

**IN THE INCOME TAX APPELLATE TRIBUNAL
'B' BENCH : BANGALORE**

**BEFORE SHRI ABRAHAM P GEORGE, ACCOUNTANT MEMBER
and
SHRI VIJAY PAL RAO, JUDICIAL MEMBER**

ITA No.1556/Bang/2012
(Assessment year: 2009-10)
and
ITA No.1072/Bang/2015
(Assessment year: 2009-10)

M/s.GMR Power Corporation Ltd.
25/1, Skip House, Museum Road,
Bangalore. ... Appellant
PAN:AAACG 6037 G

Vs.

1. Addl.Commissioner of Income-tax,
Range-11, Bangalore.
2. Deputy Commissioner of Income-tax,
Circle 3(1)(2), Bangalore ... Respondent

AND

ITA No.1629/Bang/2012
(Assessment year: 2009-10)
(by the revenue)

Assessee by: Shri Yogesh A Thar, CA.
Revenue by: Smt.Neera Malhotra, CIT(DR).

Date of hearing : 24/11/2015
Date of pronouncement: 29/12/2015.

O R D E R

Per VIJAY PAL RAO, JM:

ITA Nos.1556 & 1629/Bang/2012 are cross appeals directed against the order dated 25/9/2012 of the CIT(A) arising from the assessment order passed u/s 143(3) whereas ITA

No.1072/Bang/2015 by the assessee is directed against the order dated 12/5/2015 of the CIT(A) arising from the order passed u/s 154 of the IT Act,1961 [‘the Act’ for short] for the assessment year 2009-10.

2. First we take up the assessee’s appeal wherein the following grounds are raised:

“Ground 1: Disallowance under section 14A of the Act

1. On the facts and circumstances of the case and in law, the learned CIT(A) has erred in upholding the action of Assessing Officer (the AO") in disallowing a sum of Rs. 50,12,071/- as against the amount of Rs. 8,989/- considered by the Appellant for disallowance on the ground that the Appellant had earned exempt income and therefore the said sum, which represents indirect expenditure, was disallowable u/s. 14A of the Act r.w.r. 8D of the Income Tax Rules, 1962.
2. The CIT(A) erred in not appreciating that the Appellant has only incurred an amount of Rs. 8,989/- in relation to exempted income and further disallowance u/s. 14A r.w.r 8D needs to be of actual expenditure incurred and the same cannot be made mechanically by applying the prescribed formula.
3. The Appellant humbly prays that the AO be directed to restrict the amount of disallowance at Rs. 8,989/- under the provisions of Section 14A read with Rule 8D of the IT Rules, 1962.

Without prejudice to Ground 1 above

Ground 2:

1. On the facts and circumstances of the case and in law, the learned CIT(A) has erred in not deciding the Appellant Ground No. IV relating to adding the amount of disallowance, if any made under section 14A read with rule 8D of the Act, to the cost of investments.
2. The Appellant humbly prays that the AO be directed

to add the amount of disallowance, if any made under Section 14A to the cost of mutual fund units.

Ground 3: Disallowance of deduction under section 57(111) of the Act

1. On the facts and circumstances of the case and in law, the learned CIT(A) has erred in upholding the action of AO in holding that the amount of interest expenses of Rs. 9,72,59,364/- is to be allowed as deduction under the head income from business as against the claim of the Appellant that the same is to be allowed as deduction u/s. 57(iii) while computing the income under the head 'income from other sources' since the corresponding interest income was offered for tax under the head 'income from other sources'.
2. The CIT(A) erred in not appreciating that the Appellant has indisputably used the borrowed funds for investment in fixed deposits and for no other purpose. The interest expenditure thereon were incurred wholly and exclusively for earning the interest income from Fixed Deposits and therefore the said amount of interest expenditure is deductible under section 57(iii) of the Act.
3. The Appellant therefore prays that the AO be directed to allow the deduction for the interest expenses of Rs. 9,72,59.364/- under section 57 (iii) of the Act and not under the head 'income from business' other than Power Generation.

Without prejudice to Ground 3 above

Ground 4:

1. On the facts and circumstances of the case and in law, the learned CIT(A) has erred in not deciding the Appellant Ground No. VI stating that when the interest expenditure of Rs. 9,72,59,364/- is to be considered for deduction under the head business then the corresponding interest income of Rs. 14,03,18,975/- would also be chargeable to tax under the head business instead of taxing the same under the head income from other sources.
2. The Appellant humbly prays that the AO be directed to tax the interest income of Rs. 14,03,18,975/- and allow the corresponding interest expense either under the head "Income from Business" or under the head "Income from Other Sources".

Ground 5:

The appellant craves leave to add, alter and/or amend all or any of the foregoing grounds of appeal. ”

Ground No1 regarding applicability of sec.14A of the Act:

3. We have heard learned AR of the assessee as well as learned DR and considered the relevant material on record. At the outset, we note that an identical issue was considered by the Tribunal in assessee's own case for assessment year 2008-09 in ITA No.778/Bang/2012 vide order dated 12/7/2013 in para.4.4.1 as under:

“4.4.1 We have heard both the learned Authorised Representative and the learned Departmental Representative at length on the issue of disallowance under section 14A of the Act r.w. Rule 8D of the Rules, carefully perused and considered the submissions on record including the judicial decisions cited. A perusal of the provisions of section 14A of the Act, more specifically sub-section (2) thereof, provides that if the Assessing Officer is not satisfied with the correctness of the claim of the assessee, then the Assessing Officer shall determine the amount of expenditure incurred in relation to such income, which does not form part of the total income under the Act in accordance with the method prescribed under Rule 8D of the Rules. The provisions of section 14A(3) specifies that the provisions of section 14A(2) would also apply when the assessee makes a claim that there is no expenditure incurred. This is, apparently, for the reason that if the assessee does not make a disallowance under section 14A of the Act, in its computation of total income when filing the return of

income, then if sub-section (3) of section 14A was not available, the Assessing Officer might not be able to make a disallowance under section 14A of the Act. Thus, where the assessee makes a claim that only a particular amount is to be disallowed under section 14A of the Act or where the assessee does not make any disallowance under section 14A of the Act, if the Assessing Officer proposes to invoke section 14A, he is to record a satisfaction to that effect on that issue. The satisfaction cannot be a plain satisfaction or a simple note, but is to be done with regard to the accounts of the assessee. In the case on hand, we find that, as also observed by the learned CIT(Appeals), the Assessing Officer has specifically made out a case that the disallowance made by the assessee was not correct. We, therefore, are of the considered opinion that the decision of the Assessing Officer to invoke section 14A of the Act has been rightly upheld by the learned CIT(Appeals)."

Accordingly, following the earlier order of this Tribunal, we hold that the AO has rightly invoked provisions of sec.14A of the Act.

Ground No.2 is regarding alternative plea for enhancing cost of investment by the amount of disallowance made u/s 14A:

4. We have heard learned AR of the assessee as well as learned DR and considered the relevant material on record. We note that this issue was considered by the Tribunal in the assessee's own case for the assessment year 2008-09 (supra) in para.5 as under:

"5. As regards the ground raised at No.2 by the assessee that the learned CIT(Appeals) has erred in not deciding the issue related to adding the amount of

disallowance made under section 14A of the Act to the cost of investments, we agree with assessee that though this issue was raised before the learned CIT(Appeals) as can be seen at pages 20 and 21 of CIT(Appeals) order, we find that the learned CIT(Appeals) has not addressed this issue. The assessee's submissions in this regard are as under :

" 4. Without Prejudice to Ground II and III above,

4.1 The appellant humbly submits that the disallowance made under section 14A of the Act be added to the cost of mutual fund units. In this regard, reliance is also placed on the following decisions wherein it has been held that where the assessee has added the interest to the cost of the shares held such interest to be treated as part of cost and reduced from the sale consideration in computing the capital gains.

- *S Balan V DCIT (308 ITR 151) (Pune) (AT)*
- *CIT V Mithlesh Kumari (92 ITR 9) (Del)*
- *Addl CIT V K S Gupta (119 ITR 372) (AP)*
- *CIT V Maithreyi Pai (152 ITR 247) (Karn)*
- *CIT V Indian Overseas Bank Ltd (222 ITR 77) (Mad)*

4.2 The appellant humbly prays that the Assessing Officer be directed to add the disallowance made under 14A to the cost of mutual fund units."

In this view of the matter, we are of the view that it would be in the fitness of things to remand this issue back to the file of the learned CIT(Appeals) with the direction to consider this issue and render a finding thereon after affording the assessee adequate opportunity of being heard in the matter."

Since the issue has already been set aside by the Tribunal to the record of the CIT(A), therefore, to maintain rule of consistency,

we set aside this issue to the record of CIT(A) for adjudication of the same in terms of earlier order of this Tribunal.

Ground Nos.3 & 4 regarding claim of deduction of interest expenditure u/s 57(iii):

5. The AO noted that the assessee has claimed expenditure of Rs.9,72,59,364/- under the head 'income from other sources'. The assessee claimed before the AO that interest income earned by the assessee is assessable as 'income from other sources' and the interest expenditure of Rs.9,72,59,364/- being interest incurred on proportional borrowed fund of Rs.130 crore utilised for earning such interest income is deductible u/s 57(iiii) of the Act. The AO disallowed the claim of expenditure u/s 57(iiii) under the head 'income from other sources' but allowed the same under the head 'income from business' and thereby reduced eligible profit u/s 80-IA of the Act.

5.1 The assessee challenged the action of the AO before the CIT(A) and submitted that when borrowed fund was utilised for making deposits and other investment which has yielded interest income assessable to tax as 'income from other sources', then interest expenditure on borrowed fund is allowable u/s 57(iiii) of the Act. The CIT(A) did not agree with the contention of the assessee and confirmed the action of the AO.

5.2 Before us, learned AR of the assessee has pointed out that interest and finance charges are pertaining to the borrowed

fund of Rs.130 crores which was used by the assessee for making fixed deposits. He has referred to schedule 16 of the Profit & Loss Account, which contains details of interest and financial charges at page 34 of the paper book and submitted that the special purpose project loan cannot be used for other purpose and only the loan of Rs. 130 crores was taken during the year under consideration could not be utilized for business purpose and it was kept in the fixed deposit. Therefore, the said loan amount was used for earning interest and not for business purpose of the assessee during the year under consideration. In support of his contention, he has relied upon the following judgments:

1. *Continental Construction Ltd. vs. CIT* (195 ITR 81)(SC)
2. *DCIT vs. Prestige Garden Construction P.Ltd.*(67 SOT 139)
3. *H.K.Investment Co. Pvt. Ltd. vs. CIT* (211 ITR 511) (Guj.)
4. *India Cements Ltd. vs. CIT* 60 ITR 52 (SC)

5.3 On the other hand, learned Departmental Representative has relied upon the finding of the AO as well as the CIT(A) and submitted that the assessee failed to prove that interest claim was wholly and exclusively utilised in respect of 'income from other sources' with regard to fixed deposit. Undisputedly, loans were taken by assessee for purpose of business of the assessee and portion of was temporarily used by way of fixed deposit. Therefore, the claim of assessee regarding interest of Rs.9.72 crore cannot be said to have been incurred for the purpose of earning interest income. When loan was taken business purpose then interest expenditure on such loan will be allowed as business

expenditure. Therefore, AO is justified in treating the interest expenditure as business expenditure.

5.4 We have considered the rival submissions as well as relevant material on record. The total interest expenditure claimed by the assessee is Rs.15.79 crore under the head interest and financial charges out of which Rs.14.70 crore is interest on fresh loans. Out of this total interest expenditure, assessee itself has made disallowance of Rs.61,52,481/- u/s 14A as per computation of income at page 1 of the paper book and a sum of Rs.1,27,54,616/- was claimed as business expenditure. The AO has also considered an amount of Rs.11.61 crore as the total amount of interest on loan amount of Rs.130 crore. The assessee furnished details that out of total borrowed fund of Rs.130 crore, a sum of Rs.71.30 crore was utilised for fixed deposit and the corresponding interest on said amount comes to Rs.9.72 crores which the assessee claimed as deduction u/s 57(iiii) against 'income from other sources'. The said amount used for fixed deposit has not been disputed by the AO as well as the CIT(A). The CIT(A) in para.4.4 of the impugned order has accepted this fact that pending utilisation of loan, the amount was temporarily kept in fixed deposit with various banks and interest income of Rs.10.59 crores was earned. The details of deposit made by the assessee during the year are given at page 134 of the paper book as under:

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Particulars	Loan As on	Loan As on	Loan As on	Payment made	Loan As on	Payment made	Loan As on	Payment made	Loan As on	Payment made	Loan As on	Amount in Rs Lakhs
	31/03/1997	31/03/1998	31/03/1999	During FY 1999-00	31/03/2000	During FY 2000-01	31/03/2001	During FY 2001-02	31/03/2002	During FY 2002-03	31/03/2003	
A SECURED LOANS												
I Rupee Term Loan												
a From Financial Institutions	1,153.89	7,318.00	12,318.28	811.28	11,507.00	1,316.00	10,191.00	1,316.00	8,875.00	1,316.00	7,559.00	
b From Banks	-	8,315.68	10,637.88	1,188.83	9,449.05	960.77	8,488.08	1,134.60	7,353.48	1,315.75	6,037.73	
II Foreign Currency Loan												
a From Financial Institutions	2,058.27	6,921.66	8,540.38		9,618.00	1,086.74	8,531.28	1,237.03	7,294.23	1,313.10	5,981.13	
b From Banks		2,716.60	2,716.60		2,792.45		2,795.99	288.70	2,527.29	435.70	2,091.59	
III Supplier's Credit		14,705.92	30,848.84	2,968.59	27,880.25	1,412.08	26,468.17	2,313.63	24,154.54	3,904.60	20,249.94	
III Cash Credit and Demand Loans from Banks					618.16		1,370.40	401.22	969.18		3,096.96	
TOTAL Secured Loan	3,212.16	37,260.97	65,061.98	3,197.07	61,864.91	4,020.10	57,844.91	6,671.18	51,173.73	6,157.38	45,016.35	
B UNSECURED LOANS												
a From Banks												2,000.00
b From Others												92.00
TOTAL unsecured Loan												2,092.00
TOTAL	3,212.16	37,260.97	65,061.98	3,197.07	61,864.91	4,020.10	57,844.91	6,671.18	51,173.73	6,065.38	47,108.35	

From the above details, it is clear that only part of this loan was used by the assessee for making investment in securities which yielded exempt income by way of dividend. Therefore, when the assessee has earned interest on fixed deposit amounting to Rs.10.59 crore, then corresponding claim of interest expenditure of Rs.9.72 crore is not an unusual claim of earning said income. Once the assessee has established that borrowed fund was used for making deposit and earning interest income then corresponding expenditure on the borrowed fund on account of interest is allowable u/s 57(iiii). The co-ordinate bench of this Tribunal in the case of *Prestige Garden Construction (supra)*, had considered an identical issue in para 5.5.1 to 5.5.6 as under:

“5.5.1 We have heard the rival contentions and perused and carefully considered the material on record. In the case on hand, the facts as emanate from the record are that, the assessee borrowed a loan of Rs.81.30 Crores from JP Morgan Chase Bank on 18.12.2006 for the purpose of construction of 'Forum Value Mall' at Whitefield, Bangalore on which interest was payable on a monthly basis @ 12.25% per annum. The assessee then entered into a currency swap arrangement with ABN Amro Bank to reduce the burden of interest cost and for hedging the interest rate risk. This is evident from para 10 of Notes to the Accounts

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forming part of the audited financial statements for the year ending 31.3.2008 (placed at page 20 of the assessee's paper book), wherein it is stated as under:-

“10. The company had taken a term loan of Rs.813,000,000 in the previous year. In order to reduce its interest cost, the company had entered into a currency swap arrangement with its bankers, wherein the INR loan was notionally swapped with CHF. The currency swap arrangement was structured along with USD / CHF embedded options. The company entered into this arrangement with the intention of hedging the interest rate risk and not for speculation or trading purposes. The arrangement was settled during the current year and gain on settlement of the contract amounting to Rs.17,528,315 has been credited to the profit and loss account. There are no other outstanding derivative contracts as at the balance sheet date.”

5.5.2 The construction and development of Forum Value Mall' was in the initial stage of development where the loan of Rs.81.30 Crores was borrowed from JP Morgan Chase Bank on 18.12.2006. The assessee therefore placed an amount of Rs.63 Crores out of the loan of Rs.81.30 Crores with M/s. Prestige Estate Projects Ltd., as inter corporate deposit on 20.12.2006 on which interest thereon was receivable @ 13% per annum on the day to day balance. The inter corporate deposit was repaid by Prestige Estate Projects Ltd., as and when funds were required by the assessee after the construction and development of 'Forum Value Mall' commenced in January, 2007. The balance of the inter corporate deposit as on 1.4.2007 was Rs.45.75 Crores which was squared off by 26.1.2008 and the entire loan of Rs.81.30 Crores taken by the assessee from JP Morgan Chase Bank was repaid on 1.2.2008.

5.5.3 Interest paid on the loan of Rs.81.30 Crores for the period 1.4.2007 to 31.3.2008, (viz. the period under consideration) totally amounted to Rs.8,49,32,272. Out of this interest amounting to Rs.5,32,82,402 was determined as interest cost relating to the inter-corporate deposit and the same was debited to the profit and loss account. The remaining interest amounting to Rs.3,16,47,870 was

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capitalised to Building in the Balance Sheet and no deduction was claimed in respect of this capitalised interest. According to the assessee, the interest capitalised represented proportionate cost of borrowings deployed for construction of Forum Value Mall. The Assessing Officer does not dispute the working and question of both the interest debited to profit and loss account and that portion which is capitalised. In view of the fact that interest was payable on a monthly basis on the loan of Rs.81.30 Crores taken, the interest cost relating to the borrowings placed as inter corporate deposits should also be computed @ 12.25% on a monthly basis, which works out to Rs.5,32,82,402 and was debited to the profit and loss account for the year under consideration. In this factual matrix of the matter, we hold that the finding of the Assessing Officer that an amount of Rs.3,85,49,961 was the interest relating to the inter-corporate deposit appears to be factually erroneous.

5.5.4 As against the interest expenditure of Rs.5,32,82,402 related to inter corporate deposits @ 12.25% per annum payable monthly, interest earned from inter corporate deposits @ 13% per annum amounted to Rs.4,09,10,613. The interest expenditure was more than the interest earned even though the rate of interest on the inter-corporate deposit was higher than the loan of Rs.81.30 Crores taken by the assessee. This was because the interest payable to the Bank was computed on monthly balance whereas the interest receivable was calculated on day to day balance. Further, as per the material on record and the Auditor's Report, the currency swap arrangement, in respect of the entire loan, was entered into with a view to reduce the interest cost and for hedging the interest rate risk. The learned Departmental Representative did not demonstrate as to how the currency swap arrangement was only in respect of the unutilised funds as concluded by the Assessing Officer. In this view of the matter, we hold that the finding of the Assessing Officer that the currency swap arrangement was only in respect of unutilised funds is factually erroneous. We, therefore, hold that the currency swap arrangement and the resultant income therefrom amounting to Rs.1,75,28,315 was in respect of the entire loan and the same was linked to the loan borrowed for the purpose of reduction of interest cost.

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5.5.5. As per section 57(iii) of the Act, any expenditure laid out or expended wholly and exclusively for the purpose of making or earning the income is allowable as deduction. Under section 37 of the Act, revenue expenditure laid out wholly and exclusively for the purpose of carrying on business is allowed as a deduction. In the case on hand, the interest amounting to Rs.5,32,82,402 debited to the profit and loss account was the interest cost of the loan funds temporarily placed as a inter-corporate deposit. The currency swap arrangement and the income there from amounting to Rs.1,75,28,315 was also in respect of the entire loan and was linked to the loan borrowed for the purpose of reduction of interest cost. Thus, the interest debited to the profit and loss account amounting to Rs.5,32,82,402 was incurred for earning income from the inter-corporate deposit and the currency swap arrangement and in the regular course of business carried on by the assessee and we, therefore, hold that the interest so debited to the profit and loss account is admissible as a deduction under section 57(iii) of the Act or alternatively under section 37(1) of the Act.

5.5.6. Further, the interest from inter-corporate deposit and the currency swap arrangement totally amounting to Rs.5,84,38,928 (Rs.4,09,10,613 plus Rs.175,28,315) was higher than the interest paid amounting to Rs.5,32,82,402 debited to the profit and loss account and has also admittedly been brought to tax. In view of the facts and circumstances of the case as discussed above, the action of the Assessing Officer in disallowing interest paid amounting to Rs.1,47,32,441 is therefore factually incorrect and is accordingly deleted. "

Following the order of this Tribunal in the case of *Prestige Garden Construction P.Ltd.* (supra), we allow the claim of the assessee in respect of interest of Rs.9.72 crore as deduction u/s 57(iiii) of the Act.

6. The assessee has also raised additional ground raising issue that even if the amount of Rs.9.72 crore is treated as

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business expenditure, the said expenses was not incurred for the purpose of eligible business entitled to deduction u/s 80-IA of the Act and consequently the claim of deduction u/s 80-IA should be increased by the said amount. In view of our finding on the issue of treatment of interest expenditure and deduction u/s 57(iiii), the additional ground raised by the assessee becomes infructuous and accordingly dismissed.

7. The revenue has raised the following grounds:

1. "The order of the Learned CIT (Appeals), in so far as it is prejudicial to the interest of revenue, is opposed to law and the facts and circumstances of the case.
2. The learned CIT (Appeals) , erred in holding that the Assessing Officer should not have disallowed the indirect interest of Rs 2,61,93,197 computed under rule 8D(2)(ii) while making the disallowance u/s 14A of the Act, without appreciating the facts and circumstances of the case.
3. The learned CIT (Appeals), erred in holding that the Assessing Officer, should not have disallowed the indirect interest of Ps 2,61,93,197 under rule 8D(2)(ii) while making the disallowance u/s 14A of the Act, without appreciating that, when the interest expense incurred cannot be directly attributed to any particular income or receipt, provisions of rule 8D(2)(ii) automatically become applicable.
4. The learned CIT (Appeals) has erred in not appreciating that the cash flow statement as well as the profile of investments and assets reflect that part of the additional loan of Rs.130 cr availed during the year was utilized for investments in tax exempt investments also.
5. The learned CIT(A) has erred in not appreciating that the disallowance in terms of rule 8(2)(ii)

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has to be worked out on the basis of deployment of capital between the exempt assets and non-exempt assets, as is clear from the formula laid down and the definition of total assets given in sub-rule (3) of rule 8D.

6. The learned *CIT(A)* has erred in allowing relief without appreciating the law that exclusion of interest in terms of clause (ii) of sub-rule (2) is only of that portion which is directly attributable to *any particular income or receipt* and the learned *CIT(A)* has erred in not attaching required significance to the expression '*any particular income or receipt*' and has therefore equated the aforesaid expression with the "business purpose" without realizing that interest expenditure without business purpose is not admissible otherwise also.

7. For these and such other grounds that may be urged at the time of hearing, it is humbly prayed that the order of the *CIT (A)* be reversed in so far as the issue is of disallowance of indirect interest under section 14A read with rule 8D(2)(ii) read is concerned and that of the assessing officer be restored.

8. The appellant craves leave to add, to alter, to amend or to delete any of the grounds that may be urged at the time of hearing of the appeal. "

8. The solitary issue arises from the grounds of revenue is regarding part relief granted by the *CIT(A)* in respect of disallowance under section 14A on account of interest expenditure of Rs.2,61,93,197/-.

8.1 We have heard the learned Departmental Representative as well as learned AR of the assessee and considered the relevant material on record. The AO has considered interest expenditure of Rs.14.07 crore for the purpose of making disallowance u/s 14A

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read with sec.8D(2)(ii) being indirect expenditure. Learned AR of the assessee has pointed out that AO has made double disallowance in respect of amount of Rs.61,52,481/- which was disallowed suo motu by the assessee in the computation and the AO while computing disallowance under rule 8D has not reduced the amount of Rs.61.52 lakhs already disallowed by the assessee. He further pointed out that for assessment year 2008-09, the Tribunal has deleted the disallowance of interest u/s 14A to the extent of the project loans being specific in nature.

8.2 On the other hand, learned Departmental Representative has submitted that the assessee has failed to establish that borrowed fund was not used for the purpose of making investment yielding dividend income. Therefore, the AO has computed disallowance as per rule 8D.

8.3 Having considered rival submissions as well as relevant material on record, we find that except Rs.130 crore, there was no fresh loan taken by the assessee during the year under consideration. The AO has recorded this fact in para.3 of the assessment order and calculated interest of Rs.1.61 crore in respect of said amount of Rs.130 crore. The assessee has given details of utilisation of this amount comprising Rs.71.30 crore as fixed deposit, Rs.4.51 crore used for investment in units of Mutual Fund and Rs.9.35 crore as utilised for business purposes. The

other loans were project loans and therefore, specific loan cannot be used for purpose other than the particular project. The Tribunal for the assessment year 2008-09, has considered an identical issue in para.4.4.3 and 4.4.4 as under:

"4.4.3 A perusal of the provisions of sub Rule (1) of Rule 8D of the Rules indicates that it also speaks of satisfaction. Sub-Rule (2) of Rule 8D has three sub parts which provide the following :-

i) deals with the amount of expenditure directly relating to the income which does not form part of total income;

ii) is a computation provided in respect of expenditure incurred by the assessee by way of interest during the previous year which is not directly attributable to any particular income or receipt. This clearly implies that if there is any interest expenditure which is directly relatable to any particular income or receipt, such interest expenditure is not to be considered under Rule 8D(2)(ii). In the case on hand, the order of the learned CIT(Appeals) has clearly brought out that the interest expenditure is not relatable to the exempt income earned by the assessee. The assessee, in the relevant period under consideration, had sufficient funds, reserves and surplus for making investment in tax free instruments / securities. The loans outstanding were taken by the assessee much before the investments in tax free securities were made, for specific business projects and purposes and the repayments of the loans were being made, as per the terms and conditions of the loans, without any default. In this factual matrix, it is clear that the assessee has adequately established that the investments made in tax free securities in the period under consideration were out of interest from funds

and it stands established that there is no nexus between the borrowed funds either directly or indirectly with the investments made in tax free securities.

4.4.4 Further, Rule 8D(2)(ii) of the Rules, is clearly worded in the negative viz. "not directly attributable." Thus, for bringing any interest expenditure claimed by the assessee under the ambit of Rule 8D(2)(ii), it will have to be demonstrated by the Assessing Officer that the said interest is not directly attributable to any particular income or receipt. This is for the reason that the provisions of Rule 8D(1) reads as -

" 8D (1) Where the Assessing Officer, 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 Act for such previous year, he shall determine the amount of expenditure in relation to such income in accordance with the provisions of sub-rule (2)."

In the case on hand, the learned CIT(Appeals), after considering these relevant facts, that the assessee had not used any of its borrowings for investing in / purchasing of the tax free securities, has deleted the disallowance, made by the Assessing Officer, in respect of interest expenditure. We are of the considered view that on this ground itself (as elaborated on at para 4.3.2 of this order), the deletion of the disallowance on account of interest expenditure by the learned CIT(Appeals) is to be upheld. It is ordered accordingly. "

8.4 We further note that while making disallowance under section 14A the AO has considered the only item of suo moto disallowance of Rs.8,989/- which is a direct expenditure incurred by the assessee in respect of tax free income whereas an amount of Rs.61.52 lakhs disallowed by the assessee on account of interest expenditure was not considered by the AO. Therefore, it is clear that the AO has made a double disallowance of the said amount of Rs.61,52,481/-. Once the assessee has given the relevant details of utilization of the said amount of Rs.130 crores during the year under consideration, then the interest on the amount which is utilized for the purpose of investment in tax-free bonds only is attributable in respect of earning tax-free income. Thus, for purpose of computation of disallowance as per rule 8D, it cannot exceed the actual amount which is attributable for earning interest income. Once the disallowance made by the assessee on its own is found to be based on proper allocation of interest expenditure as per proportionate interest bearing fund used for the purpose of investment in tax-free securities, then the AO cannot make a further disallowance of interest expenditure pertaining to fund which was not used by the assessee for the purpose of investment. Accordingly, we do not find any error or illegality in the finding of the CIT(A) in giving relief to the assessee. Further, this issue was already decided by the Tribunal in assessee's own case for assessment year 2008-09 as reproduced above.

8.5 The appeal of the revenue is dismissed.

9. In the appeal filed by the assessee (ITA No.1072/Bang/2015) arising from order passed u/s 154, the assessee has raised the following grounds:

"Ground 1: Modification of Order dated November 8, 2012 by passing Order u/s.154 September 23, 2013 is void

1. On the facts and circumstances of the case and in law, the learned CIT(A) has erred in upholding the action of the Assessing Officer ("the AO") in passing the Order u/si 54 dated September 23, 2013 modifying the Order dated November 8, 2012 passed to give effect to the Order of CIT(A) dated September 25, 2012.
2. The CIT(A) failed to appreciate that the amount of deduction u/s.801A which was rightly determined at Rs.79,57,92,7751- in the Order dated November 8, 2012 passed to give effect to the order of the CIT(A) based on the income from power generation business cannot be reduced to Rs.69,85,24,422/- by merely changing the opinion that interest expenditure of Rs.9,7259,364/- pertaining to loan from Infrastructure Development Finance Company Limited are to be reduced from income from power generation business with which it has nothing to do is debatable one and which cannot be rectified by passing an Order u/s.154 of the Income-tax Act, 1961.
3. The Appellant humbly prays that the Order u/s.154 dated September 23, 2013 passed by the AO is void and liable to be quashed.

Without prejudice to Ground 1 above

Ground 2: Interest expense of Rs.9,72,59,364/- is to be allowed under the head income from business other than power generation

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1. On the facts and circumstances of the case and in law, the learned CIT(A) has erred in upholding the action of the AO in holding that the amount of interest expense of Rs.9,72,59,364/- is to be allowed as deduction under the head income from business of power generation and accordingly reduced the deduction u/s.801A as against the claim of the Appellant that the same is to be allowed under the head income from business other than power generation in line with the erstwhile Order of the 011(A) dated September 25, 2012.
2. The CIT(A) failed to appreciate the fact that her predecessor CIT(A) in Order dated September 25, 2012 has held that there is no tax burden on the Appellant in respect of disallowance of expenditure of Rs.9,72,59,364/- claimed u/s.57(iii) and allowed under the head income business and further held that deduction u/s.801A of the Act to be allowed on the business income as enhanced by the additions/disallowances made in the assessment order. The direction of the 011(A) in the erstwhile Order dated September 25, 2012 is very clear that the expenditure is to be allowed under the head income from business other than power generation.
3. The Appellant prays that the AO be directed to allow the interest expense of Rs.9,72,59,364/- under the head income from business other than power generation and allow deduction u/s.801A on the assessed income from business of power generation.

Ground 3:

The Appellant craves leave to add, alter and/or amend all or any of the foregoing grounds of appeal.”

In view of our finding on the treatment of interest expenditure and claim of deduction u/s 57(iiii), this appeal becomes infructuous and the same is dismissed.

10. In the result, assessee’s appeal viz. ITA No.1556/Bang/2012 is allowed; appeal of the revenue viz. ITA

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No.1629/Bang/2012 and the appeal of the assessee viz. ITA
1072/Bang/2015 are dismissed.

Pronounced in the open court on 29th December, 2015.

sd/-
(Abraham P George)
ACCOUNTANT MEMBER

sd/-
(Vijay Pal Rao)
JUDICIAL MEMBER

eksrinivasulu
Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.
6. Guard file

By order

Assistant Registrar
Income-tax Appellate Tribunal
Bangalore