IN THE INCOME TAX APPELLATE TRIBUNAL "E", BENCH MUMBAI

BEFORE SHRI R.C.SHARMA, AM
&
SHRI SANDEEP GOSAIN, JM

ITA No.7797/Mum/2011
ITA No.7654/Mum/2011
(**Assessment Year :2007-08 & 2008-09**)

DCIT CIR 3(1) R.No.607, Aayakar Bhavan Mumbai – 400 020	Vs.	M/s. Edelweiss Capital Ltd., Edelweiss House, 4th Floor, Off. CST Road, Kalina, Mumbai – 400 098
PAN/GIR No.		**AAACE1461E**
Appellant)	..	**Respondent**)

ITA No.1763/Mum/2013
(**Assessment Year :2009-10**)

DCIT CIR 3(1) R.No.607, Aayakar Bhavan Mumbai – 400 020	Vs.	M/s. Edelweiss Capital Ltd., 14th Floor, Express Towers, Nariman Point, Mumbai – 400 021
PAN/GIR No.		**AAACE1461E**
Appellant)	..	**Respondent**)

ITA No.6608/Mum/2011
(**Assessment Year :2008-09**)

M/s. Edelweiss Capital Ltd., 14th Floor, Express Towers, Nariman Point, Mumbai – 400 021	Vs.	Addl CIT RG 3(1) Aayakar Bhavan M.K. Road, Mumbai – 400 020
PAN/GIR No.: AAACE1461E		
Appellant)	..	**Respondent**)

ITA No.1584/Mum/2013
&
ITA No.4329/Mum/2014
(**Assessment Year : 2009-10 & 2010-11**)

M/s. Edelweiss Financial Services Ltd., Formerly Known as Edelweiss Capital Ltd., Edelweiss House, 4th Floor, Off. CST Road, Kalina, Mumbai – 400 098	Vs.	Addl CIT 3(1) Aayakar Bhavan Mumbai – 400 020
PAN/GIR No.: AAACE1461E		
Appellant)	..	**Respondent**)

ITA No.4652/Mum/2014
(**Assessment Year : 2010-11**)

DCIT CIR 3(1) R.No.607 Aayakar Bhavan Mumbai – 400 020	Vs.	M/s. Edelweiss Financial Services Ltd., Formerly known Edelweiss Capital Ltd., 14th Floor, Express Tower, Nariman Point, Mumbai – 400 021
PAN/GIR No.:		**AAACE1461E**
Appellant)	..	**Respondent**)

ITA No.315/Mum/2017
(**Assessment Year : 2009-10**)

DCIT CIR 4(1) (1), R.No.640, 6th Floor Aayakar Bhavan, M.K.Road Mumbai – 400 020	Vs.	M/s. Edelweiss Securities Pvt. Ltd., Edelweiss House, Off. CST Road, Kalina, Santacruz East, Mumbai - 400098
PAN/GIR No.		**AAACK3792N**
Appellant)	..	**Respondent**)

Assessee by	Shri Arvind Sonde
Revenue by	Shri Bhupendra Kumar Singh and Shri V. Tulin
Date of Hearing	**22/12/2017**
Date of Pronouncement	**14/03/2018**

आदेश / O R D E R

***PER BENCH*:**

These are cross appeals filed by assessee and revenue against the order of CIT(A)-Mumbai for the A.Y.2007-08 to 2010-11, in the matter of order passed u/s.143(3) / 143(3) r.w.s. 147 of the IT Act.

2. Most of the grounds are common in all the years under consideration. Ld. AR placed on record orders of jurisdictional High Court, orders of

Tribunal including orders of group concerns covering the issues under consideration.

3. Common grievance of the revenue in all the years pertains to disallowance of interest u/s.36(1)(iii) of the IT Act being difference of interest on loan given to subsidiary companies, and disallowance of interest under rule 8D (2)(ii) of I.T.Act.

4. Common grievance of assessee in all the years pertains to disallowance u/s.14A r.w.R. 8D(2)(iii).

5. Rival contentions have been heard and record perused.

6. Facts in brief are that assessee is engaged in the business of advisory and transactional services, trading / investment in securities and derivatives. During the course of scrutiny assessment for the A.Y.2007-08, AO disallowed claim of deduction of interest paid to the extent of differential rate in between the borrowings made from M/s. Lehman Brothers and the interest charged on the short term leading to wholly owned subsidiary companies amounting to Rs.65,09,590/-. The A.O. has discussed this issue in detail in para 4 of the assessment order. The relevant portion of A.O.'s order is extracted herein below: -

> *"After analysis of Balance Sheet and fund flow, it emerges that the loan received from M/s.Lehman Brothers has been utilized for making loans to subsidiary companies. Admittedly, the rate of interest charged is lower than the rate of interest paid to M/s.Lehman Brothers. The assessee is engaged in the business of merchant banking and advisory services. The assessee has given large loans to such subsidiary companies. Therefore, it is evident that the main purpose of the loan taken from M/s.Lehman Brothers was to provide fund to subsidiary companies, which are operating in different fields, such as NBFCs, Insurance business etc. In the case of ascessee*

company, there was no reason other than to provide funds to its subsidiary companies for taking loan from,M/s.Lehman Brothers. Therefore, by this transaction, the assessee company has incurred loss on account of difference in rate of interest charged and rate of interest paid, Such loss cannot be treated as allowable considering that the transaction is a non-commercial transaction.
In view of the above discussion, the loss arising on account of difference between the rate of interest paid to M/s. Lehman Brothers and rate of interest charged from subsidiary companies is hereby disallowed."

7. By the impugned order, CIT(A) deleted the disallowance after observing as under:-

"8.2 I have considered the A.O.'s order as well as appellant AR's submission. It is an admitted fact that the appellant has issued 13.5% fully convertible debentures to Lehman Brothers and had advanced these funds, to its wholly owned subsidiaries on interest @ 9% p.a. It is further clear that the funds received on issuance of the 13.5% fully convertible debentures were for a period of 5 years whereas the funds advanced to subsidiary companies were repayable on call & demand. It is further clear the wholly owned subsidiaries are carrying on business activities related to Finance and Capital Markets. In the assessment orders passed u/s. 143(3), in the cases of wholly owned subsidiary companies, there is no finding recorded that the funds borrowed have not been used for business purposes. In the case of S.A. Builders Ltd. v CIT (288 ITR 1)(SC), it has been held on page 10 as under:
"However, where it Is obvious that a holding company has a deep interest in its subsidiary, and hence if the holding company advances borrowed money to a subsidiary and the same is used by the subsidiary for some business purposes, the appellant would, in our opinion, ordinarily be entitled to deduction of interest on its borrowed loans."

In the case of CIT v Dalmia Cement Bharat Ltd. 330 ITR 595 (Del) it has been held as under.

"We, therefore, answer the reference by ho/ding that the Tribunal was correct in holding that no portion of the interest paid by the assesses on its borrowed funds can be disallowed on the ground that a portion thereof has been diverted to subsidiary company. "
The other decisions relied by the A.R.'s also support the claim of the appellant that no disallowance is called for merely for the reason that the 5 year term borrowings from Lehman Brothers have been utilized for giving loans to wholly owned subsidiary companies at a lower rate of interest.
***8.3** In the circumstances the disallowance of claim of deduction of interest paid to the extent of the differential rate in between the borrowings made from Lehman Brothers and the interest charged on the short term lending to*

> *wholly owned subsidiary companies of Rs.65,09,590/- is deleted. Thus, the appellant this ground of appeal is allowed."*

8. During the course of hearing before us, the learned AR has relied on the following judicial pronouncements in support of contention that no disallowance of interest is warranted in case of advance to subsidiary at concessional rate of interest or without interest

- *Hero Cycle Pvt. Ltd vs CIT [379 ITR 347 SCI*
- *S-A. Builders Pvt. Ltd. Vs CIT [288 ITR 0001 SC]*
- *CIT vs Reliance Communication Infrastructure Limited [260 CTR 0159]*
- *ACIT vs Reliance Communication Infrastructure Limited [2009-TIOL-313 ITAT-Mum]*
- *CIT vs Dalmia Cement (Bharat) Limited [330 ITR 0595]*
- *ACIT vs Edicon Mining Equipment Pvt. Limited RTA 77S8/Mum/20101*
- *ApnalQaa.com India Private Limited [2011-TIQL-295-ITAT-Mmnl*
- *Trigyn Technologies Limited [TTA 4855/Mum/20091*
- *Bhogilal Laherchand and Sons [ITA 66/Mum/2010]*

9. Learned DR relied on the order of the AO.

10. We have considered rival contentions and carefully gone through the orders of the authorities below and found from record that assessee has advanced loan to wholly owned subsidiaries at interest rate of 9%. AO found that assessee had received funds @13.5% by issuing fully convertible debentures. AO disallowed interest attributable to difference in rate of interest. CIT(A) deleted the same after observing that fund was given to wholly owned subsidiaries which are carrying on same business activities relating to finance and capital market, therefore, following the judicial pronouncements in case of SA Builders (SC), the interest expenditure cannot be disallowed. Furthermore, the judicial pronouncements by Hon'ble Supreme Court in case of Hero Cycles and

other decisions of Mumbai Tribunal as stated above supports that no disallowance of interest can be made merely because advance was given at a lower rate of interest or without charging any interest to the wholly owned subsidiaries. In the instant case before us, advance was given to the wholly owned subsidiaries at an interest rate of 9%. Following the proposition of law laid down in the above judicial pronouncements, we do not find any infirmity in the order of CIT(A) for deleting the disallowance of interest so made by the AO.

Assessment Year 2008-09:-

11. In ground No.1 & 2, revenue is aggrieved for deleting disallowance made by AO u/s.14A r.w.r. 8D(2)(ii) of the IT Rules.

12. Rival contentions have been heard and record perused. From the record, we found that assessee has agitated against the disallowance made u/s.14A r.w. Rule 8D. The assessee has earned dividend income on shares held as current investments and long term investments. The entire amount of dividend income has been claimed to be exempt u/s 10(34) & 10(35) of the Income-tax Act. In the computation of income enclosed with its return of income, the assessee had computed the expenses at Rs.51,46,120/- as expenditure incurred in relation to earning of exempt income by way of dividends. The assessee's AR has claimed that the expenses incurred in relation to the earning of Dividend income were computed on a scientific and reasonable basis having regard to the accounts of the assessee of the previous year. However, AO did not

accept assessee's contention and computed disallowance under Rule 8D (2)(ii) & 2(iii).

13. By the impugned order, CIT(A) deleted disallowance of interest under Rule 8D(2)(ii) after observing as under:-

> *"8.11 Before considering whether the AO has correctly computed the disallowance under Rule 8D, it would be worthwhile to consider the findings of the A.O. and the submissions made by the AR's. The AO, after recording his reasons for working out the disallowance under Rule 8D(2), has not determined any direct expenditure incurred in relation to the income which does not form part of the total income as per Rule 8D(2)(i). As regards Rule 8D(2)(ii), the AO has worked out the disallowance on account of gross interest debited to the Profit & Loss Account. From the findings recorded in the assessment order, it is seen that the AO has arrived at the satisfaction since the appellant did not furnish any documentary evidence or fund flow statement to prove the contention that the shares/mutual funds were not made out of borrowed funds. The AO in the circumstances held that it would be reasonable to conclude that the investments in tax free securities / shares have gone out from a common pool in proportion to the borrowed funds and own funds. In coming to this conclusion, the AO has held that the onus was on the assessee to show that there is a direct nexus in between the own funds and the investments in shares & securities which is generating exempt income. The appellant's AR's have contended that the AO has completely gone against the provisions of law while making this disallowance as per Rule 8D(2)(ii) of the Income Tax Rules. The AR's have argued that the appeilant has utilized the entire borrowings for the purposes of its business and hence the interest expenditure is directly attributable to the business activities carried on by the appellant.*
> ***8.12*** *The appellants AR's have specifically drawn my attention to the Balance Sheet of the appellant company as on 31.3.2007 and 31.3.2008, to ascertain the issue whether in the facts of appellants case, it can be said that the interest expenditure is directly attributable to any particular income or receipt. The perusal of the Balance Sheet reveals the following:*
> *(i) The appellant companies investments in shares & securities have gone up by Rs.8,11,30,37,781/- during the previous year;*
> *(ii) The share capital has gone up by Rs.32,68.28,376 crores and the reserves and surplus have increased by Rs.8,67,20,36,108/-;*
> *(iii)The profits for the year are Rs.39,31,05,132/-;*
> *(iv) The secured loans are on account of vehicle loan & housing loan;*
> *(v) During the previous year the appellant company raised secured loans by way of non-convertible debentures of Rs.25,60,00,000/- and obtained overdraft facility of Rs. 1,00,12,32,877/-;*
> *(vi) The unsecured loan of Rs.1,80,00,00,000/- was raised in the earlier year on issuance of fully convertible debentures to Lehman Brothers;*
> *(vii) During the previous year the appellant company raised unsecured loans on issuance of non-convertible debentures of Rs.4,25,00,00,000/- and commercial paper of Rs.3,75,00,00,000/-;*

(viii) During the previous year the appellant company has raised unsecured loans on inter-corporate deposits of Rs.3,10,00,000/-. The inter-corporate deposits are normally for the period of 3 months to 6 months tenure.; and
(ix) The interest earned on loans and advances was more than the interest paid on secured/ unsecured loans.
***8.13** On the basis of the aforesaid data/facts from the appellants balance sheet, it is evident that the appellant company had source of own funds (share capital, share premium & profits) and borrowed funds (unsecured loans repayable on demand and short term deposits). The own funds are in excess of the investments made in shares & securities. Further, in the facts of appellant's case, the additional funds by way of demand loans and short term deposits were fo.* short term duration. Hence they cannot be said to have been deployed for the purposes of making investments during the year unless and until proximate relation/nexus is established by the A.O. that such investments have been sourced from the borrowings. Thus, it can be concluded that the borrowed funds have not been used for the purposes of investments in shares & securities. Besides this, the appellant company is engaged in the business of investment banking and financing. Hence, on the basis of the Jurisdictional High Court decision in the case of CIT v Reliance Utilities and Power Ltd. [supra] it is held that the appellant company must have made investments out of its own funds rather than from borrowed funds and hence the interest expenditure incurred on borrowed funds deserves to be classified as business expenditure which is allowable u/s. 36(1)(iii) of the Act, being expenditure is directly attributable to the earning of business income.*
8.14 Besides this, I find that the A.O. has denied the claim of the appellant company merely on the ground that the appellant company has not furnished cash flow statement and also not proved with evidence that the investment in shares, mutual funds etc. generating exempt income has not been made from the borrowed funds. In this background, the A.O. has found the claim of the appellant company to be incorrect and has made the disallowance u/s.14A on proportionate basis of funds available to the appellant company of own capital as well as borrowed funds for working out the disallowance u/s.14A of the Act r.w.r.80. Then after the A.O. has taken the entire interest expenditure which has been debited by the appellant company as business expenditure to its profit and loss account for quantifying the disallowance uls.14A r.w.r.8D(2)(ii) of the Income-tax Rules in proportion of the ratio of the funds available to the appellant company. However, as I find that the legislation and the prescribed rules allow to take only such interest expenditure incurred for disallowance under Rule 8D(2)(ii) which is not directly attributable to any particular income or receipt. In the case of the appellant, the interest expenditure is directly attributable to the business income of the appellant company which is investment banking and financing etc. and hence I find that the A.O. was not correct in his action in taking the total interest expenditure which was debited to the profit and loss account of the appellant company for the said disallowance uls.14A of the Act though the A.O. has taxed the returned business income of the appellant company from such primary business activity of the appellant company under the head "Business and Profession' u/s.28 of the Income-tax Act. As the basic principles of taxation, expenditure incurred for earning of the income has to be allowed and hence I find that the A.O. was incorrect in his action to disallow the expenditure which otherwise is allowable u/s. 36(1)(iii) of the Act as business expenditure.

8.15 Further, to the aforesaid position of appellants own funds and also having regard to the Jurisdictional High Court decision in the case of CIT v Reliance Utilities and Power Ltd. [supra], the appellants AR further argued that the onus is on the AO to establish that the investments in shares and securities are sourced from the appellants borrowed fund and in the absence of such determination of such nexus, it would be incorrect to draw a presumption that the investments in tax free securities/shares have been made out of a common pool of funds in proportion to the borrowed funds and the own funds. I find that the Hon'ble Delhi ITAT have held in the case of Maharashtra Seamless Ltd. (supra) and Jindal Photo Ltd. (supra), that it is the duty on the part of the A.O. to prove that the specific claim of the interest expenditure of the appellant company is not related to business expenditure and after this decision only the A.O. can make the disallowance under Rule 8D(2)(ii) r.w.s. 14A of the Act. The issue hence, in the facts of appellants case, is whether the onus is on the appellant to establish that the investments in shares & securities are sourced from its own funds; and whether merely because the source of funds were mixed funds (own funds and borrowed funds) and it was difficult to establish that the own funds were utilized for the purposes of making investments, it would be correct to draw a presumption that the investments in tax free securities/ shares have been made out of a common pool of funds in proportion to the borrowed funds and the own funds. As stated above, the appellant company has a mixed pool of funds comprised of own funds, funds obtained on securities issued and borrowed funds. The Hon'ble Bombay High Court in the case of Godrej and Boyce Manufacturing Co. Ltd. vs. DCIT (supra) have held at page 100 that "The Assessing Officer must, in the first instance, determine whether the claim of the assesses in that regard is correct and the determination must be made having regard to the accounts of the assessee.". Thus as per the decision of the Hon'ble Bombay High Court, the onus of determination, on the basis of the accounts, is on the A.O. In the decision of the Hon'ble Delhi Tribunal in the case of DCIT v Jindal Photo Ltd. (ITA 4539/Del/2010) it has been held as under:
"18. Now, as per section 14A(2) of the Act, if the AO, having regard to the accounts of the assessee, is not satisfied with the correctness of the claim of the assessee in respect of expenditure incurred in relation to income which does not form part of assessee's total income under the Act, the AO shall determine the amount incurred in relation to such income, in accordance with such method as may be prescribed i.e. under Rule 8D of the AT Rules. However, in the present case, the assessment order does not evince any such satisfaction of the AO regarding the correctness of the claim of the assessee. As such, Rule 8D of the Rules was not appropriately applied by the AO as correctly held by the CIT(A). It has not been done by the AO that any expenditure had been incurred by the assessee for earning its dividend income. Merely, an ad hoc disallowance was made. The onus was on the AO to establish any such expenditure. This onus has not been discharged. In "CIT v Hero Cycles" (P & H) 323 ITR 518, under similar circumstances, it was held that the disallowance u/s. 14A of the Act requires a clear finding of incurring of expenditure and that no disallowance can be made on the basis of presumptions. In "ACIT v Eicher Ltd." 101 TTJ (Del) 369, that it was held that the burden is on the AO to establish nexus of I' expenses incurred with the earning of exempt income, before making any disallowance u/s. 14A of the Act In "Maruti Udyog v DCIT 92 ITD 119 (Del), it has been held that before making any disallowance u/s. 14A of the Act, the onus to establish the nexus of the same with exempt income, is on the revenue. In "Wimco Seedlings Limited v DCIT" 107 ITD 267 (Del)(TM) it has been held that

there can be no presumption that the assessee must have incurred expenditure to earn tax free income. Similar are the decisions in

i. *Punjab National Bank v DCIT 1'03 TTJ 908 (Del)*
ii. *Vidyut Investments Ltd. 10 SOT 284 (Del); and*
iii. *D.J. Mehta v ITO **290**IR 238 (Mum)(AT)*

*In the case **DCIT** v Maharashtra Seamless Ltd. (Del) **(ITA** No. 4063/Del/2006) **it** was decided by the Hon'ble of ITAT as under:*

*"7. We have heard the parties and have perused the material **on** record. **The Id.** CIT(A), while determining the disallowance, has observed, that the assesses had maintained that the interest expenditure in question was incurred in respect of the borrowings on cash credit limits utilized for normal business purposes of the assesses; that no part of the borrowed funds had been utilized by the assessee for making investments in the tax free bonds; that Rs,17 crores has been invested in the tax **free** bonds out of assessee's own funds of Rs.203.17 crores, as available with the assessee, as per the assessee's balance sheet; that, however, the funds were mixed and it was not possible to ascertain as to whether the investments in the tax free bonds was out of the assessee's own funds or from borrowed funds; that this could only have been ascertained, if the cash flow of the assessee had been examined, and the source of investment in the tax free bonds clearly identified, which had not been done by the AO; that the AO had not established any nexus between the borrowed funds and the investments in the tax free bonds; and that therefore, apportionment on a pro-rate basis was not proper. Nothing has been brought on record to counter the assessee's contention that the investment in the tax free bonds had been made out of the share holders funds.*

8. We do not find any error in the order of the Id. CIT(A). It remains undisputed that the funds are mixed and it is not possible to ascertain as to whether the investment in the tax free bonds was out of the assessee's own funds. The source of investment in the tax free bonds was not identified. The A.O. did not establish any nexus between the borrowed funds and the investments in tax free bonds. The cash flow of the assessee was not seen. Therefore, the Id. CIT(A) is correct in opining that the apportionment on a pro rata basis was improper in the absence of anything brought by the AO to rebut the assessee's stand that the investment in the tax free bonds has been made out of the funds of the shareholders of the AO."

Having regard to the aforesaid judicial pronouncements, it is he!d that the onus is on the A.O. to establish that the investments in shares & securities are sourced from the appellants borrowed fund and in the absence of determination of such nexus, it would be incorrect to draw a presumption that the investments in tax free securities / shares have been made out of a common pool of funds in proportion to the borrowed funds and the own funds.

8.16 Alternatively, in case the ratio laid down by the Hon'ble Bench of Mumbai ITAT in the case of Morgan Stanley India Securities Pvt. Ltd. Vs. ACIT (Mum) reported in ITA No.5072/M/2005 & 6774/M/2008 for A.Y. 2001-02 & 2004-05 is applied in the facts of the appellant's case, it is seen that the net interest paid is in the negative (i.e. the gross interest received is in excess of interest paid). Once the netting of interest is done, there would be no disallowance u/r.8D(2)(ii) of the IT rules. While coming to the conclusion, I am fortified by the converse principle laid down in the case of Reliance Utilities (supra). In the case of the appellant, the interest paid on borrowing are presumed to be on the utilization of

borrowed fund for the purpose of business carried on by the appellant i.e. investment banking and financing. In the facts of the appellant's case, the appellant during the year had sufficient own funds to explain the source of the additional investment made during the year. It is also a fact that the appellant had obtained funds by issuance of securities and borrowing. Thus, the assessee has a mixed set of own funds and borrowed funds. Neither the assessee nor the A.O. has established any nexus in between the borrowed fund and the investment made. In these circumstances, the principles laid down by the Hon'ble Bombay High Court become squarely applicable. For the aforesaid reasons, I find it appropriate to hold that the provisions of Rule 8D(2)(ii) are not applicable in the facts of appellant's case, as the entire expenditure by way of interest is directly attributable to income or receipts which is chargeable to tax as total income under the Income-tax Act.

8.17 Having regard to the aforesaid referred decisions, it is first held that for the purposes of Rule 8D(2)(ii), the A.O. has to determine the interest expenditure not directly attributable to any income or receipt chargeable to tax. Secondly, it is held that deduction u/s.36(1)(iii) is allowable on funds borrowed for the business and entire amount of interest is allowable as deduction since the interest expenditure would be directly attributable to the earning of income chargeable under the head 'Income from Business or Profession". ....

***8.18** As stated in para 8.10 hereinabove, for the purposes of Rule 8D(2)(ii), what is required to be determined is whether the assessee has incurred any expenditure by way of interest and if so to determine whether such interest expenditure is directly attributable to any particular income or receipt. To determine these issues, one would have to be guided by the provisions of the Act and various judicial pronouncements, having regard to facts available on record. The Hon'ble Bombay High Court in the case of Reliance Utilities Ltd. 313 ITR 340 has laid down the principle that where the own funds are in excess of investments made, there would be a presumption that the investments have been made out of the own funds. The natural corollary of this principle would be that the borrowed funds would be presumed to have been utilized for the purposes of business carried on by an assessee, in case the own funds are sufficient to cover the value of investments. This principle, according to me, establishes a direct attribution of own funds to the value of investments made by an assessee. Further, as per provisions of section 36(1)(iii), interest expenditure on amounts borrowed and used for purposes of business is allowable as deduction while computing the total income under the head 'income from business or profession' Hence in case the borrowed funds have been used for the purposes of business, the entire interest expenditure is allowable u/s.36(1)(iii) of the Act, as the interest expenditure is directly attributable to the incomes or receipts assessable under the head Income from Business or Profession'. In the facts of appellants case, the entire interest expenditure has been claimed to be allowed as deduction u/s.36(1)(iii) of the Act. Thus, in the facts of the appellant's case, there can be no denial of the fact that the interest paid on borrowings are directly attributable to the income assessable under the Act. In these facts, and having regard to. the principle laid down by the Hon'ble Jurisdictional High Court in the case of Reliance Utilities (supra), it is held that the entire interest expenditure is directly attributable to business income, which has been duly taxed by the A.O. Hence no disallowance under Rule 8D(2)(ii) can be made as the interest expenditure incurred by the appellant company is an allowable expenditure u/s.36(1)(iii) of the Act as business expenditure. ,*

> *8.19 In summation and in view of the discussion hereinabove, it is held that the disallowance computed by the A.O. under Rule 8D(2)(ii) is incorrect and not justified in aforestated facts in case of appellant company. The entire interest expenditure is directly attributable to the income or receipts chargeable to tax under the head 'Income from Business or Profession[1] as it is evident from appellant's submissions as extracted in this order."*

14. Against the above order of CIT(A) revenue is in further appeal before us.

15. Ld. DR relied on the order of AO.

16. It was argued by learned AR that no disallowance under Rule 8D(2)(ii) can be made since own funds of assessee are more than investment. For this purpose, reliance was placed on the following judicial pronouncements.

- *HDFC Bank Limited vs DOT (383 ITR 529 Bom)*
- *CIT vs HDFC Bank Limited (366 ITR 505 Bom)*
- *C1T vs Reliance Utilities & Power Limited (313 ITR 0340 Bom)*
- *DCIT vs Crossborder Investment Pvt. Ltd [TTA 7658/Mum/2011]*
- *Edelweiss Securities Limited vs DCIT pTA 7235/Mum/2Q 11]*
- *M/s. Laadki Trading & Investment Ltd vs Addll. CIT [ITA 5493/Mum/2012]*
- *Mrs. Anahaita Nairn Shah vs APT [ITA 7115/Mum/2013]*

17. It was further argued that for the purposes of disallowance under Rule 8D(2)(ii) of the I.T. Rules, net interest (interest expenses - interest income) is to be considered. For this purpose reliance was placed on the following judicial pronouncements:-

- *DCIT vs Better Value Leasing & Finance Limited [ITA 2288/Mum/2014]*
- *ITO vs Kamavati Petrochem Pvt Ltd [TTA 2228/Ahd/20121*

18. We have considered rival contentions and carefully gone through the orders of the authorities below. We had also deliberated on the judicial pronouncements referred by lower authorities in their respective orders as well as cited by learned AR and DR during the course of hearing before us in the context of factual matrix of the case. From the record we found that own funds of the assessee i.e., share capital and reserves at the end

of the year is Rs.13,49,75,79,368/- however, against this own fund assessee made investment of Rs.10,59,23,39,574/-. Thus, there was extra own funds of Rs.2,90,52,39,794/-. With regard to the interest expenditure, we found that interest expenses during the year was Rs.77,23,08,554/- where as interest income was Rs.93,48,14,787/-. Thus, there was net income of Rs.16,25,06,233/- on account of interest. A clear finding has been recorded by CIT(A) both with respect to availability of own funds in excess of investment and assessee having interest income more than the interest expenditure. Since the interest income was more than the interest expenditure, no disallowance is warranted under Rule 8D (2)(ii). We direct accordingly.

19. Since the assessee's own funds were more than the investment, in view of the decision of Jurisdictional High Court in case of HDFC Bank Ltd., and Reliance Utilities and Power Limited, no disallowance of interest is warranted under Rule 8D2(ii) of the IT Act. Accordingly, there is no infirmity in the order of CIT(A) for deleting the disallowance of interest u/s.14A.

20. Ground No.3 of Revenue's appeal are same as discussed by us in the Assessment Year 2007-08, following the reasoning given hereinabove, we do not find any infirmity in the order of CIT(A) for deleting disallowance of difference of interest u/s.36(1)(iii). We direct accordingly.

21. In the Assessment Year 2008-09, in the appeal filed by assessee, ground has been taken with regard to disallowance made by AO u/s.14A

r.w.R 8D(2)(iii). The AO has discussed the issue at para 5.5 to 5.21 and page No.13-18. The CIT(A) has discussed the issue at para 8.6 to 8.23 at pages 23-38. It was argued by learned AR that in view of the decision of the Tribunal in the group concern M/s. Edelweiss Financial Services Ltd., in ITA No.6610/Mum/2011 disallowance should be restricted to 5% of the exempt income. He further contended that investment in subsidiaries company have to be excluded for computing disallowance as per rule 8D(2)(iii). For this purpose, reliance was placed on the decision of Mumbai Bench in case of Garware Wallropes Limited (65 SOT 0086 Mum) and JM Financial Ltd., (ITA 4521/Mum/2012). It was also argued by learned AR that only investment giving raise to exempt income has to be considered for disallowance u/s.14A r.w.R. 8D of the IT rules. For this purpose reliance was placed on the following decisions:-

- *Edelweiss Finance and Investment Private Limited [ITA 6610/Mum/2011]*
- *ACB India Limited vs DCIT (TTA 615/2014 Del HC]*
- *M/s. Edelwiess Securities Limited vs DCIT [ITA 7235/Mum/2011]*
- *Coal India Limited [ITA 1032/Kol/2012]*

22. We have considered rival contentions and found that after excluding the investments on which no exempt income was received, the disallowance works out to be Rs.49,63,387/-, however, assessee himself has offered disallowance at Rs.51,46,120/-. Keeping in view the judicial pronouncements referred above, we restore the matter back to the file of AO and direct the AO to recompute the disallowance under Rule 8D(2)(iii) after excluding the investment on which no exempt income has been

earned as well as investment in subsidiary companies. We direct accordingly.

Assessment Year 2009-10

23. In this year also AO has made disallowance u/s.14A r.w.R. 8D(2)(iii). In the return of income assessee has offered disallowance of Rs.34,85,813/-.

24. From the record, we found that after excluding investment on which no exempt income was received by the assessee, disallowance works out to be Rs.11,934/- against which assessee has already offered disallowance of Rs. 34,85,813/-, thus, there is an excess offer of disallowance to the tune of Rs.34,73,879/-.

25. Following the reasoning given in the A.Y.2008-09, we restore the matter back to the file of AO and direct the AO to recompute the disallowance after excluding the investment on which no exempt income has been earned as well as investment in subsidiary companies. We direct accordingly.

26. AO has also disallowed corporate membership fees to Bombay Gymkhana. The AO has discussed the issue at para 6 page 98 and the CIT(A) at para 4.3.1 to 4.3.11 page 2 to 7.

27. We have considered rival contentions. The issue under consideration is squarely covered by the following decisions:-

- ***CIT vs United Glass Manufacturing Company [2012-TIOL-102-SC]***
- ***Capgemini Business** Services (India) **Ltd [ITA** 7779/Mum/2011]*
- *SAB Miller India **Limited** [ITA **7123/Mum/2012]***
- *DClTvs HJnduja Global Solution Limited [ITA 1107/Mum/20I4*

- ***Clariant Chemicals** (I) **Ltd vs** Addll **CIT [ITA 4281/Mum/201 1]***
- ***ITO vs** Idea Cellular Ltd **[ITA 3568/Mum/2008]***

28. Respectfully following the proposition of law laid down by the Hon'ble Supreme Court and the Mumbai Tribunal narrated above, we do not find any merit for the disallowance of corporate membership fees paid to be treated as revenue expenditure incurred for business purposes.

29. In the appeal filed by revenue, the revenue is aggrieved for deleting disallowance made by AO under Rule 8D(2)(ii). The CIT(A) has deleted the disallowance after recording detailed finding at para 2.1 to 2.4 at page 1&2. The CIT(A) has followed his decision for the A.Y.2008-09 dated 07/07/2011, wherein at para 8.18 page 33, it was held that assessee's own funds were invested in the securities, therefore, no disallowance is warranted.

30. We have considered rival contentions and found that assessee's own funds in the form of share capital and reserves were Rs.13,54,82,54,318/- However, investment by the assessee was Rs.12,49,72,61,410/-. Thus, there was an excess own funds of Rs.1,05,09,92,908/-. Since the own funds were more than the investment made, respectfully following the decision of Jurisdictional High Court in case of HDFC Ltd., and Reliance Utilities and Power Ltd., we do not find any infirmity in the order of CIT(A) for deleting disallowance of interest made by AO under Rule 8D(2)(ii) of the IT Act.

31. Ground No.3 raised by revenue is with regard to deleting disallowance of interest made u/s.36(1)(iii) of the Act being differential interest on loan given to subsidiary companies.

32. As the facts and circumstances during the year under consideration are same, respectfully following the reasoning given by us in the A.Y.2007-08 vis-à-vis, detailed finding recorded by CIT(A), we do not find any reason to interfere in the order of CIT(A) for deleting disallowance of interest u/s.36(1)(iii).

<u>Assessment Year 2010-11(ITA No.4329/Mum/2014):</u>

33. Grounds taken by Revenue are pertaining to disallowance of interest u/s.36(1)(iii). Following the reasoning given by us in the A.Y.2007-08 hereinabove, we do not find any infirmity in the order of CIT(A) for deleting disallowance of interest u/s.36(1)(iii).

34. With regard to the deletion of disallowance made by AO under Rule 8D(2)(ii) and deleted by CIT(A), we found that assessee was having own funds in the form of share capital and reserves amounting to Rs.13,082,410,000/-. However, investment made by assessee was amounting to Rs.11,536,050,000/- thus there was an excess own funds of Rs.1,546,360,000/-. Clear finding to this effect has been given by CIT(A). As the own funds were more than the investment. Following the reasoning given hereinabove, we do not find any infirmity in the order of CIT(A) for deleting disallowance of interest made by AO under Rule 8D (2)(ii).

35. We also found that during the year, there was interest expenditure of Rs.23,05,53,531/- as against interest income of Rs.78,85,76,438/-. Thus, there was net interest income of Rs.55,80,22,907/-. Since interest income was more than the interest expenditure, no disallowance is warranted under Rule 8D(2)(iii). We direct accordingly.

36. Assessee is aggrieved for disallowance made by AO under Rule 8D(2)(iii). We have considered rival contentions and gone through the orders of authorities below. Following the reasoning given in the A.Y.2008-09, we restore the matter back to the file of AO and direct the AO to recompute the disallowance after excluding the investment on which no exempt income has been earned as well as investment in subsidiary companies. We direct accordingly.

ITA No.315/Mum/2017(A.Y.2009-10)

37. This is an appeal filed by the revenue against the order of CIT(A) for the A.Y.2009-10, in the matter of order passed u/s.143(3) r.w.s. 147 of the IT Act.

38. In this appeal, Revenue is aggrieved for allowing setting of speculation loss from trading in shares out of income from trading in commodities.

39. Rival contentions have been heard and record perused. The brief facts of the case are that after assessment was completed u/s.143(3), the assessee's case was reopened u/s 147 of the Act vide notice dated

27.03.2014 issued u/s 148 of the Act. The AO has declined netting of speculative loss against the income of commodity trading.

40. By the impugned order, CIT(A) allowed set off of income from commodity trading, against speculation loss incurred by the assessee, after having the following observation:-

> *"6.3.7 On perusal of all the above facts narrated above, it can be concluded that ground no. 2 of the appellant involves two issues - (1), whether the AO had any legal jurisdiction to reopen the case u/s 147 of the I.T.Act, 1961 and (2), even if the case was reopened for the sake of verification of the facts, was it open for the AO to make any changes in income or not*
> *In so far as legal jurisdiction of the AO is concerned in reopening the case, in my opinion, the Act provides enough power to the AO to reopen the case. Therefore, this part of the issue (1) is decided in favour of the AO.*
>
> *As regards the second issue involved in this ground is concerned, it forms the question of fact where it is seen that despite reopening of the case the AO has not been able to appreciate the question of facts put up before him by the appellant and has incorrectly relied upon the ratio of judgment in the case of Prasad Agents (P) Ltd vs ITO (2009) 180 taxmann(Bom). In case of Prasad Agents the Hon'ble High Court of Bombay upheld the disallowance of AO because in that case loss on diminution of value of shares and its claim as normal loss by the appellant was rejected by High Court since, the appellant did not claim that there was any loss because of trading in shares rather the claim was with regard to loss in diminution of shares. As against this in the present case the appellant has incurred speculation loss on account of trading in equity segment which appellant itself has treated as speculation loss hence the judgment of Hon'ble High Court in the case of Prasad Agents (supra) is not applicable. As regards facts relating to income of the appellant, it has been explained that the appellant has incurred the speculation loss of Rs 22,52,57,483/- which has been set off against the speculation income of Rs 16,10,90,3477- earned from commodity trading (on unrecognized stock exchange) and remaining loss of Rs 6,41,67,136/- has been carried forward to the subsequent assessment years to be set off against speculation income. The AO has quoted provision of section 43(5)(d) in para 5 of assessment order which says " an eligible transaction in respect of trading in derivatives referred to in clause AC of Section 2 of Securities Contract (Regulation Act) 1956 (42 of 1956) carried out in a **recognized stock exchange/'** Here it seems that the AO is confused in interpreting this proviso because there is no dispute that the appellant had earned income in commodity trading and which was not on the recognized stock*

exchange and once this is the fact then the income earned so by the appellant cannot be treated as normal income within the purview of Section 43(5)(d) of the I.T.Act, 1961. The AO has not disproved that the commodity trading income was not out of unrecognized commodity exchange market and as long as when the appellant earned out of unrecognized commodity exchange, the income or loss out of transaction on such unrecognized exchange will remain speculative in nature- the amendment in Sec 43(5)(d) was only to provide benefit to the assessees to treat their losses as non speculative only when such losses were incurred while trading on any recognized stock exchange and not otherwise. This benevolent provisions itself cannot be used against appellant by misinterpreting the same.

Further reference can be made to the decision of Hon'ble Delhi High Court in the case of DLF Commercials (2013) 218 Taxman 45 (Delhi), where it has been held as under:

- The term 'speculative transaction' has been defined only in section 43(5). At the same time, it is qualified that the scope of the definition is restricted in its application to working out the mandate of sections 28 to 41. In terms of the Explanation to section 73 in the case of a company, business of purchase and sale of shares is deemed to be speculation business. However, certain companies are excluded from this Explanation, which are:
(i) a company whose gross total income consists mainly of income which is chargeable under the heads 'Interest on securities', 'Income from house property', 'Capital gains' and 'Income from other sources'.
(ii) a company, the principal business of which is the business of banking or the granting of loans and advances. [Para 7]

Section 43 defines for the purpose of sections 28 to 41 certain terms. These latter provisions fall in Chapter IV - D, which deal with computation of business income. The said provisions provide for matters relating to computation of such income, rent taxes, insurance of buildings, repairs of plant and machinery, depreciation, reserves for shipping business, rehabilitation fund, expenditure on certain eligible objects or schemes, deductions, amounts not deductible, profits chargeable to tax, etc. The assessee is no doubt correct in contending that the only definition of' derivatives' is to be found in section 43(5), yet the Court cannot ignore or overlook that the definition to the extent it excludes such transactions from the mischief of the expression 'speculative transactions' is confined in its application. Parliamentary intendment that such transactions are also excluded from the mischief of Explanation to section 73, however, is not borne out. [Para 8]

It is no doubt tempting to hold that the expression 'derivatives' is defined only in section 43(5) and it excludes such transactions from the odium of speculative transactions, yet the Court would be doing violence to

Parliamentary intendment. This is because a definition enacted for only a restricted purpose or objective should not be applied to achieve other ends or purposes. Doing so would be contrary to the statute. Thus contextual application of a definition or term is stressed, wherever the context and setting of a provision indicates an intention that an expression defined in some other place in the enactment, cannot be applied, that intent prevails, regardless of whether standard exclusionary terms (such as 'unless the context otherwise requires[1]) are used. [Para 10]

The stated objective of section 73 apparent from the tenor of its language is to deny speculative businesses the benefit of carry forward of losses. Explanation to section 73 has been enacted to clarify beyond any shadow of doubt that share business of certain types or classes of companies are deemed to be speculative. That in another part of the statute, which deals with computation of business income, derivatives are excluded from the definition of speculative transactions, only underlines that such exclusion is limited for the purpose of those provisions or sections. In the instant case, by all accounts the derivatives are based on stocks and shares, which fall squarely within the Explanation to section 73. Therefore, it is idle to contend that derivatives do not fall within that provision. [Para 11]

Therefore, the order passed by the Tribunal was not justified. [Para 12]"

To sum up, it is concluded that in so far as the action of the AO with regard to reopening of the case u/s.147 is concerned, the IT Act gives enough scope to give jurisdiction to the AO to reopen the case. Therefore, this part of the action of the AO is to be treated as upheld.

However, the later part of the action of the AO with regard to disallowance of adjustment of speculation loss with speculation income of the appellant to the extent of amount discussed above/ is concerned, cannot be held to be justified because of the reasons/analysis of facts given above as well as judicial pronouncements in the case of Bharat Ruia (supra) and DLF Commercials (supra).

In the result, this ground of appeal is to be treated as Partly Allowed.

7.1 Ground No. 3(a) and (b) relates to action of AO in treating the income of Rs. 16,10,90,3477- from commodity trading as non-speculative by not allowing set off of speculative loss against thereof.

7.2. The Appellant filed the written submission during the appellate proceeding which is reproduced as under:

"3.1 The Appellant submits that in the preceding paragraphs (i.e. 2.2.3 to 2.2.6) it has duly explained that it has incurred the speculation loss of Rs. 22,52,57,483/- which has been adjusted against the speculative income of Rs. 16,10,90,347/- and the remaining loss of Rs. 6,41,67,136/-. The above

facts are ignored by the AO. Therefore, the Appellant submits that the AO shall be directed to set off the speculation losses of Rs. 22,52,57,483/- against the speculation income of Rs. I6,10,90,347/- and remaining losses of Rs. 6,41,67,136/- shall be carried forward to the subsequent years for set off against the speculation income."

7.3. I have considered the facts of the case, assessment order passed by the AO and the submission made by the appellant. It has already been explained and discussed in para 6.3 above that the AO did not dispute that appellant carried out commodity trading transaction on unrecognized exchange and it has been held by me above that in this situation the action of the AO to disallow the adjustment of speculation loss and speculation income to the extent indicated there for the reason of facts and judicial pronouncements in the case of Bharat Ruia (supra) and DLF Commercials (supra). The appellant has done the trading in commodities on the unrecognized stock exchange at that point of time, which the appellant explained only after the notification dated 22.05.2009 and 21.12.2009 became recognized exchange and therefore prior to that (i.e. upto FY 2008-09 and for 1 month 22 days of FY 2009-10), any such transactions were to be treated as speculative.

Therefore, it is clearly demonstrated by the Appellant that during the financial year 2008-09 relevant to present assessment year 2009-10, which is under consideration, the exchanges were not recognized. Hence, in the light of High Courts decision in the case of Bharat Ruia (supra) and DLF Commercials (supra), I am of the considered view that the transaction in commodities is speculative transaction; thus, the Appellant has correctly set off the speculation loss against such income from the commodity trading. Therefore, the action of the AO in treating the income of Rs. 16,07,83,147/- from commodity trading as non-speculation income is quashed and the AO is directed to delete the amount of RS 16,07,83,147/-.

In the result, this ground of appeal is ***Allowed.***

41. Rival contentions have been heard and record perused. We had also deliberated on the judicial pronouncements referred by lower authorities in their respective orders. From the record, we found that assessee was carrying out business of commodity trading on un-recognised exchange and also business of trading in shares. Assessee has claimed set off of loss arising out of trading in shares against the income arising out of

trading in commodities. The AO declined set off on the plea that assessee has suffered speculative loss from trading in shares where as assessee was having non-speculative income from trading in commodities. Since, the assessee was doing trading in commodities at unrecognized exchange, the CIT(A) held that income so accrued by trading of commodities at unrecognized exchange is also speculation in nature, therefore, the speculation loss so arose out of trading in share is liable to be set off against the speculative income from trading in commodities. The CIT(A) also discussed the amendment of Section 43(5)(d) which came into force subsequently i.e. 22/05/2009 and which was to provide benefit to the assessee to treat their losses as non-speculative only when such losses were incurred while trading in recognized stock only and not otherwise. In the instant case before us, since assessee was trading at un-recognised stock exchange, therefore, income arising out of trading of commodities at such unrecognized stock exchange also amounts to speculation income, therefore, there is nothing wrong for allowing set off speculation loss against speculation income and for carry forward of unabsorbed speculative loss to be set off against the future speculation income. The AO has not disproved that the commodity trading income was not out of unrecognized commodity exchange market and as long as when the assessee earned out of unrecognized commodity exchange, the income or loss out of transaction on such unrecognized exchange will remain speculative in nature- the amendment in Sec 43(5)(d) was only to

provide benefit to the assessees to treat their losses as non speculative only when such losses were incurred while trading on any recognized stock exchange and not otherwise.

42. In view of decision of Hon'ble Bombay High Court in the case of Bharat Ruia in Income Tax Appeal No.1539/2010 dated 18/04/2011 and Delhi High Court in case of DLF Commercials Ltd., in ITA 94/2013 dated 11/07/2013 the assessee has correctly set off speculation loss on shares against speculative income from trading in commodity and carried forward the unabsorbed speculative loss to the subsequent year to be set of against speculative income.

43. The findings recorded by CIT(A) have not been controverted by learned DR, accordingly, we do not find any reason to interfere in the order of CIT(A).

44. In the result appeals of Revenue are dismissed.

Assessment Year 2010-11 (ITA No.4652/Mum/2014)

45. Ground taken by revenue with regard to deleting disallowance u/s.36(1)(iii) of the IT Act. Following the reasoning given in the A.Y.2007-08, we do not find any infirmity in the order of CIT(A) for deleting disallowance made u/s.36(1)(iii).

46. With regard to disallowance under Rule 8D(2)(ii), we found that assessee's own funds were to the extent of Rs.13,082,410,000/-. However, investment was to the tune of Rs.11,536,050,000/-. Thus there

was excess own fund of Rs. 1,546,360,000/-. A clear finding to this effect has been recorded by CIT(A) in his appellate order.

47. It is clear from the above that there was an excess own fund of Rs. 1,546,360,000/-. Accordingly, no disallowance is warranted in view of the decision of Jurisdictional High court in case of HDFC Bank Ltd., and Reliance Utilities and Power Ltd., Respectfully following these decisions, we confirm the finding of CIT(A) for deleting disallowance under Rule 8D(2)(ii) of the IT Act.

48. Assessee is aggrieved for disallowance upheld by CIT(A) under Rule 8D(2)(iii). Following the reasoning given in the A.Y.2008-09, we restore the matter back to the file of AO and direct the AO to recompute the disallowance after excluding the investment on which no exempt income has been earned as well as investment in subsidiary companies. We direct accordingly.

49. In the result, appeals of Revenue are dismissed whereas appeals of assessee are allowed in part in terms indicated hereinabove.

Order pronounced in the open court on this 14/03/2018

Sd/-	**Sd/-**
(SANDEEP GOSAIN)	**(R.C.SHARMA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai; Dated 14/03/2018
Karuna 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.

BY ORDER,

सत्यापित प्रति //True Copy//

(Asstt. Registrar)
ITAT, Mumbai