of the Assessee was bad in law. The following was the decision of the Tribunal which was upheld by the Hon'ble Calcutta High Court:-

> "While rejecting the claim of the assessee with regard to expenditure or no expenditure, as the case may be, in relation to exempted income, the AO has to indicate cogent reasons for the same. From the facts of the

present case, it is noticed that the Assessing Officer has not considered the claim of the assessee and straight away embarked upon computing disallowance under Rule 8DD of the Rules on presuming the average value of investment at ½ % of the total value. In view of the above and respectfully following the coordinate bench decision in the case of .J.K. Investors (Bombay) Ltd., supra, we uphold the order of CIT(A) ."

*The Hon'ble Calcutta High Court in the case of CIT Vs. R.E.I.Agro Ltd., in **GA 3022 of 2013** in ITAT 161 of 2013 dated 23.12.2013 also took identical view. The aforesaid two decisions by the Hon'ble jurisdictional High Court are binding on this Tribunal. Hence, we hold that the action of the AO in directly embarking on Rule 8D(2) of the rules was not proper and hence the disallowance under rule 8D(2)(iii) of the Rules is also directed to be disallowed. The net result would b that the disallowance under Sec.14A of the Act as made by the assessee before the AO is directed to be accepted. Thus Ground No.3 & 4 as modified is allowed. "*

15.1 Taking a consistent view of this Co-ordinate Bench in assessee's own case in ITA No.1199/Kol/2012 (supra) we hold accordingly. This ground of assessee is allowed.

16. Now coming to Revenue's ground of appeal in ITA 649/Kol/2013

At the outset we find that Revenue has not disputed the facts with regard to availability of own funds of the Assessee i.e. aggregate of capital and reserve and surplus as on 31.03.2009 amounting to ₹5851.94 crores and investment of ₹657.24 crores. Thus, the investment was much less than the bank own fund as on 31.03.2009. In identical facts in own case of the assessee in **ITA No.1199/Kol/2012** (supra), the Hon'ble Tribunal has decided the issue in its favour. In similar facts Reference in this regard was also made to the following decisions for the proposition that overall availability of interest free funds have to be seen before making disallowance u/s.14A of the Act read with Rule 8D(2)(ii) of the rules.

(i) CIT Vs. Reliance Utilities and Power Ltd. 313 ITR 340 (Bom);

(ii) CIT Vs. UTI Bank (2013) 32 Taxmann.com 370 and

(iii) CIT Vs. Gujarat Power Corporation 352 ITR 583 (Guj.)

In the light of the aforesaid decisions, we are of the view that the disallowance of interest expenses under rule 8D(2)(ii) of the Rules of ₹37,98,24,903/- cannot be

sustained and the same is directed to be deleted. Hence this ground of Revenue is dismissed.

17. Next issue in this appeal of assessee in ground No.5 is that Ld. CIT(A) erred in restricting the deduction of expense by way of interest, rent etc. to ₹2,14,051/- out of ₹29,00,071/- which was disallowed in the earlier year u/s. 40(a)(ia) of the Act on account of non-deduction of TDS.

18. The assessee claimed expenses for Rs. 29,00,171/- in the computation of income in the year under consideration. These expenses were disallowed in the earlier years on account of non-deduction of TDS under section 40(a)(ia). Now the assessee deducted the TDS and deposited the amount in bank in the year under consideration. Hence the deduction was claimed. However, AO observed that no evidence in respect of payment of TDS was furnished and accordingly AO disallowed the claim of assessee.

19. Aggrieved, assessee preferred an appeal before Ld. CIT(A) whereas the necessary documents for TDS deduction and deposit were filed. It was also submitted that the same could not be filed before the AO at time of assessment proceedings because those documents were collected from various branches of bank located throughout the country. Assessee filed necessary evidence for the actual deposit of TDS in the year under consideration before Ld. CIT(A). Accordingly, Ld. CIT(A) deleted the addition made by AO except the deduction in respect of which the TDS challan was not made available. Considering this, Ld. CIT(A) gave partly relief to assessee by observing as under:-

> *"33. I have carefully considered the observations of the Assessing Officer in the assessment order and submissions of the appellant. The appellant has produced a challan in original of Rs.48,504/- only and filed a copy thereof. The appellant has further submitted that it could not produce the balance challans. The Assessing Officer is directed to allow the deduction of the disallowance mad for non-deposit of TDS challan for an amount of Rs.48,504/-. The appellant is directed to produce the original challan of Rs.48,504/- and documents pertaining to the relevant expenditure before the AO and file the full information and details corresponding to the interest amount on which this TS was deducted. The assessing officer will examine the said figures and after due*

verification allow the interest expenditure corresponding to the TTDS of Rs.48,504/-. This ground of appeal is partly allowed."

Being aggrieved by this, assessee has come up in appeal before us.

20. Before us Ld.AR for the assessee submitted that various TDS details were not submitted before AO as these were not procured from the branches. He further submitted that the documents now have been collected and accordingly requested the Bench to restore the issue back to the file of Assessing Officer for fresh adjudication. Ld. DR, on the other hand, agreed to the submission of the AR.

21. We have heard the rival contentions of both the parties and perused the materials available on record. Considering the submissions made before us by Ld AR and in the interest of natural justice and fair play we restore the issue back to the file of AO with a direction to decide the issue afresh as per law after providing reasonable opportunity of being heard to assessee. Hence, this ground of assessee's appeal is allowed for statistical purpose.

22. Next inter-connected issue in ground No.6 to 8 in assessee appeal is that Ld. CIT(A) erred in confirming the disallowance of loss for ₹78,09,87,000/- arising due to revaluation of unsettled interest swap contract.

22. The assessee, in the year under consideration has claimed deduction for ₹78.09 crores in respect of interest swap contracts which were not settled on the balance sheet date. The AO observed that the claim of assessee for the loss of unsettled contracts is a notional and contingent in nature. The actual outcome of such unsettled contract in respect of interest swap contracts will be ascertained when the contracts will be settled in future i.e. after the balance-sheet date. Accordingly, AO disallowed the claim of assessee.

23. Aggrieved, assessee preferred an appeal before Ld. CIT(A). The assessee before the ld. CIT(A) submitted that Interest Rates Swaps contract were undertaken for Rs. 500 crores on 13th March 2006 to hedge its tier II bonds issued for Rs. 500 crores. The loss was worked out in respect of those contracts which were unsettled at the balance sheet date in terms of RBI circular number DBOD .BP.BC.87/ 21.01.002/2005-06 issued dated 8th June 2006. It was also submitted that it has been

consistently following the practice for booking the loss arising from mark to market position of the interest swaps contracts which are based on generally accepted accounting policy. However the ld. CIT(A) disregarded the claim of the assessee and confirmed the order of AO by observing as under :

> *"41. The issue under consideration in this appeal has is in respect to unsettled interest rate swap contract as at 31st March, 2009 as appearing in the Note on Accounts of the Appellant bank as given on Paper No.326 of the paper book. The settlements are to take place in future. In the case of the appellant bank, the settlement has not been made on 31st March, 2009, or during this period. The appellant has submitted that as per its consistent accounting policy it is providing in the books for loss arising from mark-to-market position of the swap based on generally accepted accounting policy. As peer the appellant according to RBI's guidelines the bank is required to revalue unmatured contracts i.e. financial instruments as per the rates of exchanges notified by Foreign Exchange Dealers' Association of India (FEDAI). The bank provide for loss, if any arising from market-to-market position. However, as per its submissions, if there is a gain, that is not considered in the accounts. It is a clear deviation from the principles laid down by the Hon'ble Supreme Court in the case of CIT v. Woodward Governor India P. Ltd. [2009] 312 ITR 254 (SC). However, provision for loss already booked in the earlier year is written back when the market rate is favourable and the amount so written back is offered for tax. The plea of the appellant that the amount so written back is offered for tax. The plea of the appellant that the investment are valued at cost or market price, whichever is lower, depreciation on investments is allowed to the bank consistently by the Revenue is an accepted principle of accounting since income from investment is shown as business income by the bank in the income tax return and it has to be valued at cost or market price whichever is lower since unrealised profits are not to be offered and similarly it is considered that the loss which has not occurred cannot be allowed. The loss arising from market-to-market position of financial instruments is different and cannot be considered allowable as deduction as such loss has not arisen so far in the normal course of business operation of the appellant bank. The said rates are still liable to fluctuations of the market in future. It is still an unknown and intermediary calculation of a future occurring with known result liability.*
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> *42. There was no dispute regarding allowability of the taxation of the foreign exchange gain or loss to the appellant in this case and the only dispute appears to be regarding timing i.e. year of allowability before the Assessing Officer and it has not considered its allowabiliy on merits since it has been disallowed otherwise in the assessment order. No doubt there is a binding obligation against the assessee the minute it entered into derivative instrument contracts and for that matter in any contract, the liability arises depending upon the terms and conditions but it still cannot be enforced until it has matured or*

settled otherwise with a new contract. In the case of the appellant this liability as not crystallized.

43. The Hon'ble High Court of Madras in the case of Indian Overseas Bank v. Commissioner of Income-tax *in its judgment dated February 13, 1990 reported in [1990] 51 TAXMANN 283 (Mad) has held that whether there is a loss or profit on foreign exchange transactions can be ascertained only after a settlement of the forward contracts and not before and that so long as that stage had not been reached, the loss can only be notional and not actual or real and notional loss cannot be claimed as a deduction. It further held that whether a loss or profit, the principle applicable would be the same and the estimated profit, till the settlement of the forward foreign exchange contract, could be regarded only as notional and not actual or real and such notional profits cannot also be assessed. It further observed as under:*

> '4. We may point out that in respect of the very same assessee, for the assessment years 1968-69 and 1969-70, the question arose whether the assessee is entitled to a deduction of Rs.9,23,125 being the provision against profit on exchange and Rs.4,32,152 being the provision for anticipated loss on outstanding forward exchange contracts, respectively. In deciding this question, in **IT Appeal No. 1864** (Mad) of 1974-75, for those assessment years, the Tribunal, after noticing the nature of the forward transactions carried on by the assessee in foreign exchange, was of the view that the profit or loss in each year has to be determined with reference to the events that had taken place in the accounting year and that merely because they may change by the time the contract is settled, there is no warrant for postponing the determination and, therefore, the loss claimed by the assessee was admissible as a deduction. The correctness of this view was the subject-matter of the reference dealt with in Indian Oversea as Bank's case (supra). The contention urged by the revenue in that case was that neither the notional profit nor the notional loss can be taken into account and whether a future settlement of the outstanding contract will result in a loss or profit, will become known only when the outstanding contracts are settled and that notional profit or loss, without a settlement of the outstanding foreign exchange contracts, cannot be subjected to tax treatment and, therefore, the deductions accepted as allowable by the Tribunal, were not in order. This contention of the revenue was accepted and it was held that whether there is a loss or profit on foreign exchange transactions can be ascertained only alter a settlement of the forward contract and not before and that so long as that stage had not been reached, the loss can only be notional and not actual or real and notional loss cannot be claimed as a deduction. Whether a loss or profit, the principle applicable would be the same and the estimated profit, till the settlement of the forward foreign exchange contracts, could be regarded only as notional and not actual or real and such notional profits cannot

> also be assessed. Though the principle laid down in Indian Overseas Bank's case (supra) related to a case of notional loss, in view of the applicability of the same principle even to a case of notional profit, we hold that the amounts of Rs.1,72,911 and Rs.15,57,022.40 represented notional profit only and not actual profit for the assessment years 1972-73 and 1973-74 and could not be subjected to tax. We may also in this connection usefully refer to Shoorji Valbhadas & Co. (supra) where the Supreme Court pointed out that the levy of income-tax is on income and though the Act had taken note of the twin points of time at which the liability to tax Is attracted, viz., the accrual of income or its receipt, yet, the substance of the matter is income and if income does not result at all, there cannot be a tax, even though for purposes of book-keeping entry cannot be income, unless on income has actually resulted. The amounts in thee references were only estimated anticipated income arrived at on the basis of the rates of exchange which prevailed, presumably on the last day of the accounting year, without an actual settlement of the forward contracts in foreign currencies having been brought about and in that sense, the amounts in question represented merely notional profits and could not have been subjected to tax treatment in the hands of the assessee. We are unable to accept the reasoning of the Tribunal that the events in the accounting year have to be taken note of in determining the profit or loss in each year and that the changes that may be brought about on a settlement of the forward contracts in foreign exchange would not in any manner affect the assessability of the amounts of tax. We are also unable to accept the contention of the learned counsel for the revenue that the amounts in question are assessable, based on the reasoning of the Tribunal. We, therefore, answer the common question referred to us in the negative and in favour of the assessee, with the costs of the assessee.'

Being aggrieved by this, assessee has come up in appeal before us.

24. Before us the ld. AR reiterated the submissions made before the learned CIT(A). The ld. AR also drew our attention page 29 of the paper book and demonstrated that the gain on unsettled contract was also offered to tax and the same was accepted. On the other hand the ld. DR vehemently supported the order of lower authorities.

25. We have heard the rival contentions, perused the materials available on record and the case law cited before us by both the parties. Before coming to the specific issue let us go through the concept of interest Rate Swap Contract. Two parties agree

in this contract to pay interest on fixed rate on a notional principal amount in consideration of receiving a floating rate of interest, or *vice versa*. In actuality these obligations are settled by making a net payment, i.e. difference between fixed and floating rate of interest. These contracts are entered into to hedge against variations in floating rate of interest from time to time. The floating rate of interest is indicated by MIBOR (Mumbai Inter Bank Offer Rate), which is benchmark interest rate for the call money market, and the rate at which banks can borrow funds from other banks. Therefore it is this risk of significant variations in the floating rate which is sought to be mitigated by the assessee by entering into interest rate swaps. Depending on whether the amount is receivable or payable under the interest rate swap contract, the amounts are booked as income or expenditure in the P&L a/c. There are no issues with regard to the income so disclosed or the expenditure so claimed for deduction. The dispute in the instant case relates to in respect of unsettled interest rate swap contracts as at the balance sheet date. In simple words, the valuation of interest rate swap as on the balance sheet date only indicates computation of profit or loss on account of these contract. It is also important to mention the fact that the aforesaid loss is eventually reduced from the profit of the bank for tax purposes. However, in the subsequent assessment year in which the settlement of the contract actually happens also takes into consideration of loss or profit as the case may be. It is undisputed that whatever is the loss on interest rate swap valuation as on the balance sheet date is finally be squared up by transfer to the actual loss or profit on settlement. It is not really, therefore, the question as to whether the deduction is to be allowed or not, but only the assessment year in which deduction is to be allowed. As such, we find that it is wholly tax neutral but for the timing of deduction.

25.1 We also find that the provisions of section 145 of the Act require profits to be computed in accordance with the method of accounting regularly employed. The provisions of section 145 of the Act and the mandatory accounting standards are duly followed. We on perusal of records find that the assessee has been following this method of recognizing the loss on the unsettled contracts on regular basis. Besides the accounting principles, which has been duly recognized by the Courts, mandates that

anticipated losses are to be provided for in the computation of income but it does not permit anticipated profits to be taken into account till the profits actually arise. In holding so we find support & guidance from the case of *Chainrup Sampatram vs. CIT* (1935) 24 ITR 482, where Hon'ble Supreme Court has held as under :

> *"while anticipated loss is taken into account, anticipated profit...is not brought into account as no prudent trader would care to show increased profit before its actual realization. This is the theory underlying the rule that the closing stock is to be valued at cost or market price whichever is lower, and it is now generally accepted as an established rule of commercial practice and accountancy".*

25.2 Indeed these observations were made in the context of valuation of stock but underlying principle of valuing closing stock also applicable to the instant case. Accordingly the interest rate swap contract entered by the assessee against the increase in floating rate of interest, the losses on unsettled contracts will be eligible for deduction. On these facts, it cannot be disputed that the assessee did not incur a loss on these contracts on the balance sheet date. The assessee's estimated liability on account of fixed rate of interest, after duly taking into account discounting factor for time value of money, is clearly more than the amount receivable by the assessee for the same amount at the agreed fixed rate. This aspect has not been disputed by the authorities below at all. In the similar facts and circumstances the issue was decided in favour of assessee by various Courts. In this connection, we rely in the case of ABN Amro Securities India Pvt. Ltd. Vs. ITO reported in 133 ITD 343 where it was observed as under :

> *"Business income—Loss—Loss on account of valuation of interest rate swap—Vide Notification No. 9949, dt. 25th Jan., 1996, under s. 145, all anticipated losses are to be taken into account in computing business income—That the assessee has suffered loss in holding contract of interest rate swap is not in dispute nor is there any dispute on the discounting factor—Assessee is entitled to deduction of loss on account of valuation of interest rate swap subject to the rider that allowability of deduction in the current year is subject to verification of corresponding adjustment in the year in which next settlement date falls"*

In view above and respectfully following the above proposition, the impugned disallowance is accordingly deleted. This relief is, however, subject to the rider that

the allowability of deduction in the current year is subject to verification of corresponding adjustment in the year in which next settlement date falls. The assessee gets the relief accordingly. Hence the ground of appeal of the assessee is allowed.

26. The assessee has raised the additional grounds of appeal two times on two different dates i.e. 22nd January 2016 and 9th January 2016 respectively. We for the sake of convenience, treat the additional grounds filed on 22nd January 2016 as 10, 11 & 12 in continuation of earlier grounds while considering of the same on merits. Hence, additional grounds filed on 22nd January 2016 are reproduced below:-

1. *That on facts and circumstances and also on law, the Learned CIT and the Learned AO have failed to appreciate that shares, securities, bonds etc. being held as stock-in-trade, the provisions of Rule 8D(2)(ii) and (iii) are not applicable to the appellant bank and only the amount of expenditure directly relating to exempt income can be disallowed under Rule 8D(i)"*

   In view of the additional ground being urged, the appellant prays for modifying the ground No.s 3 & 4 in the Memorandum of appeal as follows:

"Ground No.3

Without prejudice to the Additional ground of appeal as above, that, on facts as well as on law, the Learned Commissioner of Income Tax (Appeas)-VI, Kol has erred in confirming the application of provision of Rule 8D read with section 14A(2) of the Income Tax Act, 1961 without bringing on record any cogent reasons for disregarding and rejecting the estimate including the manner of making estimate of disallowances amounting to rs.26,18,441 certified by the Tax Auditors in Form 3CD and offered by the appellant bank itself in the return of income filed by the appellant.

Ground No. 4:

Without prejudice to the Addition al ground of appeal as above, that on facts as well as on law, the Learned Commissioner of Income Tax (Appeal)-VI, Kol has erred in directing the Learned Assessing Officer to consider Rs.3,20,38,250, being 0.5% of the average investment, as amount disallowable under section 14A read with Rule 8D.

2. *"Additional ground in respect of omission of claim for amortization of premium paid for purchase of HTM categories of securities.*

   'That on facts your appellant omitted to claim deduction in respect of amortization of premium amounting to Rs.91,30,00,000 paid on

purchase of securities under "Held to Maturity" category in computation of its business income through inadvertence and accordingly, direction may be given to the Learned Assessing Officer to allow opportunity to appellant to adduce necessary evidence for justifying its claim.'

3. "Additional ground in respect of relief under section 91 for Honkong Branch.
'That on facts your appellant omitted to claim relief of Rs.14,50,105 under section 91 of the Income Tax Act for tax paid in Hongkong in respect of profit of branch situated therein and accordingly, direction may be given to the Learned Assessing Officer to allow opportunity to appellant to adduce necessary evidence for justifying its claim.'

27. Further, the issue in additional ground no. 1 raised by assessee is in regard to disallowance u/s 14A of the Act. At the time of hearing, Ld AR for the assessee withdrawn the same. Hence, same is dismissed as withdrawn.

28. Issue raised in additional ground No. 2 is that assessee omitted to claim deduction in respect of amortization of premium amounting to ₹91.30 crores paid on purchase of securities under "Held to Maturity" (HTM for short).

29. Ld. AR for the assessee before us submitted that assessee is entitled for deduction for amortization of premium paid on the securities as HTM but same deduction was omitted to claim in its return of income. Accordingly, Ld. AR requested the Bench to restore the additional issue to the file of AO for fresh adjudication as per law. Ld. DR agreed to the submission of the Ld. AR. Hence, we, in the interest of natural justice and fair play we restore the additional issue to the file of AO for fresh adjudication as per law after providing reasonable opportunity of being heard to assessee. Hence this additional ground of appeal of the assessee is allowed for statistical purposes.

30. Coming to additional ground No.3 is that assessee omitted to claim the relief u/s. 91 of the Act in respect of tax paid by assessee for its branches located in Honkong.

31. In this regard Ld. AR before us submitted that assessee is entitled for deduction u/s 91 of the Act for the tax paid in respect of its branch income based in Honkong but

the same was not claimed in the return of income. Thus the ld. AR requested the Bench to restore the additional ground back to the file of AO for fresh adjudication as per law. Ld. DR agreed to the submission of Ld. AR.

32. After hearing both the sides and perusal of records, we, in the interest of justice & fair play restore the issue back to the file of AO for fresh adjudication as per law. Hence this additional ground of appeal of the assessee is allowed for statistical purposes.

33. Now coming to the additional ground raised by the assessee vide letter date 9th January 2016 which is given below.

> *"That in the facts and circumstances of the appellant and also on law, provision for arrear salary amounting to Rs.122 crore made in the accounts of the appellant in respect of ongoing negotiation of 9th Bipartite memorandum of wage settlement should be held to be admissible deduction in view of various judicial pronouncements and in the interest of natural justice, although the same was added back by the appellant in its return of income for Assessment Year 2009-10 by mistake or the Learned Assessing Officer may be directed to adjudicate the matter after verification of necessary evidence.*

34. The issue raised in additional ground filed on 9th January 2016 is that assessee omitted to claim provision for arrears of salary amounting to Rs.122 crores which was provided in the accounts but by mistake the same was added back in its return of income.

35. At the outset, we find that the issue was not raised before appellate stage. However, the deduction for the same was allowed by Hon'ble ITAT in assessee's own case in earlier years. Accordingly, Ld. AR for the assessee has prayed before us to restore the issue to the file of AO for necessary verification. Ld. DR for the Revenue, on the other hand, raised no objection if the issue is restored back to the file of AO. In view of the above proposition and in the interest of natural justice and fair play we restore the issue back to the file of AO for fresh adjudication as per law. Hence, this additional ground of assessee's appeal is allowed for statistical purpose.

36. In the result, assessee's appeal allowed partly for statistical purpose.

Coming to Revenue's appeal in ITA No.649/Kol/2013.

37. The Revenue has raised the following grounds of appeal.

> *"1. That on the facts and circumstances of the case, Ld. CIT(A) failed to appreciate the facts of the case and was therefore grossly unjustified in deleting the addition of Rs.91,30,00,000/- being amortization of premium paid for purchase of securities.*
> *3. Whether on the facts and circumstances of the case, Ld. CIT(A) erred in law in deleting the addition made by AO in respect house property income without considering the provisions as laid down u/s. 23 of the IT Act, 1961."*

38. First issue raised by Revenue in this appeal is that Ld. CIT(A) erred in deleting the addition made by AO for Rs.91.30 crores being amortization of premium paid for purchase of securities.

39. At the outset, we find that the same issue was raised by assessee in additional ground of appeal no. 2 number vide letter dated 22nd of January 2016 which we have already discussed in para-29 of this order and same restored back to the file of AO for fresh adjudication. We find this issue is connected with the additional ground of appeal filed by the assessee. Accordingly we are also inclined to restore this issue to the file of AO for fresh adjudication as per law. Hence, this ground of appeal of the revenue is allowed for statistical purposes.

40. The second issue raised by the Revenue in this appeal is that ld. CIT(A) erred in deleting the addition made by the AO under section 14A of the Act.

41. At the outset we find that we have already dismissed this ground of appeal of Revenue vide Para No. 14 in ITA No. 306/Kol/2013. Hence the ground raised by Revenue is dismissed.

42. The third issue raised by the Revenue in this appeal is that ld. CIT(A) erred in deleting the addition made by the AO with regard to the house property income.

43. During the course of assessment proceedings, AO observed that the annual value determined u/s. 23 of the Act for its property located in Kolkata, Mumbai, Chandigarh, Jaipur at a very nominal rate. As per AO the provision of Sec. 23 of the Act requires the assessee to determine the annual value which the property might reasonably be expected to let from year to year. Accordingly, AO called upon assessee for explanation in order to adopt the market rate in respect of all the aforesaid properties for determining the annual value under section 23 of the Act. In response thereto, assessee submitted the receipts of municipal tax for the purpose of valuation of annual value. However, AO rejected the claim of assessee and determined the annual value on the basis of rates available on the website www.majic.brick.com and accordingly worked out the income under house property.

44. Aggrieved, assessee preferred an appeal before Ld. CIT(A) whereas assessee submitted that there is pending litigation with the tenants in respect of house property located at Kolkata and Mumbai, therefore the nominal rent was received from those tenants. Further, assessee submitted that the annual value determined by AO is without any basis. After considering the same, Ld. CIT(A) partly deleted the addition by observing as under:-

> *"29. I have carefully perused the submission of the appellant and the observation of the Assessing Officer and also carefully considered the judgment as relied on by the appellant bank. The appellant has stated that in respect of two properties t 17B Bank Square, Chandigarh and Civil Lines, Sitapur – 261001, the annual value adopted by the AO may be considered as final. Th house property of the appellant bank situated at 14, M.P Sarani, Kolkta-700001 and 37, Mumbai Samachar Marg, Mumbai-400023 are under litigation the appellant bank had not received any rent from the tenants of both the properties. The appellant during appellate proceedings submitted that the valuation of the Municipal Corporation of Kolkata and Mumbai may be accepted as the annual value for the purposes of determining the income from '***House property***'. The plea of the appellant is accepted. The appellant is directed to file the valuation of the Municipal Corporation of Kolkata and Mumbai and it will be accepted by the Assessing Officer. The annual value determined by the Assessing Officer in respect of two properties at 7B, Bank Square, Chandigarh (UT) and Civil Lines, Sitapur (MP)) is upheld on the basis of the submissions of the appellant. This ground of appeal is partly allowed."*

Being aggrieved by this, Revenue has come up in appeal before us.

45. Both the parties before us relied in the order of lower authorities as favourable to them.

46. We have heard the rival contentions of both the parties and perused the materials available on record. At the outset we find in the identical facts & circumstances in the case of United Bank of India Vs. DCIT in **ITA No. 1916/Kol/2012** the Co-ordinate Bench vide its order dated 30-12-2015 has decided the issue in favor of assessee. The relevant extract of the order is reproduced below:

> *"In the instant case, the Learned CIT(A) had adopted the municipal value of Rs. 20,44,361/- as the gross annual value and proceeded to compute the taxable income from house property on that basis. Against this, the assessee is not in appeal before us. Hence we find that the revenue should not be aggrieved at all in the instant case. In any case, the figures obtained from the website www.magicbricks.com cannot be treated as a reliable evidence. Hence we find no infirmity in the order of the Learned CITA. Accordingly, the ground no.1 raised by the revenue is dismissed."*

The facts of the instant case are similar to the case discussed aforesaid. Respectfully following the decision of Hon'ble ITAT in the case of United bank of India *(supra)* we find no infirmity in the order of ld. CIT(A). Hence, the issue raised by the revenue is dismissed.

47. In the result, Revenue's appeal stands partly allowed for statistical purpose.

48. **We summarize the results as under:-**

(i) Assessee's appeal is partly allowed for statistical purpose.

(ii) Revenue's appeal stands partly allowed for statistical purpose,

Order pronounced in open court on 08/02/2017

Sd/-	Sd/-
(S.S.Viswanethra Ravi)	(Waseem Ahmed)
Judicial Member	Accountant Member

*Dkp Sr.P.S

दिनांकः- 08/02/2017 कोलकाता / Kolkata

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. आवेदक/Assessee-M/s Allahabad Bank 2, N.S. Road, Kolkata-01
2. राजस्व /Revenue-DCIT, Circle-6, Room No.17, 6th Floor, Aayakar Bhawan, P-7, Chowringhee Square, Kolkata-69
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

By order/आदेश से,

/True Copy/

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
कोलकाता