

**IN THE INCOME TAX APPELLATE TRIBUNAL "B", BENCH KOLKATA**

**BEFORE SHRI N.V. VASUDEVAN, JM & DR. A.L.SAINI, AM**

**आयकरअपीलसं./ITA No.1633, 1634 & 1635/Kol/2016**

**(निर्धारणवर्ष / Assessment Years: 2009-10, 2011-12 & 2012-13)**

<b>ACIT, LTU-2, Kolkata</b>	<b>Vs.</b>	<b>M/s Century Plyboards (I) Ltd.</b>
6 <sup>th</sup> Floor, Large Tax Payer Unit, 180, Shantipally, Kolkata – 700 107.		6, Lyons Range, Kolkata – 700 001.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No. : AABCC 1682 J		
<b>(Appellant)</b>	<b>..</b>	<b>(Respondent)</b>

Appellant by :Md. Usman, CIT(DR)

Respondent by :Shri D. S. Damle, FCA

सुनवाईकीतारीख/ **Date of Hearing** : **06/12/2017**

घोषणाकीतारीख/**Date of Pronouncement** : **25/01/2018**

**आदेश / O R D E R**

**Per Dr. Arjun Lal Saini, AM:**

The captioned three appeals filed by the Revenue, pertaining to Assessment Years 2009-10, 2011-12 & 2012-13, are directed against the orders passed by the Id. Commissioner of Income Tax (Appeals), which in turn arise out of assessment orders passed by the Assessing Officer under section 143(3)/263 of the Income Tax Act, 1961 (hereinafter referred to as the 'Act').

2. Since, these three appeals relate to the same assessee, different assessment years, identical issues are involved, therefore, these have been clubbed and heard together and a consolidated order is being passed for the sake of convenience and brevity.

**3. First we take Revenue's appeal in ITA No.1633/Kol/2016, A.Y. 2009-10.**

At the outset, itself the Id. Counsel for the Assessee pointed out that in this case the Id. Commissioner of Income Tax, had exercised the jurisdiction u/s 263 of the Income Tax Act, 1961 and directed the Assessing Officer to pass Denovo assessment order. Later, the assessee filed an appeal before the Hon`ble ITAT challenging the validity of the order passed by the CIT under section 263 of the I.T. Act. The revision order dated 28.03.2014 passed under section 263 by the CIT had been cancelled and quashed by the Hon`ble Income Tax Appellate Tribunal, Kolkata in ITA No.643/Kol/2014 dated 20.01.2016, and therefore, the impugned order in appeal is no longer valid and has become infructuous.

We have heard both the parties on this preliminary issue. We note that order passed by the Id CIT under section 263 of the Act, dated 28.03.2014 has been quashed by the coordinate Bench of ITAT Kolkata, vide ITA No.643/Kol/2014, dated 20.01.2016, therefore, the said appeal filed by the Revenue, in ITA No.1633/Kol/2016, does not have any leg to stand, and hence, the appeal filed by the Revenue becomes infructuous in the eyes of law.

3.1 In the result, appeal filed by the Revenue ( in ITA No.1633/Kol/2016), is dismissed.

**4. Now, we shall take appeals filed by the Revenue in ITA No.1634/Kol/2016 for A.Y. 2011-12 and Appeal No.1635/Kol/2016 for A.Y. 2012-13.**

5. In these two appeals, common issues are involved therefore, these are being adjudicated together. A comparative Chart for both the years are given below which explains, ground-wise in remark column, that these issues are covered by assessee's own case:

Sl. No.	Issue	AY 2011-12	AY 2012-13	Remarks
1.	Disallowance of deduction under 80-IC for Ferro unit	Ground No. 1 and 2		This issue is covered in ITA No. 1873/Kol/2014, for AY 2010-11 and finding are given in Para 6 of this

				order. This issue is also covered in ITA No.2306 & 2307/Kol/2013 for AY 2007-08 & 2008-09 and findings are given in in Para24 at Page16 of this order.
2.	Disallowance of deduction under 80IA for CFS (Sonai)-Kolkata	Ground Nos. 3 and 4	Ground No.1	This issue is covered in ITA No. 1873/Kol/2014 for AY 2010-11, and findings are given in Para 11 at Page12&13 of the order.
3.	Disallowance of deduction under 80IA for CFS (JJP)-Kolkata		Ground No.2	This issue is covered in ITA No. 1873/Kol/2014 for AY 2010-11. and finding are given in Para 11 at Page12&13 of the order.
4.	Disallowance of Leaserent amortization	Ground No. 5	Ground No. 4	This issue is covered in ITA No. 1873/Kol/2014 for AY 2010-11 and finding are given in Para 16 at Page18 of the order.
5.	Disallowance under section 14A read with 8D of the Rules	Ground Nos. 6 and 7	Ground No.3	This issue is covered in ITA No. 1873/Kol/2014 for AY 2010-11, and finding are given in Para 20 at Page26 of the order.

**6. Ground Nos.1&2 raised by the Revenue in A.Y 2011-12 in ITA No.1634/Kol/2016 wherein the issues involved is regarding disallowance of deduction under 80-IC for Ferro unit, since the assessee failed to make any substantial expansion.**

This issue is squarely covered by assessee's own case in ITA No. 1873/Kol/2014, for AY 2010-11, and finding are given in Para 6 of this order which read as follows:

*"6. We have heard the rival contentions of both the parties and perused the material available on record. At the outset, we find that the instant case has already been decided in favour of assessee in assessee's own case in ITA No. 2307/Kol/2013 (supra) and the relevant extract of the order is reproduced below:-*

*"23. We have given a very careful consideration to the rival submissions. It is an admitted fact that M/s Shyam Century Ferrous Ltd established a new undertaking in the state of Meghalaya in AY 2002-03 for manufacturing of ferro alloys. In respect of profits derived from the said undertaking that the assessee was entitled to claim deduction u/s.80IB(4) of the Act. The deduction u/s. 80IB of the Act was available for a period of ten years. M/s Shyam Century Ferrous Ltd established a new undertaking in AY 2002-03 and was entitled to claim deduction for a period of 10 years. For AY 2003-*

04 the said assessee claimed deduction and was allowed deduction u/s 80IB of the Act. In AY 2004-05 there was a change in the Act whereby deduction u/s. 80IC of the Act was available for an undertaking situated in the North Eastern states. Since the undertaking of M/s Shyam Century Ferrous Ltd was in Meghalaya, the undertaking can claim deduction u/s 80IC of the Act which was hitherto claimed by the said assessee u/s. 80IB(4) of the Act. The only requirement for claiming deduction u/s 80IC of the Act was that the total period of deduction including the period of deduction u/s. 80IB of the Act should not exceed 10 years. This condition was admittedly satisfied in the case of M/s Shyam Century Ferrous Ltd. M/s Shyam Century Ferrous Ltd amalgamated with the assessee and the assessee claimed deduction u/s. 80IC of the Act for AY 2008-09. The AO took a view that the assessee can claim deduction u/s. 80IC of the Act only if it makes a substantial expansion. This was not the correct position in law as has been held by CIT(A). In our opinion the CIT(A) has rightly come to the conclusion that in respect of unit which claimed deduction earlier u/s 80IB of the Act such unit will continue to get the benefit of deduction of 80IC of the Act subject to the limitation of ten year period. The deduction for an undertaking making substantial expansion of the existing undertaking is not applicable in the case of the assessee. We are of the view that the conclusions drawn by CIT(A) on this issue are fully justified and does not call for any interference. Accordingly this appeal of the revenue is dismissed.”

24. In the result ITA No.2307/Kol/2013 is dismissed.

Respectfully following the same, we find no reason to interfere with the finding arrived by the Ld. CIT(A). Under the circumstances, this ground of Revenue’s appeal is dismissed.”

6.1 As the issue is squarely covered in favour of the assessee by the decision of the coordinate bench, in assessee`s own case and there is no change in facts and law and the Revenue is unable to produce any material to controvert the aforesaid findings and the Id CIT(A) has allowed the appeal of the assessee by following the decision of Tribunal in assessee`s own case for A.Y. 2010-11, we find no reason to interfere in the said order of the Id CIT(A) and the same is hereby upheld. Therefore, these grounds Nos.1 & 2 of appeal of Revenue are dismissed.

**7. Ground Nos.3 & 4 in ITA No.1634/Kol/2016 for AY 2011-12 and Ground No.1 in ITA No.1635/Kol/2016 for AY 2012-13 raised by the**

**revenue is regarding disallowance of deduction under 80-IA for CFS (Sonai) Kolkata,( an infrastructural facility).**

This issue is covered in assessee`s own case, in ITA No. 1873/Kol/2014, for A.Y. 2010-11, and findings are given in Para 11 at Page12&13 of the order, which read as under:

*“11. We have heard the rival contentions of both the parties and perused the material available on record. From the foregoing discussion, we find that AO has denied the deduction claimed by the assessee u/s 80IA of the Act on the ground that assessee is not engaged in business of infrastructure facilities. However, Ld. CIT(A) granted the relief to assessee by observing that assessee is engaged in CFS activity which is infrastructure facility and therefore eligible for deduction u/s 80IA of the Act.*

*11.1 Now the issue before us arises whether assessee is eligible for deduction u/s. 80IA of the Act in respect of CFS in the given facts and circumstances. There are certain undisputed facts which are enumerated below :-*

- i) The assessee has acquired land on lease form KPT and also paid lease premium to KPT which is reflecting in the financial statement of assessee.*
- ii) The assessee is approved CFS as evident from the letter written by KPT which reads as under:-*

*Kolkata Port Trust  
15, Strand Road  
Kolkata-700001*

*Fax No.033-2230-4901/  
2213-7367  
Telephone No.2230-2045  
(direct)  
2230-3451 Extn.371  
E.mail:osd@kopt.in  
[asimkopt@gmail.com](mailto:asimkopt@gmail.com)*

*Webside:  
ww.kolkataporttrust.gov.in  
Administration Department  
January, 31, 2013*

*No.Admn/140/E  
M/s Century Plyboards(I)Ltd.,  
4, Fairlie Place, HMP House,  
2<sup>nd</sup> Floor,  
Kolkata-700001.*

*Sir,  
Sub: M/s Century Plyboards (I) Ltd. is a CFS operator-confirmation*

*With reference to your letter dated 22.1.2013, this is to confirm as follows:-*

*“Kolkata Prot Trust has given on lease land measuring 22096 sq. mtrs. At B and c Block, Sonai for setting up and operating Container Freight Station (CFS) that came into operation on 24<sup>th</sup> November, 2008 and that the said CFS is an extended part of port and provide infrastructural support to decongest the port by carrying out activities relating to handling of containers which otherwise would have been carried out by the port.”*

*Yours faithfully,  
Sd/-  
(A.K.Mukhopadhyaya)  
Secretary (I/C)”*

*iii) The name of assessee for setting up of CFS was duly approved by the Letter of Intent dated 08.09.2008 issued by the Ministry of Commerce & Industries.*

*iv) The name of the assessee is reflecting in the Notification issued by the Commissioner of Custom in the Public Notice No.59/2008 dated 05.11.2008 wherein it was notified that the assessee is custodian for operating the CFS at KP.*

*v) The CBDT has clarified in its Circular No. 10/2005 issued on 16.12.2005 by stating that the port for the purpose of Section 80IA of the Act would include structures used for the purpose of loading & unloading if the Port Authority issues certificate in this regard.*

*On perusal of the above stated facts, we find that there remains no ambiguity with regard to the fact that assessee is engaged in CFS which is an infrastructure facilities as envisaged u/s 80IA of the Act. The deduction was denied by the AO on the ground that assessee is not engaged in the business of development of infrastructure facilities. However, after examining the above stated facts we find that the assessee has taken a land on lease for setting up the infrastructure facilities at KP and has incurred the cost for its development. Therefore, we hold that the assessee has set up the CFS facility and operating the same and accordingly eligible for claiming the deduction u/s. 80IA of the Act. In the light of above reasoning, we hold that the order of the Ld. CIT(A) is correct and in accordance with law and no interference is called for. We uphold the same. This ground of Revenue’s appeal is dismissed.”*

7.1 As the issue is squarely covered in favour of the assessee by the decision of the coordinate bench, in assessee`s own case and there is no change in facts and law and the Revenue is unable to produce any material to controvert the aforesaid findings and the Id CIT(A) has allowed the appeal of the assessee by following the decision of Tribunal in assessee`s own case for A.Y. 2010-11, we find no reason to interfere in the said order of the

Ld CIT(A) and the same is hereby upheld. Therefore, these grounds Nos.3 & 4 for A.Y.2011-12 and ground No.1 for A.Y.2012-13 of appeals of Revenue are dismissed.

**8.Ground No.2 in ITA No.1635/Kol/2016, for A.Y. 2012-13 raised by the revenue is regarding disallowance of deduction under 80IA for CFS (JJP) Kolkata (infrastructural facility).**

This issue is covered in assessee`s own case in ITA No.1873/Kol/2014 for A.Y. 2010-11, and finding are given in Para 11 at Page 12 & 13 of the order, which read as under:

*“11. We have heard the rival contentions of both the parties and perused the material available on record. From the foregoing discussion, we find that AO has denied the deduction claimed by the assessee u/s 80IA of the Act on the ground that assessee is not engaged in business of infrastructure facilities. However, Ld. CIT(A) granted the relief to assessee by observing that assessee is engaged in CFS activity which is infrastructure facility and therefore eligible for deduction u/s 80IA of the Act.*

*11.1 Now the issue before us arises whether assessee is eligible for deduction u/s. 80IA of the Act in respect of CFS in the given facts and circumstances. There are certain undisputed facts which are enumerated below:-*

- i) The assessee has acquired land on lease form KPT and also paid lease premium to KPT which is reflecting in the financial statement of assessee.*
- ii) The assessee is approved CFS as evident from the letter written by KPT which reads as under:-*

*Kolkata Port Trust  
15, Strand Road  
Kolkata-700001*

*Fax No.033-2230-4901/  
2213-7367  
Telephone No.2230-2045  
(direct)  
2230-3451 Extn.371  
E.mail:osd@kopt.in  
[asimkopt@gmail.com](mailto:asimkopt@gmail.com)*

*Webside:  
ww.kolkataporttrust.gov.in  
Administration Department  
January, 31, 2013*

*No.Admn/140/E  
M/s Century Plyboards(I)Ltd.,*

4, Fairlie Place, HMP House,  
2<sup>nd</sup> Floor,  
Kolkata-700001.

Sir,

Sub: M/s Century Plyboards (I) Ltd. is a CFS operator-confirmation

With reference to your letter dated 22.1.2013, this is to confirm as follows:-

“Kolkata Prot Trust has given on lease land measuring 22096 sq. mtrs. At B and c Block, Sonai for setting up and operating Container Freight Station (CFS) that came into operation on 24<sup>th</sup> November, 2008 and that the said CFS is an extended part of port and provide infrastructural support to decongest the port by carrying out activities relating to handling of containers which otherwise would have been carried out by the port.”

Yours faithfully,

Sd/-

(A.K.Mukhopadhyaya)

Secretary (I/C)”

iii) The name of assessee for setting up of CFS was duly approved by the Letter of Intent dated 08.09.2008 issued by the Ministry of Commerce & Industries.

iv) The name of the assessee is reflecting in the Notification issued by the Commissioner of Custom in the Public Notice No.59/2008 dated 05.11.2008 wherein it was notified that the assessee is custodian for operating the CFS at KP.

v) The CBDT has clarified in its Circular No. 10/2005 issued on 16.12.2005 by stating that the port for the purpose of Section 80IA of the Act would include structures used for the purpose of loading & unloading if the Port Authority issues certificate in this regard.

On perusal of the above stated facts, we find that there remains no ambiguity with regard to the fact that assessee is engaged in CFS which is an infrastructure facilities as envisaged u/s 80IA of the Act. The deduction was denied by the AO on the ground that assessee is not engaged in the business of development of infrastructure facilities. However, after examining the above stated facts we find that the assessee has taken a land on lease for setting up the infrastructure facilities at KP and has incurred the cost for its development. Therefore, we hold that the assessee has set up the CFS facility and operating the same and accordingly eligible for claiming the deduction u/s. 80IA of the Act. In the light of above reasoning, we hold that the order of the Ld. CIT(A) is correct and in

*accordance with law and no interference is called for. We uphold the same. This ground of Revenue's appeal is dismissed."*

8.1 As the issue is squarely covered in favour of the assessee by the decision of the coordinate bench, in assessee's own case and there is no change in facts and law and the Revenue is unable to produce any material to controvert the aforesaid findings and the Id CIT(A) has allowed the appeal of the assessee by following the decision of Tribunal in assessee's own case for A.Y. 2010-11, we find no reason to interfere in the said order of the Id CIT(A) and the same is hereby upheld. Therefore, this ground No.2, for A.Y.2012-13 of appeal of Revenue is dismissed.

**9. Ground No.5 in ITA No.1634/Kol/2016, for AY 2011-12 and Ground No.4 in ITA No.1635/Kol/2016, for AY 2012-13 raised by the Revenue is regarding disallowance of lease rent amortization.**

This issue is covered in assessee's own case in ITA No.1873/Kol/2014 for A.Y. 2010-11 and finding are given in Para 16 at Page 18 of the order, which read as under:

*"16. We have heard rival contentions of both the parties and perused and carefully considered the material on record; including the judicial pronouncements cited and placed reliance upon. The issue in the instant case revolves to the amount of the lease premium amortized by the assessee over a lease period as discussed above. The assessee after the commencement of the business has claimed the proportionate deduction of the aforesaid expenditure pertaining to the year under consideration. Undisputedly the proportionate deduction was claimed by assessee u/s 37(1) of the Act after the commencement of its business.*

*16.1 Indeed, case law relied on by Ld DR as discussed above is against the assessee wherein it has been held by the Hon'ble Madras High Court in the case of Enterprising Enterprise (supra) and aforesaid judgment was delivered by the Hon'ble Madras High Court vide order dated 01-04-2004 which was subsequently affirmed by Hon'ble Supreme Court vide order dated 04.12.2006. However, subsequent to the aforesaid judgment, we find that the CBDT has issued a Circular 9/2014 dated 23.04.2014 wherein the*

*impugned expenditure was allowed over the lease period after the commencement of business and relevant extract of the Circular is reproduced below:-*

*2. In such projects, the developer (hereinafter referred to as 'assessee'), in terms of concessionaire agreement with Government or its agencies is required to construct, develop and maintain the infrastructural facility of roads/highways which, inter-alia, includes laying of roads, bridges, highways, approach roads, culverts, public amenities etc. at its own cost and its utilization thereof for a specified period. In lieu of consideration of the expenditure incurred on construction, operation and maintenance of the infrastructure facility covered by the period of the agreement, the assessee is accorded a right to collect toll from users of such facility. The expenditure incurred by such assessee on development and construction of such infrastructural facility are capitalized in the accounts. It is seen that in returns-of- income, assesseees are generally claiming depreciation on such capitalized expenditure treating it as an 'intangible asset' in terms of section 32(1)(ii) of the Act while in assessments, such claims are being disallowed by the Assessing Officer on the grounds that such infrastructural facility is not owned, wholly or partly, by the taxpayer which is an essential condition for claiming depreciation and further right to collect toll does not fall in any of the categories of 'intangible assets' specified in sub-clause(ii) of sub-section (1) of section 32 of the Act.*

*3. In BOT arrangements for development of roads/highways, as a matter of general practice, possession of land is handed over to the assessee by the Government/notified authority for the purposes of Construction of the project without any actual transfer of ownership and such assessee has only a right to develop and maintain such asset. It also enjoys the benefits arising from use of asset through collection of Toll for a specified period without having actual ownership over such asset. Therefore, the rights in the land remain vested with the Government or its agencies. Thus, as assessee does not hold any rights in the project except recovery of toll fee to recoup the expenditure incurred, it cannot therefore be treated as an owner of the property, either wholly or partly, for purposes of allowability of depreciation under section 32(1)(ii) of the Act. Thus, present provisions of the Act do not allow claim of depreciation on Toll ways due to non fulfillment of ownership criteria in such cases.*

*4. There is no doubt that where the assessee incurs expenditure on a project for development of roads/highways, he is entitled to recover cost incurred by him towards development of such facility (comprising of construction cost and other pre-operative expenses) during the construction period. Further, expenditure incurred by the assessee on such BOT projects brings to it an enduring benefit in the form of right to collect the toll during the period of the agreement. Hon'ble Supreme Court in the case of Madras Industrial Investment Corporation Ltd. vs. CIT in 225 ITR 802 , 2002-TIOL-290-SC-IT-LB allowed spreading over of liability over a number of years on the ground that there was continuing benefit to the company over a period. Therefore, analogously, expenditure incurred on an*

*infrastructure project for development of roads/highways under BOT agreement may be treated as having been made/incurred for the purposes of business or profession of the assessee and same may be allowed to be spread during the tenure of concessionaire agreement.*

*5. In view of above, Central Board of Direct Taxes, in exercise of the powers conferred under section 119 of the Act hereby clarifies that the cost of construction on development of infrastructure facility of roads/highways under BOT projects may be amortized and claimed as allowable business expenditure under the Act.*

*6. The amortization allowable may be computed at the rate which ensures that the whole of the cost incurred in creation of infrastructural facility of road/highway is amortized evenly over the period of concessionaire agreement after excluding the time taken for creation of such facility.*

*7. In the case where an assessee has claimed any deduction out of initial cost of development of infrastructure facility of roads/highways under BOT projects in earlier year, the total deduction so claimed for the Assessment Years prior to the Assessment Year under consideration maybe deducted from the initial cost of infrastructure facility of roads /highways and the cost 'so reduced' shall be amortized equally over the remaining period of toll concessionaire agreement.*

*8. It is hereby clarified that this Circular is applicable only to those infrastructure projects for development of road/highways on BOT basis where ownership is not vested with the assessee under the concessionaire agreement.*

*9. This may be brought to the notice of all concerned*

*The aforesaid Circular was issued on 23.04.2014 and subsequent to the judgment of Hon'ble Madras High Court as well as Hon'ble Supreme Court. The Circular being beneficial to the assessee is binding on the lower authorities. In our considered view, the AO before making any disallowance should have referred to the aforesaid Circular. In the background of the above discussion and precedent of the cases we do not find any infirmity in the order of Ld. CIT(A) and accordingly we uphold the same. This ground of Revenue is dismissed."*

9.1 As the issue is squarely covered in favour of the assessee by the decision of the coordinate bench, in assessee`s own case and there is no change in facts and law and the Revenue is unable to produce any material to controvert the aforesaid findings and the Id CIT(A) has allowed the appeal of the assessee by following the decision of Tribunal in assessee`s own

case for A.Y. 2010-11, we find no reason to interfere in the said order of the Id CIT(A) and the same is hereby upheld. Therefore, the ground No.5, for A.Y.2011-12 and ground No.4 for A.Y.2012-13 of appeals of Revenue are dismissed.

**10.Ground Nos.6 and 7 in ITA No.1634/Kol/2016 for AY 2011-12 and Ground No.3 in ITA No.1635/Kol/2016, for AY 2012-13, raised by the Revenue are regarding disallowance under section14A read with Rule 8D of the Rules.**

These issues/ grounds are covered in assessee`s own case in ITA No.1873/Kol/2014, for AY 2010-11, and finding are given in Para 20 at Page 26 of the order, which read as under:

*“20.Ld. DR before us submitted that it is the duty of the assessee to demonstrate that none of the borrowed fund has been used for the purpose of making the impugned investment and the assessee failed to discharge the onus lied on it. Therefore, AO had to make the disallowance as per the Rule 8D of the Rule. Ld. DR in this connection relied on the judgment of Hon'ble jurisdictional High Court in the case of Dhanuka and Sons reported in 339 ITR 319. Ld. DR vehemently relied on the order of AO and he requested the Bench to confirm the same.*

*On the other hand, Ld. AR before us submitted that AO in the assessment year 2009-10 has admitted the fact that no borrowed fund has been utilized for the purpose of making the impugned investment. Ld. AR in support of assessee`s claim has relied on the assessment order for AY 2009-10 in the assessee`s own case which is placed on pages 139 to 142 of the paper book. Thus, in the year under consideration there is no question of alleging that borrowed fund has been utilized in the investment without bringing any iota of evidence by the AO. He further submitted that there was sufficient fund available with the assessee and therefore it can be inferred that the impugned investment has been made out of own fund of the assessee. In this connection, Ld. AR submitted that the Hon'ble jurisdictional High Court after considering the judgment of Dhanuka & Sons reported in 339 ITR 319 in the case of Pr. CIT vs. Rasoi Ltd in GA No.633 of 2016 has observed as under:-*

*“it appears for both the assessment years the Appellate Authority held that there was no finding of direct nexus between the borrowed fund and*

investment in shares. The assessee's own funds were far in excess of the average total investments. There could not be any presumption of utilization of borrowed funds. Hence disallowance under section 14A read with Rule 8D(2)(ii) was deleted while disallowance of indirect expenses of Rs.1,82,346/- by application of Rule 8D(2)(iii) upheld with the direction to allow relief of the sum already disallowed by the appellant itself.

On appeal preferred by the Revenue the Tribunal held as follows:-

'we have heard rival submissions and gone through facts and circumstances of the case. We find that now the revenue could not establish that the investments made in shares giving exempted income is out of borrowed funds on which interest is paid by assessee. There is no nexus whatsoever. On specific query Ld. Sr. DR could not controvert that the assessee has made investment in shares giving exempt income out of own funds which is at about 2429 lacs and investment is at Rs.365 lacs only. Once this fact has not been denied and CIT(A) has categorically observed that the assessee has made investment in shares out of its own funds no disallowance can be attributed qua the interest paid on borrowed funds for investing the same in interest free funds. In view of the above, we confirm the order of CIT(A) on the common issue.....'

We find that this case has yielded concurrent finding of facts regarding expenditure incurred by the assessee for the purpose of earning the exempt income, by the Appellate Authority and the Tribunal. As such there is no scope for interference with such concurrent findings of facts. We, therefore, are not satisfied that the case involves any substantial question of law. The application and appeal are thus dismissed."

Ld. AR relied on the order of Ld. CIT(A) and prayed before the Bench to confirm the same.

21. We have heard the rival contentions of both the parties and perused the material available on record. In the instant issue, AO has made the disallowance as per Rule 8D of the Rule on the ground that the assessee has earned dividend income which is exempted from tax though the assessee has made a disallowance of ₹1.60 lakh and furnished the manner of working out the disallowance which is placed on pages 134 to 137 of the paper book. However, we find that the explanation submitted by the assessee while framing the assessment proceedings was rejected by AO without adducing any reason thereon. Therefore, it can be concluded that no defect of whatsoever was pointed out by the AO at the time of assessment proceedings. Rather the AO had resorted to the provision of Rule 8D of the Rule for the purpose of disallowance. However, the provision of law requires the AO before resorting to the disallowance has to record the satisfaction after referring the books of account of the assessee. But in the instant case, the AO has failed to do so. Therefore, we hold that the AO has passed his order against the provision of law. In holding so, we draw support from judgment of Hon'ble Delhi High Court dt. 25.2.2015 reported in

(2015) 372 ITR 694 (Del.) wherein it was held that without recording satisfaction there could be no question of disallowance u/s 14A read with Rule 8D.

Besides the above, we find that there was sufficient fund available with the assessee. Therefore any inference can be drawn that the impugned investment was made out own fund of assessee. In this connection, we rely in the case of Pr. CIT vs. Rasoi Ltd.(supra) The relevant extract reads as under:-

*“It appears for both the assessment years the Appellate Authority held that there was no finding of direct nexus between the borrowed fund and investment in shares. The assessee’s own funds were far in excess of the average total investments. There could not be any presumption of utilization of borrowed funds. Hence disallowance under section 14A read with Rule 8D(2)(ii) was deleted while disallowance of indirect expenses of Rs.1,82,346/- by application of Rule 8D(2)(iii) upheld with the direction to allow relief of the sum already disallowed by the appellant itself.*

*On appeal preferred by the Revenue the Tribunal held as follows:-*

*‘we have heard rival submissions and gone through facts and circumstances of the case. We find that now the revenue could not establish that the investments made in shares giving exempted income is out of borrowed funds on which interest is paid by assessee. There is no nexus whatsoever. On specific query Ld. Sr. DR could not controvert that the assessee has made investment in shares giving exempt income out of own funds which is at about 2429 lacs and investment is at Rs.365 lacs only. Once this fact has not been denied and CIT(A) has categorically observed that the assessee has made investment in shares out of its own funds no disallowance can be attributed qua the interest paid on borrowed funds for investing the same in interest free funds. In view of the above, we confirm the order of CIT(A) on the common issue.....’*

*We find that this case has yielded concurrent finding of facts regarding expenditure incurred by the assessee for the purpose of earning the exempt income, by the Appellate Authority and the Tribunal. As such there is no scope for interference with such concurrent findings of facts. We, therefore, are not satisfied that the case involves any substantial question of law. The application and appeal are thus dismissed.”*

We also further find that the AO in assessee’s own case in the immediate preceding AY 2009-10 has given the finding that no borrowed fund has been invested by the assessee in the impugned investment. The relevant extract of the assessment order for AY 2009-10 is reproduced below:-

*“... .. The assessee also filed details of source of fund for investment in subsidiaries and it was noticed that investment in subsidiaries is from assessee’s own capital/fund and not from borrowed fund attracting interest incident. On examination of consolidated accounts it was noticed that the*

*subsidiaries were operating business of manufacturing cement, plywood and generation of power. All subsidiaries has their full fledged management team and company was incurring no administrative expenses on running of these subsidiaries and only Board Room control exist over such subsidiaries....”*

*We also find that all the investments were made by the assessee in the subsidiary and group companies with the purpose of having the control over those companies. Thus, the dividend income was incidental to the assessee. In rejoinder Ld. DR has not brought anything on record to the argument advanced by Ld. AR. In this connection, we find that Hon'ble Delhi High Court in the case of CIT vs. Oriental Structural Engineers Pvt. Ltd. (supra) reported in 216 taxman 92 (Del). The relevant extract of the judgment reads as under:-*

*“3. On going through the above observations we are of the view that this is merely a question of fact and does not involve any question of law much less a substantial question of law as the Tribunal held that the expenses which have been claimed by the assessee were not towards the exempted income. The disallowance, therefore was rightly limited to a sum of Rs.40,556/-. The question of interpreting Rule 8D is not in dispute only the only dispute is with regard to facts which have been settled by the Tribunal.”*

*20.1 Now coming to the disallowance made by the AO under rule 8D(2)(iii) of the Rules, we find that Ld. CIT(A) has given direction to AO to consider only those investments which have yielded the dividend income during the year after having reliance in the order of Co-ordinate Bench of this Tribunal in the case of REI Agro Ltd. (supra) in ITA No.1331/Kol/2011 which was subsequently affirmed by the Hon'ble jurisdictional High Court. In the light of above reasoning, we hold that the order of the Ld. CIT(A) is correct and in accordance with law and no interference is called for. Accordingly, we uphold the same. This ground of Revenue's appeal is dismissed.”*

10.1 As the issue is squarely covered in favour of the assessee by the decision of the coordinate bench, in assessee's own case and there is no change in facts and law and the Revenue is unable to produce any material to controvert the aforesaid findings and the Ld CIT(A) has allowed the appeal of the assessee by following the decision of Tribunal in assessee's own case for A.Y. 2010-11, we find no reason to interfere in the said order of the Ld CIT(A) and the same is hereby upheld. Therefore, the ground Nos. 6 and

7 for A.Y.2011-12 and ground No.3 for A.Y.2012-13 of appeals of Revenue are dismissed.

11. In the result, all appeals of Revenue,( that is, ITA No.1633/Kol/16, A.Y.2009-10, ITA No.1634/Kol/16, A.Y. 2011-12 and ITA No.1635/Kol/16,A.Y.2012-13), are dismissed.

Order is pronounced in the open court on 25/01/2018.

**Sd/-**  
**(N.V. VASUDEVAN)**  
न्यायिक सदस्य / JUDICIAL MEMBER  
कोलकाता /Kolkata; दिनांक Dated **25/01/2018**  
[RS SPS]

**Sd/-**  
**(DR. A.L.SAINI)**  
लेखा सदस्य / ACCOUNTANT MEMBER

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant – ACIT, LTU-2, Kolkata
2. प्रत्यर्थी/ The Respondent- M/s Century Plyboards (I) Ltd.
3. आयकरआयुक्त(अपील) / The CIT(A),
4. आयकरआयुक्त/ CIT
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, कोलकाता/ DR, ITAT, Kolkata
6. गार्डफाईल / Guard file.  
सत्यापितप्रति

True Copy

By Order

Senior Private Secretary,  
Head of Office/D.D.O,  
I.T.A.T, Kolkata Benches,  
Kolkata.