

**IN THE INCOME TAX APPELLATE TRIBUNAL “D” BENCH, MUMBAI  
BEFORE SRI MAHAVIR SINGH, JM AND SRI RAJESH KUMAR, AM**

**ITA No.4657/Mum/2004  
(A.Y. 2000-01)**

ICICI Bank Ltd, (erstwhile ICICI Ltd.), ICICI Bank Towers, Bandra Kurla Complex, Bandra (East), Mumbai -51  <b>PAN: AA ACT 1398K</b>	Vs.	D.C.I.T, Range 3 (1), Aayakar Bhavan, Mumbai-20
<b>Appellant</b>	..	<b>Respondent</b>

**ITA No.4826/Mum/2004  
(A.Y:2000-01)**

D.C.I.T, Range 3 (1), Aayakar Bhavan, Mumbai-20	Vs.	ICICI Bank Ltd, (erstwhile ICICI Ltd.), ICICI Bank Towers, Bandra Kurla Complex, Bandra (East), Mumbai -51. <b>PAN: AA ACT 1398K</b>
<b>Appellant</b>	..	<b>Respondent</b>

<b>Assessee by</b>	..	<b>Ms.Arati Visanji, AR</b>
<b>Revenue by</b>	..	<b>Shri B. Prusheth, CIT DR</b>

<b>Date of hearing</b>	..	<b>30-11-2016</b>
<b>Date of pronouncement</b>	..	<b>31 -01-2017</b>

**ORDER**

**PERMAHAVIR SINGH, JM:**

Out of these cross appeals, the assessee’s appeal in ITA No.4657/Mum/2004 and the Revenue’s appeal in ITA No.4826/Mum/2004, are arising out of the common order of the CIT (Appeals)-XII, Mumbai dated 24-03-2004 for assessment year 2000-01 passed in Appeal No.CIT (A)XII/DC. 3(1)/IT-111/03-04. The Assessment was framed by DCIT Range 3(1), Mumbai for the A.Y. 2000-01 vide order dated 28-02-2003 u/s 143(3) of the Income Tax Act, 1961 (hereinafter ‘the Act’).

2. The first issue in assessee’s appeal is as regards to deduction of write off of investments and for this assessee has raised following ground: -

*“(A) Re: Deduction of write-off of investments -  
Rs.2,28, 15,80,396  
[Para 5, pages 2 of the CIT(A) Order]*

*2. On the facts and circumstances of the case and in law, the CIT(A) erred in not assessing Rs.2,28,15,80,396 as long term capital loss in respect of write-off of shares and debentures made in certain companies.”*

At the outset, the learned Counsel for the assessee stated that an identical issue has been decided by the Tribunal in favour of the assessee in assessee’s own case in ITA No.5424/Mum/2001 wherein vide Para 7.2 and 7.3 of the order dated 13-07-2016.

3. We find that the AO noticed from the accounts of the assessee that profit on sale of investments was arrived at after providing for write off of investments of Rs.228,15,80,396/- and this was claimed as deduction in the computation of filed along with the return of income on account of diminution in the value consequent to write off of investments. The CIT (A) confirmed the disallowance claimed by the assessee by observing in Para 5 and 5.1 of his order as under:-

*“5. Ground Nos. 9,10,11 & 12 raised by the Appellant challenge the action of the AO in not assessing Rs.228,15,80,396/- as Long Term Capital Loss in respect of write of shares and debentures.*

*5.1 A similar issue had come up for consideration in appeal in the Appellant’s own case in A.Y. 1997-98 and subsequent years. Following the same, the findings of the AO are held against the Appellant. Ground Nos.9,10,11,&12 are thus held against the appellant.”*

4. We find that the AO disallowed the claim of business loss of Rs. 228,15,80,396/- on the basis that the same can be allowed as instrument in the nature of investments but not as loan. We also find that the CIT (A) confirmed the disallowance following earlier years’ decision of the Tribunal in assessee’s own case for assessment year 1981-82 and 1982-83. She admitted that write off of investment

claimed as capital loss is covered against the assessee in earlier assessment year, but business loss as allowed by the CIT (A) on account of investment on conversion of loan arrears is allowable i.e. assessment year 1997-98 wherein the Tribunal vide Para 7.2 and 7.3 has dealt the issue as under: -

*“7.2. We have gone through the facts of this case and order of the Tribunal of earlier years. It was fairly submitted by the ld. Counsel, write-off of the investment claimed as capital loss is covered against the assessee in earlier assessment years. Therefore, following the orders of earlier years, this issue is decided against the assessee and the AO is directed to follow the orders of the Tribunal for earlier years.*

*7.3 It is noted that out of the total write off, a sum of Rs.10,47,95,551, is on account of write-off of the loan which has been alternatively claimed to be business loss. It is noted that the Tribunal in assessee's own case for A. Y. 1982-83 allowed it as business loss. No distinction has been brought in facts or legal position by Ld. CIT-DR. Therefore, respectfully following the orders of earlier years, the A O is directed to follow the orders of the earlier years and allow a sum of Rs.10,47,95,551 as business loss and the balance amount on account of write-off of investment as capital loss should be disallowed, as held above also. Thus, assessee gets part relief. This ground is partly allowed.*

Respectfully following the decision of the Coordinate Bench of the Tribunal in assessee's own case as above, we direct the AO to partly allow relief as above. This common issue of assessee's appeal is dismissed and that of the Revenue is also dismissed.

5. The next common issue in this appeal of the assessee and that of Revenue is as regards to the order of the CIT (A) partly confirming the interest expenses of Rs.379,11,90,416/- incurred for earning interest free income from bonds instead of Rs.174,37,66,592/- being only direct expenses thereby allowing only part expenses

u/s 10(23G) of the Act. For this, the assessee has raised following grounds No.3 and 4:-

*“(B) Re: Deduction under section 10(23G)  
Rs.3,79,11,90,416  
[Para 6, pages 2 S 3 of the CIT(A) Order]*

3. *On the facts and circumstances of the case and in law, the CIT(A) erred in partly confirming the interest expenses at Rs.4,18,73,63,942 incurred for earning interest on tax free bonds instead of Rs.1,74,37,66,592 being only direct expenses viz. interest on borrowings made for infrastructure financing and thereby allowing only part exemption under section 10(23G).*

4. *The CIT(A) also erred in not specifically dealing with the ground regarding guarantee commission excluded by the assessing officer while considering income exempt under section 10(23G) of the Act.”.*

The Revenue has raised following ground No. 3 :-

*“3 (a) On the facts and circumstances of the case and in law, the learned CIT(A) erred in holding that computation made by the Assessing Officer in respect of exemption u/s.10(23G) has to be modified.”*

*3 (b) On the facts and circumstances of the case and in law, the learned CIT(A) failed to appreciate that interest and other expenditure relating to earning of infrastructure income was correctly computed in the assessment order.”*

*3 (c) On the facts and circumstances of the case and in law, the learned CIT(A) erred in devising a formula without appreciating that the same will not give the correct figure of interest and other expenses, attributable to earning of such income.”*

6. Both the parties admitted that the facts and circumstances are exactly identical what was in assessment year 1999-2000& 1998-1999 also. Before us, the learned

Counsel for the assessee stated that identical issue was decided in assessment year 1997-98 in ITA No.5424/Mum/2001 wherein the Tribunal has set aside the issue to the file of the AO vide Para 8.3 and 8.4 by observing as under:-

“8.3 We have gone through the facts of this case and find that the order passed by the Ld. CIT (A) is not a speaking order on various aspects of computation of income on net basis as were raised by the assessee in its statement of facts filed before the Ld. CIT(A). Before us, the assessee has submitted detailed working sheet so as to calculate correctly, the amount of net income available for exemption u/s 10(23G). For the sake of ready reference, the said work sheet submitted by the ld. Counsel is reproduced below:

		(Amount in Crores)
		Rs.
<i>Ratio of borrowed funds to total funds:</i>		
<i>Share capital</i>		550.53
		<u>3,900.21</u>
<i>Reserves and surplus</i>	<u>I</u>	<u>4,450.74</u>
	<u>II</u>	<u>29,393.86</u>
<i>Interest bearing funds:</i>		
	(I + II)	3,844.59
<i>Ratio of borrowed funds to total funds (29,393.86/33844.59*100) 86.85%</i>		
2. <i>Ratio of allocable expenses</i>		
<i>Total interest expenses as per Revenue Account</i>		4,439.67
<i>Ratio for allocation (25,02,93/4439.67*100)</i>		56.38%
3. <i>Calculation of income exempt u/s 10(23G) A</i>		
<i>Proportion of income out of borrowed funds (137,10,52,701*86.85%)</i>	B	1,190,752.329
<i>Less: Expenses allowable (proportionate) 1,190,752,329*56.38%</i>	C	671,303.899
<i>Net income exempt u/s. 10(23G) related to Borrowed bunds</i>	D (B-C)	519,448.430
<i>Add: Gross income exempt u/s.10 (23G) E(A-B)</i>		
<i>Relating to owned fund (137,10,52,710 – 119,07,329)</i>		<u>180,300.372</u>
<i>Net income exempt u/s 10(23G)</i>	<b>D+E</b>	<b>699,748,802</b>
<i>Less: Administrative expenses @1% of income received u/s 10(23G)</i>		<u>13,710,527</u>
<i>Net income exempt u/s 10(23G)</i>		<u>686,038.275</u>

8.4 *These facts have not been analysed by either of the lower authorities. In principle, we agree with the contention of the ld. Counsel that only those expenses which are relatable to earning of the exempt income can be deducted for computing net income available for exemption u/s 10(23G). Under these circumstances, we send this issue back to the file of the Assessing Officer, who shall decide this issue afresh after giving adequate opportunity of hearing to the assessee to submit requisite details and documents in support of claim made by the assessee. The assessee shall also extend requisite cooperation to the Assessing Officer. The Assessing Officer shall consider aforesaid circular of the Board as well as judgments relied upon by both the parties before us. The assessee is also free to place on record any other judgment in its support as may be available at the time of passing of fresh assessment order. The assessee is free to raise all legal and factual issues in this regard. The Assessing Officer is also at liberty to taken into account latest position of law as may be available at the time of deciding this issue afresh. The Assessing Officer shall consider all the submissions and evidences as may be placed by the assessee on objective basis and shall decide all the issues as may be raised by the assessee before him. Thus, this issue is sent back to the Assessing Officer with our direction as given above and these grounds may be treated as partially allowed for statistical purposes”.*

According to the learned Counsel for the assessee, the AO has disallowed exemption u/s 10(23G) of the Act on account of receipts of financing to infrastructure sector and not the gross receipt. The assessee filed revised computation during assessment claiming exemption of entire amount of gross receipt of Rs.379,11,90,416/-. The AO allowed the claim of exemption at Rs.104,74,00,449/- relating to income computed on account of infrastructure sector eligible for claim of deduction u/s 10(23G) of the Act. The CIT (A) further allowed relief partly modifying the order of the AO. Aggrieved, now the assessee as well as the Revenue, both are in appeal before the Tribunal.

7. Before us now, as narrated above, the assessee relied on the decision of the Coordinate Bench of the Tribunal for assessment year 1997-98 wherein no interest expense was disallowed by the assessee by claiming that it was the gross income to be allowed as exempt u/s 10(23G) of the Act. As in the earlier year, now, the assessee before us also filed alternative working of expenses, which was not before the lower authorities. Before us now, as per the working of the expenses, the same was not analyzed by the lower authorities. Hence, we remit the matter back to the file of the AO for fresh consideration. The only differential fact in the present case is that the assessee itself has disallowed direct expenses of Rs.174,37,66,592/- by way of interest expenses for earning of income u/s 10(23G) of the Act, which has been offered for disallowance. We also agree that only those expenses which are relatable to earning of exempt income can be claimed as deduction for computing net income u/s 10(23G) of the Act. In term of the above and in term of the direction of the Coordinate Bench of the Tribunal in assessment year 1997-98 in assessee's own case in ITA No.5424/Mum/2001, the AO will decide the issue. Accordingly, this issue of assessee's appeal is allowed for statistical purposes and the issue of Revenue's appeal is dismissed.

8. The next common issue in this appeal of the assessee is as regards to the order of the CIT (A) upholding the disallowance of depreciation claimed on assets leased during the year amounting to Rs.756,62,50,507/-. For this, the assessee has raised the following ground No.5: -

*“(C) Re: Disallowance of Depreciation claimed on assets leased during the year - Rs.7,56,62,50,507/-*

*Para 7, Pages 3 & 4 of the CIT(A) Order]*

*5. On the facts and circumstances of the case and in law, the CIT(A) erred in upholding the disallowance of depreciation on all those assets which were purchased and leased during the previous year after excluding the principle component of lease rentals.”.*

9. We find that the Tribunal in assessment year 1997-98 in ITA No.5424/Mum/2001 vide order dated 13-07-2016 had restored the matter back to the file of the AO to decide the same in favour of the assessee following the order of the assessment year 1995-96 by observing in Para 9.2 as under: -

*“9.2 With the assistance of the parties, it is noted by us that in A.Ys. 1995-96 and 1996-97 this issue has already been decided by the Tribunal. In A.Y. 1995-96, the Tribunal decided this issue vide its order dated 15-09-2007 reported in 115 ITD 25 (Mum). It is further noticed by us that in A.Y.1996-97 in ITA No.4109/Mum/2001 vide order dt. September 9, 2015 the Tribunal decided this issue in favour of the assessee following the order for A. Y. 1995-96 and also following the order for A. Y. 1998-99. No distinction has been made before us in the facts or legal position with regard to the issue under consideration. Under these circumstances, we direct the AO to follow the orders of the Tribunal for earlier years and decide this ground accordingly in favour of the assessee, after verifying the requisites facts. This ground is accordingly allowed for statistical purposes”.*

10. We also find that the Tribunal in assessee's own case for assessment year 1995-96 i.e. in ICICI Bank Ltd. Vs JCIT, SR-28, Mumbai (2008) 115 ITD 25 (Mumbai) has directed the AO to allow depreciation on all items claimed by the assessee. Respectfully following the said decision of the Tribunal in earlier year in assessee's own case, we direct the AO to allow the claim of the assessee after verifying the facts and figures. This issue of the assessee's appeal is thus allowed in both the years.

11. The next common issue in this appeal of the assessee and that of the Revenue is as regards to the order of the CIT (A) in partly confirming the disallowance of interest expenses of Rs.221,88,52,452/- and 1% of managerial and administrative expenses. For this, the assessee has raised the following ground No.6:-

*“(D) Re: Exemption under section 10(33)- Rs.2,21,88,52,452  
[Para 8, Page 4 of the CIT(A) Order]*

6. *On the facts and circumstances of the case and in law, the CIT(A) erred in partly confirming the interest expenses at Rs.1,34,37,32,781 and managerial and administrative expenses @ 1% at Rs.2,22,69,966 instead of Rs. Nil as declared by the Appellant.”*

The Revenue has raised following ground No. 4(a) & 4(b):-

*“4(a) "On the facts and circumstances of the case and in law, the learned CIT(A) erred in holding that the computation of exemption u/s.10(33) of the I.T. Act made by the Assessing Officer deserves to be modified applying the formula as devised by him."*

*4(b) "On the facts and circumstances of the case and in law, the learned CIT(A) failed to appreciate that the Assessing Officer had worked out the interest cost attributable to investment in shares in a correct and logical manner."*

12. We find that the assessee claimed exemption u/s 10(33) of the Act but the AO disallowed interest expenses and managerial & administrative expenses at Rs.257.63 crore and Rs.2.70 crore respectively and disallowed exemption u/s 10(33) of the Act as against the claim of the assessee of Rs.222,69,96,573/-. The CIT (A) partly confirmed the disallowance of interest expenses at Rs.134,37,32,781/- and managerial and administrative expenses at 1%. The assessee before us now claimed that no interest expenses to be allocated as the investment is made out of assessee's own funds. For this, the learned Counsel for the assessee relied upon the decision of the Hon'ble Bombay High Court in the case of CIT Vs. HDFC Bank Ltd. 366 ITR 505 (Bom.) and also in the case of CIT Vs. Reliance Utilities & Power Ltd. 313 ITR 314 (Bom.). It was contended by the learned Counsel for the assessee that the entire interest expenses are to be allowed as expenses and no interest expenses to be allocated as the investment is made out of assessee's own funds. She referred to the Tribunal's decision in assessee's own case in assessment year 1997-98 in ITA

No.5424/Mum/2001 wherein the issue is decided vide Para 10.3 by observing as under:-

*“10.3 It is noted that in earlier years, this issue has been decided in favour of the assessee, after considering the judgment of Hon’ble Bombay High Court in the case of Emerald Co. Ltd. (supra). It is noted that in assessment year 1995-96 (order dt. 09.09.2015), the Tribunal decided this issue after considering not only the judgment of Hon’ble Bombay High Court in the case of Emerald Co. Ltd. (supra) but after considering section 14A as well. Therefore, respectfully following the orders of earlier years, this ground is principally decided in favour of the assessee, subject to verification of facts of this year. Thus, A O is directed to follow the orders of earlier years and decide this ground after verification of facts of this year, and compute the deduction allowable to the assessee taking guidance from tribunal’s orders of earlier years. This ground is treated as allowed for statistical purposes”.*

13. After hearing both the sides, we find that the AO while examining the assessee’s own funds vis-à-vis investments in shares will follow the decision of the Hon’ble Bombay High Court in the case of HDFC Bank Ltd. (supra) and Reliance Utilities & Power Ltd. (supra). In case, the investment is made out of assessee’s funds, then, no interest expenses is to be allocated to the interest income. Accordingly, we set aside this issue to the file of the AO to verify the facts. This issue of the assessee is allowed for statistical purposes and the issue in Revenue’s appeal is dismissed.

14. The next two issues in this appeal of the assessee and that of Revenue are in regard to (i) deduction of share issue expenses and (ii) calculation for deduction u/s 36(1)(viii) of the Act. For this, the assessee has raised following ground Nos.7 and 9:-

*(E) Re: Deduction of share issue expenses-Rs73,32,08,329  
[Para 9, page 4 of the CIT(A) order]*

7. *The CIT(A) erred in confirming the disallowance of expenses incurred for issue of shares on the ground that they are capital in nature.*

*(G) Re : Calculation for deduction under section 36(1)(viii)  
[Para 14, Pages 7 & 8 of the CIT(A) order]*

9. *On the facts and circumstances of the case and in law, the CIT(A) erred in not accepting the working of special reserve in accordance with the method submitted by the Appellant in absence of a format/formula prescribed under section 36(1)(viii)."*

The revenue has raised following ground No.6: -

*"6. On the facts and circumstances of the case and in law, the learned CIT(A) erred in holding that for the computation u/s.36(1)(viii) of the I.T. Act, the Assessing Officer will also take into account the interest cost attributable to non-finance income, in addition to administrative overheads estimated by him at 10%."*

15. At the outset, the learned Counsel for the assessee stated that she has instructions from the assessee not to press these two issues. On this, the Revenue has not objected. Accordingly, this issue of assessee's appeal is dismissed.

16. As regards to Revenue's appeals it was claimed that the CIT (A) directed the A O to take into account interest costs attributable to non-fiancé income in addition to administrative costs estimated at 10% while working out the computation u/s 36 (1) (viii) of the Act by following the order for assessment year 1996-97. The learned Counsel for the assessee that this issue was in assessment year 1998-99 & 1999-2000 and the AO himself allowed the claim of the assessee. She referred to Para 12.7 of the assessment order and the relevant finding is as under: -

*"However, considering that the assessee incurred administrative cost, 10% of the non-fund-based income is treated as the expenditure incurred to earn such income. Certain income like interest on Government securities, as well as hire purchase operation do involves fund cost but*

*they are not in the nature of finance business. For income from securities loans and advances, stock of hire, etc., the interest cost is allowed at 71% of such income. The assessee's arguments mentioned in its submissions are not of any relevance to the matter of computation of the eligible deduction. In case of the assessee, the major cost is the interest cost which works out to about 80% of its total cost of operations”.*

When this was confronted to the learned CIT DR, he fairly conceded the position. In view of this and the fact that the identical issue is covered in favour of assessee for A.Y. 1998-99 and 1999-2000 vide Revenue's appeal no. in ITA No. 4824&4825/Mum/2004 order 06-09-2016, hence we confirm the order of the CIT (A) and this issue of Revenue's appeal is dismissed. However, we are in agreement with the argument of the learned Counsel for the assessee that AO be directed to remove the non-fund based commission amounting to Rs.129,41,05,983/- instead of Rs. 194,31,55,445/- as claimed vide additional ground raised by assessee. We find that the assessee has raised following additional ground :-

*“G) Re: Calculation for deduction under section 36(1)(viii) (Para 14, Pages 7 & 8 of the CIT(A)(A) order)*

*The CIT(A)(A) erred in removing the fund based commission and fees amounting to Rs.1,94,31,55,445/- instead of the non-fund based commission amounting to Rs.1,29,41,05,983/- from the business income to arrive at the income from finance.”*

The learned Sr. DR only requested that let the calculation provided by assessee at page 142 of its paper book be verified by the AO. On this, learned Counsel has not objected. Hence, the matter in this regard is referred back to the file of the AO for verification purpose only.

17. The next two issues in this appeal of assessee are as regards to disallowance of depreciation on fixed assets and disallowance of interest on loan for building. For this assessee has raised following ground Nos.12 & 13:-

*“(H) Re : Disallowance of depreciation on fixed assets -  
Rs. 17,05,52,154  
[Para 15, pages 8 & 9 of the CIT(A) order]*

*12) On the facts and circumstances of the case and in law, the CIT(A) erred in not allowing depreciation on fixed assets amounting to Rs.17,05,52,154 claimed on business and commercial rights acquired by the Appellant at the time of merger with Anagram Finance Limited.*

*(I) Re : Disallowance of interest on loans for building -  
Rs.3,92,75,669  
[Para 15, pages 8 & 9 of the CIT(A) order]*

*13) On the facts and circumstances of the case and in law, the CIT(A) erred in not allowing as a revenue expenditure interest on loan for building amounting to Rs.3,92,75,669.”*

18. At the outset, the learned Counsel for the assessee stated that the depreciation on fixed assets was disallowed by the AO without any discussion and even CIT(A) has disallowed by recording the following reasoning in Para 15.2:-

*“I have carefully looked into the facts of the case and in arguments made before me. I find that the AO has not considered the claim made before him at the time of the Assessment proceedings. He has not given any reasons for not entertaining the claim. During the justification in regard to the claim made by the genuineness of the claim has not been established before me. Under the circumstances, 17,05,52,154/- and the claim for interest of Rs.3,92,75,669/- cannot be allowed..”*

19. At the outset, the learned Counsel for the assessee stated the claim of depreciation and claim of interest on loan for building on fixed assets acquired on merger with Anagram Finance Ltd. but the CIT(A) has not considered this aspect. She claimed that the depreciation on business and commercial rights acquired at the time of merger being in the nature of goodwill should have been allowed in term of the decision of the Hon’ble Supreme Court in the case of CIT v. Smiffs Securities

Ltd. 348 ITR 307 (SC) and as regards to interest on capitalization of building ought to have been allowed as revenue expenditure following the decision of the Hon'ble Bombay High Court in the case of CIT v. Tata Chemicals 175 CTR 433 (Bom). On query from the bench, the learned Sr. DR fairly conceded that let the facts be examined by the AO because none of the authorities below have deliberated on these issues. Learned Counsel for the assessee has not objected to the proposal. In term of the above, we restore these two issues back to the file of the AO for deciding the issue in terms of decision of the Hon'ble Supreme Court in the case of Smiffs Securities Ltd. (supra) on the issue of depreciation and in term of Tata Chemicals (supra) on the issue of interest capitalization on building. Accordingly, these two issues are restored back to the file of the AO.

20. The next issue in this appeal of assessee is as regards to disallowance of deduction for provision for Bad Debts amounting to Rs. 272,94,72,271/-. At the outset, the learned Counsel for the assessee stated that she has instructions from the assessee not to press this ground and accordingly, the same is dismissed as not pressed.

21. The next common issue in this appeal of the assessee is as regards to charging of interest u/s 234B of the Act. The learned Counsel for the assessee as well as learned CIT DR fairly conceded that charging of interest u/s 234B of the Act in the present case is consequential in nature, hence, needs no adjudication. Accordingly, this common issue is infructuous and hence, dismissed.

22. The next issue in this appeal of assessee is against the order of CIT(A) upholding the erroneous addition of write backs previously sought to be taxed. This ground is common in the departmental appeal also and we will deal both the issues here. The grounds raised by the assessee which reads as under: -

*Re: Erroneous Addition of Writeback previously sought to be taxed – Rs.12,78,93,145/-*

17) *The CIT(A) erred in not granting relief in respect of non-cash write backs amounting to Rs.12,78,93,145/- not exigible to tax as per provisions of section 41(4) of the Act.”*

The Revenue has raised following ground No. 2(a) and 2(b): -

*“2(a) On the facts and circumstances of the case and in law, the learned CIT(A) erred in holding that non-cash write back of Rs.15,41,83,954/- should be excluded from the charge of tax because it represents non-cash write back.*

*2(b) On the facts and circumstances of the case and in law, the learned CIT(A) failed to appreciate the full facts brought on record by the AO in support of his view that the entire Witten back amount of Rs.106,04,02,809/- is taxable.”*

23. At the outset, the learned Counsel for the assessee as well as the learned Sr. DR conceded that this issue is covered by Tribunal’s decision in earlier years wherein, the issue is remanded back to the file of the AO by the following directions:-

*“27. At the outset, the learned Counsel for the assessee as well as the learned AO DR conceded that the Tribunal in assessee’s own case for assessment year 1996-97 and 1997-98 in ITA No.4109 & 5424/Mum/2001 order dated 09-09-2015 and 31-07-2016, wherein exactly on identical facts following assessee’s own case for assessment year 1987-88 in ITA No.8958/Bom/90 decided the issue and the matter back to the file of the A O. The Tribunal in assessment year 1987-88 restored the matter back to the file of the A O by observing as under in Para 9 by following Hon’ble Supreme Court decision in the case of AO Vs United Provinces Electric Supply Co. 110 Taxman 134 as under:-*

*“We find that for the asst. year 1986-87 also similar issue came up before the AO (A) and he had set aside the matter to the file of A O with similar direction. When the matter came before the Tribunal,*

*the Tribunal vide its order in ITA No.1224/Bom/90, sustained the direction of the AO (A). However, for the year under consideration, at the time of hearing before us, the learned counsel for the assessee made an additional argument that since the amount is not received by the assessee, it cannot be charged as profit u/s. 41. In support of this contention, she relied upon the decision of Hon'ble Apex Court in the case of United Provinces Electric Supply Co. (supra). However, as this claim was not made before the AO, he had not examined this aspect, i.e. whether the money is actually received by the assessee. As the matter has already been set aside by the AO (A) back to the file of the AO, in our opinion, the assessee should raised this plea before the AO. We accordingly, while upholding the setting aside of this matter back to the file of AO, direct him to examine the assessee's claim in the light of the decision of Hon'ble Apex Court in the case of United Provinces Electric Supply Co. (supra). He will also allow opportunity of being heard to the assessee”.*

28. *Respectfully following Tribunal's decision in earlier year, we exactly on same directions, restore the matter back to the file of the AO for fresh adjudication. This issue of Revenue's appeal is set aside.”*

24. Respectfully following Tribunal's decision in earlier year, we exactly on same directions, restore the matter back to the file of the AO for fresh adjudication. This issue of Revenue's appeal is set aside.

25. The next issue in this appeal of assessee is as regards to disallowance of Bad Debts written off during the year amounting to Rs.49,31,79,076/-. The learned Counsel for the assessee stated that she has instructions from the assessee not to press this issue as provisions were allowed in earlier years. The DR has not objected to the withdrawal. Hence, this issue is dismissed as not pressed.

26. The next issue in this appeal of is as regards to the disallowance of earlier years expenditure of Rs.98,145/-. For this Revenue has raised following ground No.1:-

*"1. On the facts and circumstances of the case and in law, the learned CIT(A) erred in deleting the disallowance of earlier year's expenditure, amounting Rs.98,145/-."*

The claim of assessee of earlier years expenses was disallowed by the AO following earlier years assessment orders. The CIT(A) allowed the expenses following the decision of preceding assessment years 1997-98. Now, both the parties agreed that identical issue is covered against the assessee in AY 1998-99 & 1999-2000 and hence, this issue can be allowed. We find that this issue is curved by the Tribunal's decision for AY 1996-97 in ITA No. 3782/Mum/2001 dated 28-10-2005. Respectfully following the same, we allow this issue of Revenue's appeal.

27. The next issue in this appeal of Revenue is against the order of CIT(A) allowing VRS expenses amounting to Rs.35,19,357. For this Revenue has raised following ground No.5(a) and 5(b):

*"5(a) "On the facts and circumstances of the case and in law, the learned CIT(A) erred in deleting the disallowance of Rs.35,19,357/-, being voluntary retirement expenses."*

*5(b) "On the facts and circumstances of the case and in law, the learned CIT(A) failed to appreciate the full facts of the case based on which the Assessing Officer had held that the expenditure has given the assessee a benefit of enduring nature."*

28. We have heard rival contentions and gone through facts and circumstances of the case. We find that the AO disallowed the VRS expenses be deferred and amortized expenses over a period of time. The assessee claimed that these expenses are allowable in view of Hon'ble Bombay High Court decision in the case of CIT vs.

Bhor Industries Ltd. (2003) 264 ITR 0180 (Bom). The CIT(A) after going through the decision of Hon'ble Bombay High Court in the case Bhor Industries Ltd (supra), allowed the claim of the assessee by observing para 13.3 as under:

*"13.3 I have looked into the facts of the case and submissions made. I find that the expenses incurred on VRS were incurred with a view to increase profitability by trimming out the man power with a view to modernize. The Appellant's case is clearly covered by the decision of Bombay High Court in the case of Bhor Industries Ltd., reported at 128 Taxation 626. The Appellant succeeds in ground No.38 & 39."*

Aggrieved, revenue preferred appeal before Tribunal.

29. Before us, revenue could not point out how the expenses are capital in nature and could not find fault with the findings of CIT(A). Even otherwise, the expenses on VRS are incurred wholly and exclusively for the purpose of business and hence revenue in nature and allowable entirely in the year in which these are incurred. Admittedly, these expenses are incurred in this very year, which is not in dispute. Accordingly, we confirm the order of CIT(A) and this issue of revenue's appeal is dismissed.

30. The next issue in this appeal of revenue is as regards to discount on re-purchase of foreign currency bonds. For this, revenue has raised following grounds:

*7. "On the facts and circumstances of the case and in law, the learned CIT(A) erred in allowing the deduction of Rs.84,23,492/-, being discount on re-purchase of foreign currency borrowings."*

31. We have heard rival contentions on this issue and gone through facts and circumstances of the case. We find that the AO added discount on re-purchases of foreign borrowing amounting to Rs.84,23,492/-. The CIT(A) considered the argument of the assessee that the discount on foreign currency borrowings was on re-purchased foreign currency bonds issued earlier. According to assessee these foreign currency bonds was re-purchased at discount and discount of Rs.84,32,492/- was

credited to the revenue account. According to assessee the surplus accounted merely represents an accounting entry and the same is only capital receipt. Accordingly, CIT(A) deleted the addition. Aggrieved, now revenue is in appeal before Tribunal.

32. We find that the claim of deduction of Rs.84,32,492/- represents discount on re-purchase of foreign currency borrowings, which is nothing but a capital receipt and it only represents an accounting entry. We find no infirmity in the order of CIT(A). Hence, this issue of revenue's appeal is dismissed.

33. The next issue in this appeal of revenue is against the order of CIT(A) deleting the charging of interest u/s 234B of the Act on the deemed tax payable u/s 143 (4) of the Act. For this revenue has raised following grounds:

8. *"On the facts and circumstances of the case and in law, the learned CIT(A) erred in directing the Assessing Officer to exclude levy of interest u/s.23413 of the IT. Act, in respect of the deemed tax payable u/s.143(4) of the I.T. Act."*

34. We find that the CIT(A) has deleted this charging of interest by observing in para 18.1 as under:

*"18.1 A similar ground was taken in appeal before me by the Appellant in their own case for A.Y. 1998-99, wherein, in my order No. CIT(A)XII/AC.3(1)/IT-17/00-001 dated 26.3.2004, the charge of interest u/s. 234 B has been held to be consequential but in so far as levy of interest u/s234 B on the deemed tax payable as per Sec.143(4) of the Act is concerned, the same has been deleted. Following the same, the AO is directed to delete the charge of interest u/s. 234 B in respect of the deemed tax payable as per Sec. 143 (4). The Appellant succeeds in part in this ground."*

35. We find that this issue is covered by Coordinate Bench of this Tribunal in ITA No.4824 & 4825/Mum/2004 for A.Y. 1998-99 & 1999-2000, wherein in Tribunal after considering this issue dismiss the appeal of revenue by observing as under:-

“29. The last common issue in these two appeals of the Revenue is as regards to the order of the CIT(A) deleting charging of interest under section 234 B read with section 143 (4) of the Act.

30. After hearing both the sides, we find that the CIT(A) has rightly observed that no interest is payable under section 234 B of the Act on deemed tax payable under section 143 (4) of the Act. The CIT (A) is Para 15.2 observed as under:-

15.2 I have carefully considered the facts of the case and the submissions made before me. I find that the charge of interest under section 234 B is consequential and there was no discretion with the AO in levy of the same. The AO was fully justified in charging interest under section 234 B. However, in so far as the levy of interest on the deemed tax payable amounting to Rs.28,79,44,919/- as per section 143(4) is concerned. I find that the assessed tax for the purposes of Section 234 B is clearly defined under the Act. This definition does not include the deemed tax payable as per Section 143(4). I find that such interest has been deleted in appeal for A.Y. 1996-97. Following the same, while the charging of interest under section 234 B is upheld and is subject to consequent relief in view of my findings above on various grounds, the AO is directed to exclude 234 B levy in regard to the deemed tax payable under section 143 (4) of the Act. The Appellant succeeds in regard to 41 to 45”.

We find no infirmity in the order of the CIT (A) and hence, this issue of Revenue’s appeal is dismissed.”

36. Respectfully following the Coordinate Bench decision in assessee’s own case, we confirm the order of CIT(A) and dismiss the appeal of revenue on this issue.

37. The next issue in the appeal of the assessee is as regards to addition made by AO on account special reserve withdrawal u/s 41 (4A) of the Act and confirmed by CIT(A). For this assessee has raised following ground no.8:-

“(f) Re: Addition of special reserve withdrawal under section 41(4A) of the Act – Rs.3,10,26,61,276 [Para 11, Pages 5 & 6 of the CIT(A) order]

[8] On the facts and circumstances of the case and in law, the CIT(A) erred in confirming the addition of Rs.3,00,26,61,276 being special reserve withdrawn from special reserve account created up to A.Y. 1997-98 under section 41(4A) of the Act.”

38. Brief facts are that, the AO observed in assessment order that the assessee had withdrawn a sum of Rs.310,26,61,276/- from the special reserve u/s 36(1) (VIII) of the Act. According to AO, this amount was not offered to tax by the assessee and

hence in view of newly introduced provision of section 41 (4A) of the Act by the Finance Act 1997, this amount taxable. The AO added back this amount to the total income of the assessee. Aggrieved assessee preferred appeal before CIT(A), who also confirmed the action of AO relying on assessee's own case for A.Y 1998-99 by observing as under:-

*“11.2 A similar issue had come up for consideration in Appellant's own case for AY 1998-99, wherein in appeal order No.CIT(A)XII/AC.3(1)/IT-34/02-03 dated 10.03.2004, similar arguments were advanced on behalf of the Appellant and on similar facts, the decision has been taken against the Appellant. Following the same, grounds Nos. 33, 34 & 35 are decided against the Appellant.”*

39. We have heard rival contentions and gone through facts and circumstances of the case. Only limited issue for our adjudication is:

“Whether Sub-section (4A) as inserted in section 41 of the Income Tax Act, 1961 by the Finance Act, 1997 with effect from 01.04.1998 to provide that where a deduction has been allowed in respect of "any special reserve created and maintained under sec. 36(1)(viii)" any amount subsequently withdrawn from such special reserve shall be deemed to be profits and gains of business and accordingly charged to tax as income of the year in which such amount is withdrawn but will it applies to the reserve created in the prior years i.e. up to AY 1997-98 or not?”

The Ld. Counsel for the assessee argued that this issue is decided against the revenue by coordinate bench of this Tribunal in assessee's own case for AY 1998-99 in ITA No.4114/mum/2004, although the issue was decided on reopening, but observed on merits also vide para 5.4 as under:-

*“5.4 It is noticed that during the original assessment proceedings, the assessee was required to file details in respect to reserve created, withdrawn and deduction claimed. The assessee has filed complete details of reserve credited, withdrawn and the deduction claimed. The AO has discussed this*

*issue while passing original assessment in para 10 at page 64 to 70. The AO has observed in his order that the assessee has made a provision of Rs.263 crores in P&L account towards special reserve for the purpose of sec.36(1)(viii) and claimed an amount of Rs.193 crores or so as deduction in the computation filed with the return of income. It has been further observed that in the course of assessment proceedings, the assessee revised its claim to Rs.189 crores or so. Along with the revised claim, computation of eligible deduction under section 36(1)(viii) was also filed. The AO noted that the method adopted on deduction was suffered from certain infirmity; accordingly, he reduced the deduction by discussing the issue at pages 64 to 70 of his order and concluded that the assessee is eligible for deduction @ 40% amounting to Rs.64.58 crores. The computation has been given in para 69 & 70 by the AO. From these facts, it cannot be said that the AO has not applied his mind while allowing the deduction under section 36(1)(viii) in respect to special reserve created. The assessment has been reopened by the AO for the reason that as per the provisions of new section 41(4A) introduced w.e.f. 1.4.98 which is applicable from AY 1998-99, the withdrawal made by the assessee is to be treated as deemed income of business and profession. In our considered view, the reopening of the assessee is on account of merely on change of opinion for the reason that the AO, who passed assessment order originally cannot be said he was not having knowledge of provisions of sec. 41(4A). He was aware of the section 41(4A) as, as per new section 41(4A) and as per the language of sub sec. 36(1)(viii) the amount withdrawn from special reserve created and maintained are to be taxed. Upto AY 97-98 the wording of section 36(1)(viii) was 'created' and now from AY 1998-99, the wording of section 36(1)(viii) is 'created and maintained'. The assessee is maintaining separate accounts i.e. one is for special reserve created upto AY 1997-98 and another is from AY 98-99 for the special reserve created and maintained. The amount withdrawn by the assessee undisputedly is withdrawn from the reserve created upto AY 1997-98; THEREFORE, IT cannot said that the AO was not aware of the facts. The provisions of sec. 41(4A) cannot be applied for the simple reason that the amount withdrawn was from special reserve created upto AY 1997-98. The details were sought from the assessee. The complete details were filed and after examining the*

*details and provisions of respective sections, the AO concluded that deduction claimed by the assessee was on higher side; therefore, he recalculated the deduction. Accordingly, in our considered view, the reopening of the assessee was merely on account of change of opinion.”*

40. Further Ld. Counsel explained that Section 36(1)(viii) of the Act permits deduction of an amount not exceeding 40% of the profits derived from the business of providing long term finance carried to a reserve account inter alia by a financial corporation engaged in providing long term finance for industrial or agricultural development or development of infrastructural facility in India. The deduction is admissible subject to the limits laid down in the proviso to the said section. She explained that the said section was amended by the Finance Act, 1997 with effect from 1.4.1998 i.e. for & from A.Y.1998-99. The amended section mandated a special reserve to be created and maintained. Simultaneously, sub-section (4A) was inserted in sec.41 to provide that where a deduction has been allowed in respect of "any special reserve created and maintained under Section 36(1)(viii)" any amount subsequently withdrawn from such special reserve shall be deemed to be profits and gains of business and accordingly charged to tax as income of the year in which such amount is withdrawn. According to her the said section as it existed up to the AY 1997-98 required an assessee to create a special reserve from the profits derived from the eligible business and computed under the head 'profits and gains of business'. Till AY1997-98, creation of a special reserve was the limited condition imposed on an assessee claiming the said deduction. There was no requirement to maintain the special reserve so created and correspondingly, no restriction on the utilisation of such special reserve. On the other hand, at the relevant time there were several sections in the Act which not only contained a similar condition of creation of reserve for availing of the respective deduction but also allowed the assessee (a) to utilise the reserve created for designated purposes in some cases within a prescribed time frame and (b) in case of non-utilisation of the reserve amount or utilisation for a purpose other than that specified, brought to charge the amount allowed as deduction eg. sec. 32A(4)(ii) read with 32A(5); 33A(3)(ii); 33ABA(1) read with (3); 33AC(1) read with (2) and (3); 34(3)(a), 80HHB(3)(11) read with (4); 80FFHBA(2)(ii) read with (3);

80HHC (1) 2' proviso (as it existed prior to 1.4.1989); and 80HHD(1) read with (4) and (5).

41. She further explained that unlike the provisions referred to hereinabove, sec. 36(1)(viii) of the Act was silent as to the period for which the reserve was retained and/or utilisation of the same. In the absence of any specific bar, an assessee was at liberty to use the special reserve so created at any point of time. It is this right which is sought to be taken away by the ITO relying upon the amendment introduced by Finance Act, 1997. She further argued that the deduction under sec. 36(1)(viii) of the Act is allowable each year subject to the creation of a special reserve out of the profits for the year derived from the eligible business. Prior to AY1998-99, an assessee was required to create a special reserve and there existed no other limitation with respect to such reserve. From AY 1998-99, an assessee had to create and maintain the special reserve and in the event of withdrawal suffer tax under Section 41 (4A). Thus, a special reserve created before AY1998-99 and from AY 1998-99 was governed by different conditions. She explained facts of the present case that the assessee created a separate special reserve for the financial year 1999-2000 terming it as "special reserve created and maintained in terms of sec. 36(1)(viii) of the Act" ('Special Reserve 2). The reserve created for the prior years was described as " special reserve created in terms of sec 36(1)(viii) of the Act upto AY1997-98" ('Special Reserve 1'). During AY2000-01 the Appellant company withdrew a sum of Rs.310.27 Cr. from Special Reserve I. This amount was appropriated to the provision for bad debts. The amount withdrawn has been assessed under sec. 41(4A) of the Act by the AO and confirmed by CIT(A).

42. On the other hand, ld. CIT DR explained the issue under consideration that the addition of Rs.310.26 crore u/s 41(4A) of the Act, being the withdrawal from special reserve created u/s 36(1)(viii) of the Act. The assessee had withdrawn Rs. 301, 26,61,276/- from the special reserve created u/s 36(1)(viii) of the Act during the previous year relevant to AY 2000-01. However, the same was not offered to taxation under section 41(4A), introduced by the Finance Act, 1997 w.e.f. AY 1998-99 onwards. In response to the question raised by the AO, the assessee stated that it

maintained two separate accounts for "special reserve created" upto AY 1997-98 and for the subsequent period from A.Y. 1998-99 onwards. Since, the amount was withdrawn from the special reserve created of the earlier period, it is not liable for taxation u/s 41(4A). This was not accepted by the AO. He has quoted the Explanatory Note to the amendment of the Finance Act, 1997 and has stated that the amended provision imposed an obligation to maintain "special reserve created" u/s 36(1)(viii). It is thus not a replacement of the earlier provision but an extension of the existing provisions, imposing an obligation to maintain the "special reserve created" and thereby plug the loopholes of misusing the special reserve created. Therefore, the presumption against retrospectivity does not apply. Ld. CIT DR further submitted that section 41(4A) was also introduced w.e.f. 01.04.1998 whereby any amount subsequently withdrawn from such special reserve is liable for taxation from AY 1998-99 onwards. Since, the assessee has withdrawn money from the special reserve in A.Y. 2000-01, i.e. after assessment year 1998-99, it is liable for taxation u/s 41(4A). Section 41(4A) does not distinguish between "special reserve created" upto 1997-98 and "special reserve created and maintained" in the subsequent period. Once the amendment was made w.e.f. 01.04.1998, "special reserve created" in the earlier assessment year loses its separate identity and merges into "special reserve created and maintained" from AY 1998-99 onwards. The treatment given by an assessee in its books of account is not relevant and would not alter the above position. The AO has rightly held that the intention of legislature was not to distinguish the money withdrawn from reserve created upto AY 1997-98 and that after AY 1997-98. He has rightly given example of Section 115JA to buttress his finding that whenever the legislature wanted to allow deduction and make any exception, it has clearly specified it in the provisions itself. No exception has been provided in the provisions of the Act in this regard. On the other hand, Explanation to section 41(4A) makes it clear that even if the business is not in existence, the provisions of section 41(4A) shall apply where any amount is withdrawn from the special reserve. Thus, it is clear from reading of the provisions of section 36(1)(viii), 41(4A) and the Explanatory Note that section 36(1)(viii) was amended only to impose obligation for maintenance of "special reserve" which was already created and which would be created from

AY1998-99 onwards. Accordingly, any money withdrawn both from the "special reserve created" and "special reserve created and maintained" are liable for taxation u/s 41(4A), if the same is withdrawn on or after 01.04.1998.

43. Ld. CIT DR argued that the AO has also rightly given the example of another financial institution i.e. IDBI where much larger amount of Rs.2409.38 crore withdrawn from the "special reserves created" as well as the "special reserve created and maintained" u/s 36(1)(viii) was offered for taxation in AY 2002-03. The above amount includes amounts withdrawn from the "special reserve created" upto AY 1997-98. There cannot be two separate and contrary interpretations of the same provision. Hence, the sum of Rs. 310.26 crore withdrawn from the special reserve was rightly taxed by the AO. The Ld. CIT has also confirmed the above addition in para 11 to 11.2 of his appellate order. He has further stated that on similar facts, the addition made by AO was confirmed for AY 1998-99. Ld. CIT DR further distinguished the decision of the Hon'ble Bombay High Court in the case of CIT v. LIC Housing Finance Ltd., 367 ITR 458 (Bom). According to him, the ratio of the decision is not applicable because the Hon'ble High Court was deciding validity of the order passed u/s 263 of the Act. It has not decided on the merits of the issue. In the said case, the Tribunal had set aside the order of the CIT u/s 263. The Hon'ble Court decided the issue against the department on the ground that since two views are possible with regard to applicability of section 36(1)(viii) r.w.s. 41(4A) and the Tribunal adopts one of the two views possible which has resulted in loss of revenue, it cannot be treated as an erroneous order prejudicial to the interest of revenue, unless the view taken by the Tribunal was unsustainable in law. Hence, the decision has been rendered under different facts and circumstances and it cannot be applied to the facts of the assessee.

44. We have heard rival contention and gone through facts and circumstances of the case. We have gone through the provisions of section 41(4A) which applies to a "special reserve created and maintained" under Section 36(1)(viii). During the relevant year the assessee has not withdrawn any amount from the special reserve 2 that is, special reserve created and maintained since AY1998-99. The assessee had

withdrawn from the special reserve "created" upto AY1997-98. Such withdrawal would not attract the provisions of sec. 41(4A) for the reason that the condition for maintaining special reserve is an additional condition inserted by the amendment in order to avail of the deduction from AY 1998-99 onwards. The result of the amendment is to restrict the benefit granted by the said section. Such a restriction cannot be read into the said section as it existed prior to AY 1998-99 as it would amount to giving it retrospective effect. In other words, when the assessee created the reserve in assessment years prior to AY 1998-99 there was no obligation to maintain it. Nor did the free utilisation of the reserve attract any tax. That right which was vested with an assessee qua the special reserve created prior to AY 1998-99 cannot be curtailed or infringed upon by a subsequent amendment. It is well-settled that unless the terms of the statute expressly so provide or unless there is necessary implication, retrospective operation should not be given to the statute so as to affect, alter or destroy any right already acquired. This view of ours is supported by the decision of Hon'ble Supreme Court in the case of *Govinddas v ITO*, 103 ITR 123 (SC)). Since the assessee was not obliged to maintain the special reserve created upto AY 1997-98 and was entitled to freely use such reserve, provisions of sec.41(4A) would not be applicable to the sum withdrawn from the special reserve created upto AY 1998-99. Further we find that, Coordinate Bench of Mumbai Tribunal in the case *LIC Housing Finance Ltd vs. DCIT* in ITA No.672 & 673/Mum/2009 for the AY 2003-04 & 2004-05 vide order dated 02.12.2009, while holding that two views are possible and setting aside the revisionary action under sec.263, accepted that retrospective effect of the amended Section 36(1)(viii) and sec.41(4A) may not be given to the special reserve created before the amendment. Accordingly, the Tribunal follows therefore that there is an element of ambiguity in construing the said section pre and post amendment and the ratio of the judgment of the jurisdictional Court in the case of *CIT vs. J.V.Kolte* 235 ITR 239 (Bom) will apply.

45. We further find that Hon'ble Bombay High Court has affirmed the decision this Tribunal in the case *LIC Housing Finance Ltd* reported in [2014] 367 ITR 458 (Bom) by observing that the note on accounts clarified that the special reserve had

been created over the years out of the profits and that the first of these reserves related to the amount which had been transferred up to the financial year 1995-96. According to Hon'ble Court it was not as though the assessee had surreptitiously transferred any amount nor was it the case of the Revenue that transfer of such funds from the special reserve was in any manner contrary to any law. Hon'ble High Court affirmed the order of Tribunal that there was no obligation to maintain fund when the fund was created and the withdrawal was from the special reserve created before the obligation to maintain the fund came in to effect on and after 01.04.1998. Hon'ble High Court has particularly relied on the decision of Hon'ble Delhi High Court in the case of CIT vs. Industrial Finance corporation of India Ltd. [2012] 66 DTR 490 (Delhi) and relevant observation reads as under:

*“11. This court held in the matter of Grasim Industries Ltd. (supra) that the condition precedent to the exercise of ITA604.11 jurisdiction under section 263 was that the order sought to be revised must be erroneous insofar as it was prejudicial to the interests of the revenue. Where two views are inherently possible and the assessment could not be subjected to the jurisdiction under section 263. A similar view has been taken by the another Division Bench of this Court in CIT vs. Gabriel India Ltd. (supra) this view has been consistently followed. On the issue pertaining to applicability of the amended provision of reserve funds created prior to the amendment the Delhi High Court in CIT vs. I.F.C.I. (supra) has followed the analysis of the Kerala High Court in the matter of Kerala Finance Corporation Vs. CIT (2003) 261 ITR 708 (Ker). While interpreting the provisions of the amendment, the Kerala High Court held that the amendment was prospective and would be applicable only for the assessment year 1998-99 and therefore cannot be applied for the assessment years prior thereto.*

*The said judgment has held that deduction that has been allowed in respect of amounts transferred to the special reserve under section 36(1)(viii) of the Act prior to amendment and which amounts were subsequently withdrawn should not be subjected to tax. Going by the plain language as it stood at the relevant time, it can be seen that creation of a reserve was sufficient to entitle the assessee to claim the benefit under section 36(1)(viii) and the assessee was not obliged to maintain the said reserve. The inclusion of words "and maintain" was not retrospective. We doITA604.11 not find any reason to differ from this view expressed by the Kerala High Court and which was quoted with approval by Delhi High Court in CIT vs. I.F.C.I. (supra).”*

We find that Hon’ble Bombay High Court in the case LIC Housing Finance (supra) has observed that going by the plain language as it stood at the relevant time, it can be seen that creation of a reserve was sufficient to entitle the assessee to claim the benefit under section 36(i)(viii) of the Act and the assessee was not obliged to maintain the said reserve. According to Hon’ble Court the inclusion of the words “and maintain” was not retrospective. In this regard, we are of the view that Hon’ble Supreme Court in the case CIT vs. Vatika Township P. Ltd. [2014] 367 ITR 466 (SC) has also decided the issue of retrospectivity of a particular provision of levy of surcharge on Income-tax in case of block assessments. Hon’ble Supreme Court observed

33. *We would also like to point out, for the sake of completeness, that where a benefit is conferred by a legislation, the rule against a retrospective construction is different. If a legislation confers a benefit on some persons but without inflicting a corresponding detriment on some other person or on the public generally, and where to confer such benefit appears to have been the legislators*

*object, then the presumption would be that such a legislation, giving it a purposive construction, would warrant it to be given a retrospective effect. This exactly is the justification to treat procedural provisions as retrospective. In Government of India & Ors. v. Indian Tobacco Association<sup>5</sup>, the doctrine of fairness, to hold that a statute was retrospective in nature, was applied in the case of Vijay v. State of Maharashtra & Ors.<sup>6</sup>It was held that where a law is enacted for the benefit of community as a whole, even in the absence of a provision the statute may be held to be retrospective in nature. However, we are confronted with any such situation here.*

34. *In such cases, retrospectively is attached to benefit the persons in contradistinction to the provision imposing some burden or liability where the presumption attaches towards prospectivity. In the instant case, the proviso added to Section 113 of the Act is not beneficial to the assessee. On the contrary, it is a provision which is onerous to the assessee. Therefore, in a case like this, we have to proceed with the normal rule of presumption against retrospective operation. Thus, the rule against retrospective operation is a fundamental rule of law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication. Dogmatically framed, the rule is no more than a presumption, and thus could be displaced by out weighing factors.*

35. *Let us sharpen the discussion a little more. We may note that under certain circumstances, a particular amendment can be treated as clarificatory or declaratory in nature. Such statutory provisions are labeled as “declaratory statutes”. The circumstances under which a provision can be termed as “declaratory statutes” is explained by Justice G.P. Singh<sup>7</sup> in the following manner:*

*“Declaratory statutes*

*The presumption against retrospective operation is not applicable to declaratory statutes. As stated in CRAIES and approved by the Supreme Court: “For modern purposes a declaratory Act may be defined as an Act to remove doubts existing as to the common law, or the meaning or effect of any statute. Such Acts are usually held to be retrospective. The usual reason for*

*passing a declaratory Act is to set aside what Parliament deems to have been a judicial error, whether in the statement of the common law or in the interpretation of statutes. Usually, if not invariably, such an Act contains a preamble, and also the word 'declared' as well as the word 'enacted'. But the use of the words 'it is declared' is not conclusive that the Act is declaratory for these words may, at times, be used to introduced new rules of law and the Act in the latter case will only be amending the law and will not necessarily be retrospective. In determining, therefore, the nature of the Act, regard must be had to the substance rather than to the form. If a new Act is 'to explain' an earlier Act, it would be without object unless construed retrospective. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act. It is well settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended. The language 'shall be deemed always to have meant' is declaratory, and is in plain terms retrospective. In the absence of clear words indicating that the amending Act is declaratory, it would not be so construed when the pre-amended provision was clear and unambiguous. An amending Act may be purely clarificatory to clear a meaning of a provision of the principal Act which was already implicit. A clarificatory amendment of this nature will have retrospective effect and, therefore, if the principal Act was existing law which the Constitution came into force, the amending Act also will be part of the existing law.”*

*The above summing up is factually based on the judgments of this Court as well as English decisions.*

*A Constitution Bench of this Court in Keshavlal Jethalal Shah v. Mohanlal Bhagwandas & Anr.<sup>8</sup>, while considering the nature of amendment to Section 29(2) of the Bombay Rents, Hotel and Lodging House Rates Control Act as amended by Gujarat Act 18 of 1965, observed as follows:*

*“The amending clause does not seek to explain any pre-existing legislation which was ambiguous or defective. The power of the High Court to entertain a petition for exercising revisional juris-diction was*

*before the amendment derived from s. 115, Code of Civil Procedure, and the legislature has by the amending Act attempted to explain the meaning of that provision. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act.”*

36. *It would also be pertinent to mention that assessment creates a vested right and an assessee cannot be subjected to reassessment unless a provision to that effect inserted by amendment is either expressly or by necessary implication retrospective. (See Controller of Estate Duty Gujarat-I v. M.A. Merchant<sup>9</sup>. We would also like to reproduce hereunder the following observations made by this Court in the case of Govinddas v. Income-tax Officer<sup>10</sup>, while holding Section 171 (6) of the Income- Tax Act to be prospective and inapplicable for any assessment year prior to 1<sup>st</sup>April, 1962, the date on which the Income Tax Act came into force:*

*“11. Now it is a well settled rule of interpretation hallowed by time and sanctified by judicial decisions that, unless the terms of a statute expressly so provide or necessarily require it, retrospective operation should not be given to a statute so as to take away or impair an existing right or create a new obligation or impose a new liability otherwise than as regards matters of procedure. The general rule as stated by Halsbury in Vol. 36 of the Laws of England (3<sup>rd</sup> Edn.) and reiterated in several decisions of this Court as well as English courts is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or of evidence are prima facie prospectively and retrospective operation should not be given to a statute so as to affect, alter or destroy an existing right or create a new liability or obligation unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only.”*

37. *In the case of C.I.T., Bombay v. Scindia Steam Navigation Co. Ltd.<sup>11</sup>, this Court held that as the liability to pay tax is computed according to the law in force at the beginning of the assessment year, i.e., the first day of April, any change in law affecting tax liability after that date though made during the currency of the*

*assessment year, unless specifically made retrospective, does not apply to the assessment for that year.*

**Answer to the Reference**

*38. When we examine the insertion of proviso in Section 113 of the Act, keeping in view the aforesaid principles, our irresistible conclusion is that the intention of the legislature was to make it prospective in nature. This proviso cannot be treated as declaratory/statutory or curative in nature. There are various reasons for coming to this conclusion which we enumerate herein below:*

46. In view of the above referred judgements of Hon'ble Supreme Court and of Hon'ble Bombay & Delhi High Court, we are of the view that the amendment introduced in the said section by the Finance Act 1997 is not clarificatory. It has been made effective from AY 1998-99 and therefore must be construed as prospective only. The condition of maintenance of special reserve was made applicable only from 1.4.1998 and did not affect a reserve created prior thereto and consequently withdrawal from special reserve created prior to AY 1998-99 would not attract the deeming provision of Section 41(4A). Further, we are of the view that in construing a fiscal statute and in determining the liability of a subject to tax, one must have regard to the strict letter of the law and not merely to the spirit of the statute or the substance of the law. The onus is on the Revenue to satisfy the court that the case falls strictly within the provisions of the law. If the case is not covered by the four corners of the provision of the taxing statute, no tax can be imposed by inference or by analogy or by trying to probe into the intention of the Legislature and by considering what was the substance of the matter. If a section in a taxing statute is of doubtful and ambiguous meaning, it is not possible out of that ambiguity to extract a new and added obligation not formerly cast upon the taxpayer. The legal position is well settled that when a provision admits of two interpretations a view which is favourable to the assessee should be adopted.

Hence, we decide this issue in favour of assessee and the orders of lower authorities are set aside. This issue is decided in favour of assessee.

47. In the result, assessee's appeals as well as Revenue's appeals, all are allowed partly for statistical purposes as indicated above.

Order pronounced in the open court on 31-01-2017

**Sd/**  
(RAJESH KUMAR)  
ACCOUNTANT MEMBER

**Sd/-**  
(MAHAVIR SINGH)  
JUDICIAL MEMBER

Mumbai, Dated: 31-01-2017

*Sudip Sarkar /Sr.PS*

**Copy of the Order forwarded to:**

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

//True Copy//

BY ORDER,  
Assistant Registrar  
ITAT, MUMBAI