

IN THE INCOME-TAX APPELLATE TRIBUNAL "A" BENCH MUMBAI

BEFORE SHRI G.S. PANNU, ACCOUNTANT MEMBER

AND SHRI PAWAN SINGH, JUDICIAL MEMBER

ITA No.3569/Mum/2016 (Assessment Year 2010-11)

M/s Allied Digital Services Ltd. 13A, 13 th Floor, Earnest House, NCPA, Nariman Point, Mumbai-400020. PAN: AAACA5509K	Vs.	DCIT, CC- 3, Mumbai.
---	-----	-------------------------

Appellant

Respondent

ITA No.3570/Mum/2016 (Assessment Year 2011-12)

M/s Allied Digital Services Ltd. 13A, 13 th Floor, Earnest House, NCPA, Nariman Point, Mumbai-400020. PAN: AAACA5509K	Vs.	DCIT, CC- 3, Mumbai.
---	-----	-------------------------

Appellant

Respondent

Appellant by : Shri Rakesh Joshi (AR)

Respondent by : Shri R.P. Meena (CIT-DR)

Date of Hearing : 03.05.2018

Date of Pronouncement : 29.06.2018

Order Under Section 254(1) of Income –tax Act

PER PAWAN SINGH, JUDICIAL MEMBER;

1. The aforesaid two appeal by assessee under section 253 of the Income-tax Act (the Act) are directed against the separate order of Id. Commissioner of Income-Tax (Appeals)-47 [Id. CIT(A)], Mumbai dated 21.03.2016 for Assessment Year 2010-11 & 2011-12. In appeal for Assessment Year 2010-11, the assessee has raised the following grounds of appeal:

- 1) On the facts and circumstances of the case as well as in law, the Learned CIT(A) has erred in confirming the action of Learned Assessing Officer in making an addition of Rs.5,35,91,882/- on account of alleged bogus purchases, without considering the facts and circumstances of the case.

2) On the facts and circumstances of the case as well as in law, the Learned CIT(A) has erred in confirming the action of Learned Assessing Officer in not appreciating the fact that there were corresponding sales for all the purchases made that were doubted and if the purchases itself were doubted, then there was no question of the sales having been effected.

3) On the facts and circumstances of the case as well as in law, the Learned CIT(A) has erred in confirming the action of Learned Assessing Officer in disallowing the expenses u/s.14A of the Income Tax Act, 1961 as per Rule 8D, without considering the facts and circumstances of the case.

4) On the facts and circumstances of the case as well as in law, the Learned CIT(A) as well as Learned Assessing Officer has erred in not appreciating the fact that while computing the disallowance as per Rule 8D the interest expenses is to be considered after netting of the interest income.

2. Brief facts of the case are that the assessee is engaged in the business of information technology solution, filed its return of income for Assessment Year 2010-11 on 15.10.2010 declaring total income at Rs. 68,39,51,700/-. A search and seizure action under section 132 was conducted at the premises of assessee on 04.02.2011. Consequent upon search a notice under section 153A dated 03.02.2012 was served upon the assessee to file return of income within 30 days. In response to the notice under section 153A the assessee filed return of income on 23.07.2011 declaring total income at Rs. 68,82,77,358/-. Again a survey action was carried on 24.12.2012 at the premises of assessee, thereafter the assessee again filed revised computation of income on 10.01.2013 by reversing the depreciation claimed in the original return and declared income at Rs. 71,42,63,692/-. The assessment was completed by Assessing Officer under section 143(3) r.w.s. 153A on 28.03.2013. The Assessing Officer while framing the assessment order made the addition on account of bogus

purchases of Rs. 5,35,91,882/- and disallowance under section 14A for Rs. 1,25,66,049/-. On appeal before the Id. CIT(A), the addition on account of bogus purchases was sustained. However, the addition on account of disallowance under section 14A r.w. Rule 8D, the disallowance of interest expenses under Rule 8D(2)(ii) for Rs. 10,04,74,536/- was deleted. However, the disallowance under Rule 8D(2)(iii) was directed to re-compute the disallowance after excluding the investment in foreign subsidiaries. Therefore, further aggrieved by the order of Id. CIT (A), the assessee filed the appeal before the Tribunal.

3. We have heard the Id. Authorized Representative (AR) of the assessee and Id. Departmental Representative (DR) for the Revenue and perused the material available on record. Ground No. 1 & 2 relates to addition on account of bogus purchases. The Id. AR of the assessee submits that all purchases are shown in the books of account. The assessee furnished all the details regarding purchases and corresponding sale of material. The purchases recorded in the books of account cannot be called unexplained purchases, therefore, no disallowance on account of bogus purchases are made out. The sales of the assessee have not been disputed by Assessing Officer. The explanation of the assessee is that all material purchased are tallied with the sales, are not rejected by Assessing Officer. The books of accounts of the assessee were not rejected by the assessing officer. The Assessing Officer has not proved that purchases or purchase party are

fictitious. Once the sales are accepted as genuine, the purchases cannot be faulted with. The assessee has made the sales to the Government Department like Defense Resources & Development Laboratory, Hyderabad (DRDO). There were confirmation letter furnished by the supplier. Copies of invoices and bank statement of all parties were furnished. It was further submitted that mere the suppliers have not appeared before the Assessing Officer or the Id. CIT(A), the Revenue cannot conclude that purchases were not made by the assessee are not genuine. The addition cannot be made on the basis of assumption and presumption. None of the parties are hawala dealers, all the purchases were genuine. The Id. AR of the assessee prayed that entire addition is liable to be deleted. In alternative submission, the Id. AR of the assessee submits that a reasonable percentage on the basis of estimation on such purchases may be sustained and not the entire purchases, by treating purchases as bogus. In support of his submissions the Id AR for the assessee relied on the decision of Hon'ble Gujarat High Court in case of CIT vs. Bholanath Poly Feb (P.) Ltd. 355 ITR 290 (Guj.), decision of Tribunal in DCIT vs. N.T. Recycle Pvt. Ltd. in ITA No. 3982/Mum/2016 dated 13.12.2017 and in Aarti Jewelers Pvt. Ltd. vs. DCIT ITA No. 3752/M/2017 dated 16.11.2017.

4. On the other hand, the Id. DR for the Revenue submits that a search and seizure action was conducted on the assessee on 04.02.2011. During the

search and seizure, the Director of assessee declared undisclosed amount of Rs. 5,35,91,882/- for A.Y. 2010-11. The assessee has reversed the purchases of Rs. 26,77,11,057/- in its books of account, which means the bogus purchases reduced, however, while filing return of income for the current year, the assessee has not shown the additional income in the return of income disclosed during the search action nor given any explanation. During the assessment the assessee was asked to explain as to why it had not shown additional income in the return of income, which had been accepted in the course of search and seizure action. The Assessing Officer during the assessment proceeding called information under section 133(6) by deputing the Circle Inspector to inquire at the address of parties. The eleven parties were reported to have not existed on the given address, therefore, the expenditure incurred on purchases and offered by assessee during the search and seizure was added to the income of the assessee as unexplained expenditure. The assessee could not produce any evidence that the products sold are the exact which has been purchased by them.

5. In the rejoinder submission, the ld. AR of the assessee submits that the Directors of the assessee retracted from the statement recorded during the search action. The statement was extracted from Shri Nitin Saha and Prakash D. Saha, Director of the assessee-company by pressurizing them nothing incriminating material was found in the search. The ld. AR further

submits that Shri Prakash D. Saha while making disclosure during the search proceeding has explained that purchases are reflected in Register but not proof was available with him. The part of the statement of Prakash D. Saha recorded during the search cannot be read in isolation. Which has otherwise been retracted.

6. We have considered the rival submission of the parties and have gone through the orders of authorities below. The Assessing Officer while framing the assessment order noted that the Directors of the assessee-company declared undisclosed income of Rs. 5,35,91,822/-. However, the assessee has not shown additional income in the return of income furnished by assessee. The assessee was asked to explain as to why the additional income has not been offered in the return of income. The assessee filed its reply on 20.12.2012. In the reply, the assessee contended that the purchases are not bogus as there is clear corresponding sale against the purchases. The assessee has furnished detailed note along with chart showing the details of said purchases and corresponding sale. The assessee further contended that it is established company and does not indulge in procuring bogus bills. The contention of assessee was not accepted by Assessing Officer holding that explanation is general in nature. The Assessing Officer further concluded that the statement of Director and Chief Finance Officer was recorded by Investigation team on 04.02.2011. The assessee has failed to discharge the onus that confession

made by it was a result of intimidation, duress coercion. The statement recorded under section 132(4) is evidence under the Income-tax Act. As per the observation of assessing officer at the time of search, the Register of assessee was cross verified, wherein the purchases were not recorded. No evidence to this effect was collected. The assessing officer heavily relied on the statements of Directors. The reliance on the statement of Directors are without any corroborative evidence. The Assessing Officer also issued notice under section 133(6). The Assessing Officer recorded that the postal authorities return back the notice issued to seven parties with the remark "Not known". On the basis of his observation, Assessing Officer took his view that there is no evidence, if the assessee sold the product is exact which has been purchased by them and that the assessee-company is engaged in practicing of getting manipulated purchased bill and therefore, disallowed the expenditure of Rs. 5,35,91,822/- under section 37(1) of the Act. The Assessing Officer also disallowed the purchases alternatively under section 69C. During the first appellate stage the assessee urged similar contention. After considering the contentions of the assessee, the Id. CIT(A) observed that the Assessing Officer made attempt to make further inquiry from the parties but not result as the postal authority and the Circle Inspector were not able to locate the party. Moreover, the purchases and sales co-relation relied by assessee in a chart, no specific detailed identifying the product is given. The Id. CIT(A)

further observed that no sufficient material has placed on record about the retraction. The assessee has not given any evidence, if statement was recorded under threat or coercion. On his observation, the Id. CIT(A) confirmed the action of Assessing Officer.

7. We have noted that the assessee has furnished evidence in support of the submission about the sale of the purchased material. The lower authorities have not disputed the sale of the assessee. The sale is not possible without purchase. Further the books of account of the assessee were not rejected by lower authorities. We have noted that while discarding the tally of stock the Id. CIT(A) observed that there is no evidence with the assessee that the product sold is the exact product which has been purchased. The observation of Id CIT(A) is without any basis. The lower authority has not disputed that the payment made to these parties are not genuine. The observation of Id. CIT(A) is based on assumption and presumption. The Id. CIT(A) further observed that the assessee-company is engaged in practice of getting manipulated/bogus bills to streamline its account. This observation of Id. CIT (A) is also without referring any corroborative evidence. The Id. CIT (A) sustained the addition on account of unexplained expenditure under section 69C, as well as under section 37(1) of the Act. Considering the fact that neither the assessee could prove the genuineness of transaction nor the revenue was able to bring on record adverse material on record, except the statement of Director during the

search proceeding, which have been retracted that the purchases are not genuine. We have already recorded that the sale of the assessee has not been discarded by Revenue except observing that there is no evidence, if the product sold is the exact product which has been purchased. Considering the peculiarity of the fact, we are of the view that even in cases where the whole transaction is not verifiable due to various reasons; the only taxable is the taxable income component and not the entire transaction. In our considered opinion that under Income Tax Act only real income can be taxed by the Revenue. We may further note that the Hon'ble Bombay High Court in the case of CIT vs. Hariram Bhambani in ITA No.313 of 2013 decided on 04.02.15 held that the Revenue is not entitled to bring the entire sales consideration to tax, but only the profit attributable on such unrecorded sale consideration alone can be subject to income tax. We have further noticed that neither the AO nor the Ld. CIT(A) examined the gross profit ratio or net profit ratio of assessee for previous year and in subsequent years. After considering the facts of the present case and rival contentions of the parties, we are of the opinion that in order to fulfil the gap of revenue leakage the disallowance of reasonable percentage of impugned purchase would meet the end of justice. Thus, we are of the opinion that disallowance made on account of bogus purchases be restricted to 10% of the impugned/ disputed purchases, that would meet the end of justice instead of the entire purchases. The Hon'ble Gujarat

High Court in case of CIT Vs. Bholanath Poly Feb (P.) Ltd. (supra), while considering the fact, the Assessing Officer found that concerned parties from whom material were purchased were not found at their address and treated the same as bogus and made disallowance accordingly on the basis of profit embedded on such purchases. The Hon'ble High Court held that when entire quantity of stock was sold by assessee, the only profit margin embedded in such purchases would be subject to tax and not the entire purchases.

8. The co-ordinate bench of Tribunal in DCIT vs. N.T. Recycling Pvt. Ltd. (supra), which case is also based on the search action, wherein undisclosed income on account of bogus bill was added by the Assessing Officer, on appeal before the First Appellate Authority, the addition was restricted to 1%. On appeal before the Tribunal, the Tribunal considering the nature of business enhanced the addition to 8% of the alleged bogus purchases holding that there could be no sale without purchase/consumption of the material. Further, in Aarti Jewellers Pvt. Ltd. vs. DCIT (supra) sustained the addition @ 5% on account of bogus purchases on the profit embedded in such purchases. Considering the factual legal matrix discussed above, we direct the Assessing Officer to restrict the disallowance on account of alleged bogus purchases @ 10% of the impugned/bogus purchases. In the result, Ground No. 1 & 2 of the appeal is partly allowed.

9. Ground No.3 & 4 relates to disallowance under section 14A. The ld. AR of the assessee submits that during the relevant Financial Year, the assessee earned exempt income of Rs. 3,26,50,897/-. The assessee suo-moto disallowed Rs. 22,99,590/- under section 14A. The Assessing Officer without recording its dissatisfaction about the working of suo-moto disallowance, invoked the provision of Rule 8D and disallowed Rs. 1,48,65,639/-, thereby added 1,25,66,049/- under the disallowance under section 14A r.w. Rule 8D. The disallowance was made without giving opportunity to the assessee to explain the fact. The ld. CIT(A) deleted the disallowance under Rule 8D(2)(ii) for Rs. 1,00,74,536/- on account of interest expenses. However, the disallowance under Rule 8D(2)(iii) for Rs. 47,91,103/- the ld. CIT(A) directed the Assessing Officer to exclude the investment of Rs. 11,274.12 lakh in foreign subsidiaries, the dividend on which being taxable does not form part of exempt income and directed the Assessing Officer to work out the disallowance accordingly. On the other hand, the ld. DR for the Revenue supported the order of authorities below. The ld. DR for the Revenue further submits that the Hon'ble Supreme Court in case of Maxopp Investment Ltd. vs. CIT [2018] 91 taxmann.com 154 (SC) held that in cases, where shares are held as stock-in-trade, main purpose is to trade in those shares and earn profits therefrom, in the process, certain dividend is also earned, though incidentally, which is also

an income. Therefore, to that extent, expenditure incurred in acquiring those shares will have to be apportioned.

10. We have considered the rival submission of the parties and have gone through the orders of authorities below. We have seen that during the relevant Financial Year the assessee has earned dividend income of Rs.3,26,50,897/- claimed exempted under section 10(33) of the Act. Initially no suo-moto disallowance was made by assessee. The Assessing Officer issued show-cause notice as to why provisions of section 14A r.w. Rule 8D should not be applied. The assessee filed a revised computation of income and added back expenses related to the exempt income for Rs. 22,99,590/-. The assessing Officer noted that the disallowance added back is not in accordance with section 14A r.w. Rule 8D. The Assessing Officer invoked the provisions of Rule 8D and calculated the working of disallowance under Rule 8D. The Assessing Officer worked out disallowance under Rule 8D(2)(ii) for Rs. 1,00,74,536/- and under Rule 8D(2)(iii) for Rs. 47,91,103/-. No disallowance was made under Rule 8D(2)(i). Thereby the Assessing Officer worked out the disallowance of Rs. 1,48,65,639/-. The assessee has already disallowed Rs. 22,99,590/- thereby difference of Rs. 1,25,66,049/- was added back. The ld. CIT(A) deleted the disallowance under Rule 8D(2)(ii) on the submission of assessee that the assessee has sufficient interest free fund available with them and in view of the decision of jurisdictional High Court in CIT vs.

Reliance Utility & Power Ltd. 313 ITR 340. The Id. CIT(A) after examining the share capital and reserve available with the assessee, which are more than the investment made by assessee and thereby deleted the disallowance of Rs. 1,00,74,536/- under Rule 8D(2)(ii). So far as disallowance under Rule 8D(2)(iii) worked out at Rs. 47,91,103/- is concerned, the assessee contended that bulk of investment were made in subsidiary, which are long term investment having been made to secure business interest. And investment in foreign subsidiary, the dividend from which being taxable does not form part of exempt income, the Assessing Officer was directed to re-work the disallowance after excluding the investment in foreign and domestic subsidiary. We have noted and as submitted by Id. DR that recently the Hon'ble Apex Court in Maxopp Investment Ltd. Vs Commissioner of Income-tax [2018] 91 taxmann.com 154 (SC) held that in cases, where shares are held as stock-in-trade, investment in subsidiaries and main purpose is to trade in those shares and earn profits therefrom, in the process, certain dividend is also earned, though incidentally, which is also an income. This triggers applicability of section 14A, which is based on theory of apportionment of expenditure between taxable and non-taxable income. Therefore, to that extent, expenditure incurred in acquiring those shares will have to be apportioned.

11. Therefore, considering the latest decision of Hon'ble Apex Court, this ground of appeal qua the disallowance under Rule 8D(2)(iii) only is

restored to the file of Assessing Officer to decide the issue afresh. While deciding this ground of appeal the assessing officer shall consider the decision of Hon'ble Apex Court in Maxopp Investment Ltd. (supra) and any other decision which the assessee think fit, pass the order in accordance with laws. Needless to say that Assessing Officer shall grant adequate opportunity of hearing to the assessee, before passing the order in accordance with law. In the result, the Ground No. 3 & 4 of the assessee's appeal is allowed for statistical purpose.

12. In the result, appeal of the assessee is partly allowed.

ITA No. 3570/Mum/2016 for AY 2011-12

13. The assessee has raised the following grounds of appeal:

1) On the facts and circumstances of the case as well as in law, the Learned CIT(A) has erred in confirming the action of Learned Assessing Officer in disallowing the claim of Bad Debts of Rs.29,99,53,618/-, without considering the facts and circumstances of the case.

2) On the facts and circumstances of the case as well as in law, the Learned CIT(A) has erred in confirming the action of Learned Assessing Officer in not appreciating the fact that all the conditions prescribed by the Section 36(1)(vii) of the Act have been duly complied with, without considering the facts and circumstances of the case.

3) On the facts and circumstances of the case as well as in law, the Learned CIT(A) has erred in confirming the action of Learned Assessing Officer in disallowing the expenses u/s.14A of the Income Tax Act, 1961 as per Rule 8D, without considering the facts and circumstances of the case.

4) On the facts and circumstances of the case as well as in law, the Learned CIT(A) as well as Learned Assessing Officer has erred in not appreciating the fact that while computing the disallowance as per Rule 8D, the interest expenses is to be considered after netting of the interest income and investment in debt fund on which no exempt income is earned are not to be considered.

5) On the facts and circumstances of the case as well as in law, the Learned Assessing Officer has erred in making an addition on account of disallowances

made u/s.14A determined as per rule 8D, while computing the Book Profit u/s.115JB of the Income Tax Act, without considering the facts and circumstances of the case.

14. Brief facts of the case as referred above in appeal for AY 2010-11, a search was conducted under section 132 on 04.02.2011. The assessee filed return of income for assessment year 2011-12 on 03.11.2011 declaring total income of Rs. 26,73,94,160/-. Subsequent to filing of return of income of survey action was also conducted on 24.12.2012. The assessee filed revised computation of income declaring total income of Rs. 30,84,24,083/-. The assessment was completed under section 143(3) on 28.03.2013. The Assessing Officer while passing the assessment order besides the other addition and disallowance, disallowed bad-debt of Rs. 29,99,53,618/- and Rs. 2,80,23,155/- under section 14A. The Assessing Officer also made the addition of disallowance under section 14A read with Rule 8D while computing the book profit under section 115JB. On appeal before the Id. CIT(A), the disallowance of bad-debt was upheld. However, the disallowance under Rule 8D(2)(ii) for Rs. 2,30,52,830/- was deleted and disallowance under Rule 8D(2)(iii) was restored back to the file of Assessing Officer with the direction to exclude the investment in foreign domestic subsidiaries. Therefore, further aggrieved by the order of Id. CIT(A), the present appeal is filed before us.

15. We have heard the Id. Authorized representative (AR) for the assessee and the Id Departmental Representative (DR) for the revenue and perused the

record. The ground No.1 & 2 of appeal relates to disallowance of bad debts. The Id. AR for the assessee submits that the assessing officer disallowed and added back the claim bad debts for Rs.29,99,53,618/-, holding it that the intention of assessee was to adjust it against the additional income offered on account of alleged bogus purchases, allegedly declared during the search action conducted by revenue on 4th February 2011. The assessing officer treated the bad debts as colorable device to avoid the tax by holding it as the act of nullifying the reversal of purchases on the profit. The assessee during the assessment proved by furnishing the relevant entries in the form of ledgers of the parties that the amounts written off, had been shown as sales/income in past and that the said sums had been written off in the books of account itself. The assessing officer failed to appreciate the position of law as on statute book after 1st April 1989. The Id. AR further submits that the recovery of dues were very slow and it was difficult for the assessee to recover the due, and in some of the cases the assessee has filed recovery suits, which are still pending, therefore, the assessee company decided to write off; the dues outstanding for more than one year. The assessee has reputable clientage in the market viz, Government/ Public Sectors; like BSES Rajdhani Power Ltd, BSES Yamuna Power Ltd, Kingfisher Airlines Ltd, Reliance Communication Ltd, Unisys India Private limited etc. The payments by the Governments and Public sectors are made only after

procedure formalities. Sometimes, the delay is due to change of officer in charge in the Government establishment. During the assessment the assessing officer made certain inquiries from debtors. The results of enquiries were not shared with the assessee. The chart furnished by the assessing officer showing the various details of his inquiries, has no relevance. Under law none of the debtors would be ready to acknowledge their liability. In support of the submission the learned AR of the assessee relied upon the decision of Hon'ble Supreme Court in case of TRF Ltd Versus CIT (190 Taxman 391), wherein it was held that it is not necessary to establish that debt, in fact, has become irrecoverable, it is enough bad debt is written off as irrecoverable in the accounts of assessee. The learned AR further submits that after 1 April 1989 the position under the law is well settled, it is not necessary for the assessee to establish that the debt, in fact has become irrecoverable, it is enough, if the bad debt is written off as irrecoverable in the accounts of assessee. The assessing officer has not examined; whether the debts have, in fact, been written off in the accounts of assessee. The ld. AR of the assessee submits that he has already filed the details of party wise up debts written off as on 31 March 2011 along with the summary of bad debt written in tax return of along with a statement of bad debts written off. The assessee has also filed the reply submitted by various parties before the assessing officer in response to the

notice under section 133(6) of the Act and the sample agreement for contract made with the parties.

16. On the other hand the learned DR for the revenue supported the order of lower authorities. The ld. DR for the revenue further submits that the search action under section 132 was conducted at the premises of the assessee on 4th February 2011. During the search the assessee offered undisclosed income of Rs.26,77,11,057/- for the year under consideration. The assessee has not offered such declared undisclosed income while filing return of Income. During the assessment proceeding assessing officer asked the assessee to submit the details of said undisclosed income in the return of income. The assessee has set off the said profit by claiming bad debts written off of Rs.29,99,53,618/-, thereby, nullified the declared income in the search. The assessee has not submitted documentary evidences that income has been declared in respect of the bad debts in respective assessment year in respect of debts which the assessee has claimed debts as bad. The assessing officer made enquiries from the several parties and they have not admitted their liabilities in the response submitted to the assessing officer.

17. We have considered the rival submission of the parties and have gone through the orders of authorities below, record furnished by Assessee Company in support of its claim and the reliance of law made by ld. representatives of the parties. During the assessment proceeding assessing

officer noted that the assessee had claimed bad debts written off of Rs.29,99,53,618/-. The assessing officer was of the view that the assessee claimed the bad debts written off against the undisclosed income offered during the search action for Rs. 26,77,11,057/-. The assessee disclosed the said undisclosed income on account of reversal of depreciation on bogus capital purchases. Therefore, the assessee was asked to submit the detail of bad debts written off and to justify the claim. The assessee furnished his reply and contended that the clientage of the assessee company consisted of Government, Public sector and other Private sector entities and the payments from such entities were made only after procedural formalities are completed. The assessee further contended that due to the recession in the economy has led to difficult and slow in the payments by various companies which are facing financial crisis. The assessee further contended that situation of recovery in several entities are very slow and it is difficult for them to recover the dues, and some of the cases they have made efforts and file recovery suits. Therefore, considering the factors, the assessee company decided to write off the dues outstanding for more than one year for more than one year. The contention of assessee was not accepted by assessing officer holding that the assessee has filed suit only against two parties i.e. BSES Rajdhani Power Ltd and Rei Six Ten Retails Ltd, where the amounts outstanding were relatively small. However, no search

action has been taken in case where the substantial amounts ranging from Rs.1.00 Crore to Rs.10.50 Crore were outstanding.

18.The assessing officer further after making inquiry under section 133(6) concluded that a reply was received from Unisys India Ltd on 14th March 2013 and M/s Anand Rathi Shares and Stock Brokers Ltd vide reply dated the 18th March 2013, in the reply both the parties contended that they have no dispute with the assessee and objected to write off of bad debts of Rs. 10,48,93,843/- and Rs. 1,00,589/- respectively and they further submitted that they had not return back and the dues payable to the assessee from the period of 01.04.2004 to 31.03.2011. Further in respect of Thermax Ltd the assessee claimed bad debts of Rs.42,07,324/-. In response to the information called under section 133(6) the said entity submitted that they have written back an amount of Rs. 81,898/- and Rs. 28,515/- and offered the same as income for assessment year 2011-12 in their return of income. For Reliance Communication the assessee claimed bad debts for Rs. 49,51,512/-, the said entity in their reply dated 21 March 2013 contended that the closing balance as on 31 March 2011, in the ledger of assessee in their books of account the balance is shown at Rs. 86,355/-. For write-off of in their books of account Reliance Communication has not commented. In respect of SBI Global Factors Ltd the assessee claimed bad debts of Rs.3,35,901/-, however, as per the reply received from that entity the closing balance as on 31 March 2011 is only Rs. 205/-. In respect of Gas

Authority of India Ltd (GAIL), the assessee claimed bad debts of Rs.68,63,180/- this entity confirmed as on 31st of March 2011 the amount is only Rs. 51,617/- being shown is payable to the assessee company as per their books of account. In respect of BSES Rajdhani Power Ltd, the assessee contended that they have filed suit against BESE, however, on verification of the submission filed by as the BSES, they have not mentioned about filing of the suit, however, contended that only an amount of Rs. 5,37,800/- was pending for installation report. Therefore, on the basis of the above observation the assessing officer concluded that the debt shown by the assessee in his books of account does not match with the books of debtor party and that secondly, claiming of bad debts in just an arrangement to nullify the disclosure made by assessee during the course of such action and disallowed the entire claim of bed debts.

19.The assessee urged the similar contention before the learned Commissioner (Appeals). The learned Commissioner (Appeals) after considering the contention of the assessee concluded that the assessing officer brought sufficient evidence on record in the inquiries conducted under section 133(6) that there was unreconciled discrepancy between the books maintained by the assessee and the debtor in whose cases debts were classified as bad. The learned Commissioner (Appeals) also relied upon the tabulated chart summarizing the result of the enquiries confronted with the assessee and confirmed the disallowance. We have

noted that the following details were tabulated during the First Appellate stage;

Sl. No.	Name of Party	Amount (Rs.)	Position of bad debts inquiry
1	Anand Rathi Share and Stockbrokers	1,00,58,902	According to company reply dated 18.03.2013 no outstanding amount is shown in companies books of account no intimation from assessee regarding write-off has been received
2	Aurionpro Solutions Ltd.	1,74,00,448	According to the company letter dated 14 October 2013 the payment has been made through cheque issued by HDFC bank during financial year 2008-09. Therefore, there is no such debts outstanding against assessee as claimed. No stand on waste invoices as claimed by assessee.
3	Bharat Petroleum Corporation Ltd	18,06,142.30	According to company reply dated 10.10.2013 payment of Rs. 17,75,288/- against ADS/5131/2008-09 has been made to the company on 12.09.2008, regarding payment of Rs.23,270/- against ADS /2526/2008-09. No such proof submitted by assessee to company. Regarding ADS/1479/2008-09 amounting to Rs. 2,247/-. No such purchase order has been generated in the books of assessee.
4	BSES Rajdhani Power Ltd	11,29,443.00	According to letter dated all such transaction claim through invoices have not been made by the company
5	BSES Yamuna Power Ltd	8,12,361.00	Reply yet to be received
6	Dataman Infotech Pvt. Limited	4,96,44,572.00	According to companies letter dated 25.10.2013 presently Dataman Infotech Private Limited is not in operation and has closed down all the heir activities. It is also mentioned in the letter that there is no outstanding amount in their books
7	Delhi International Airport Private limited	10,46,312. 14	According to companies letter dated 23 September 2013 the payment have already been made during financial year 2008-00 and financially 2009-10 there is no outstanding.
8	Deloitte Touche Tohmastu (I) Pvt Ltd.	37,43,673.58	According to company letter dated 15 October 2013 regarding transaction against ADS/057/05-06, ADS 2077/06-07, ADS 4713/06-07, ADS 5557/08-09 & ADS 6601/08-09. No such transaction is there in the company's account. Total of such transactions comes to Rs. 11,85,471/-. Therefore, such no transaction was done. There is no question of doubts outstanding for this amount. For the remaining amount of Rs. 25,58,167/-, the payment has already been made during FY 2006-07, 2007-08 and

			2008-09. Outstanding as on 31 March 2011 in respect of deep invoices/bills is zero
9	Enterprise marketing solution Ind	1,56,57,468.56	Reply awaited
10	Essar Information Technology Ltd	8,74,249.70	According to company letter dated 10 September 2013 there is no such outstanding as on 31 March 2011.
11	Essar Telecom. Retail Ltd	3,09,888.88	According to company letter dated 17 October 2013 no such transaction has been booked against ADS/1924/2008-09. Therefore, there is no question of such outstanding debts.
12	EURO Rscg	3,50,542.52	According to company letter dated and October 2013 payment against ADS 018/2005-06, ADS/843/2005-06, ADS 1915/2005-06 and ADS/2836/2006-07 has already been made to the company during financial year 2005-06 and financially year 2006-07, The total of such payment is Rs. 3,37,752/- For ADS/01902006-07, ADS/1529/2006-07. ADS1530/2006-07 & ADS 2843/2006-07. The company has submitted that no such transaction has been made. Total of such transactions comes to Rs. 12,789/-.Therefore, there is no outstanding against the invoices.
13	Exxonmobil Company India Private Limited	3,60,764.24	According to company letter dated 8 October 2013 the payment has been made to the company during financial year 2005-06 and financially 2009-10. Presently no such outstanding as there against the invoices. Since the amount has been made there is no question of such bad debts.
14	FCS Computer System Pvt. Ltd.	4,58,432.00	According to company letter dated the 9 October 2013 the amount claimed against different invoices have been paid during financial year 2005-06. No such debts outstanding.
15	Gail India Ltd (AMC)	68,63,179.53	According to companies letter dated 17 September 2013 amount of Rs. 1,05,516/- is outstanding as on 31 March 2010. But no information regarding write-off but Debs has been received.
16	Global Trade Finance Pvt. Ltd.	3,35,901.40	According to companies letter 6 September 2013 the payment worth Rs. 3,35,901/- as claimed by ADSL have already been made. There is no such outstanding.
17	GMR Ambala Chandigarh Expressway Private limited	17,94,558.88	The companywide its letter dated 8 th October 2013 has submitted that no such transaction against ADS/6147A/2008-09 for amount to Rs. 3,15,682/- and ADS 6166/2008-09 for amounting to Rs. 14,78,876/- has been made

			with the company.
18	Hewlett Packard India Sales Private Limited	9,30,953.16	Reply awaited.
19	IBM Global Services India Private Limited	40,79,027.81	According to IBM Company letter dated 4.10.2013, no transaction has been made by the ADSL against the following invoices-
20.	IBM India Private Limited (Bharti)	1,19,851.04	1. ADS/2634/2005-06 Rs. 29,846/- 2. ADS/7039A/2008-09 Rs. 17,33,548/- 3. ADS/7040A/20P8-09 Rs. 11,58,517/- 4. ADS/5991/2008-09 Rs. 12,09,443/- 5. ADS/5452/2008-09 Rs. 2,01,573/- 6. ADS/6060/2008-09 Rs. 1,38,678/- 7. ADS/6061/2008-09 Rs. 1,67,461/- Total Rs. 46,39,058/-
21.	IBM India Private Limited (CBDT)	92,92,091.34	Further, the following entries have been reversed by the IBM. 1. ADS/1831/2008-09 Rs. 9,32,026/- 2. ADS/4902/2008-09 Rs. 2,01,573/- 3. ADS/4952/2008-09 Rs. 2,01,573/- 4. ADS/4982/2008-09 Rs. 1,55,056/- Total Rs. 16,76,296/-
22.	IBM India Private Limited (CRISIL)	52,34,691.88	Therefore, out of total transaction of Rs. 2,29,29,991/-. The payment of Rs. 1,66,14,679/- has already been made by IBM to ADSL. The Transactions amounting to Rs. 46,39,058/- have not been made. The transaction worth Rs. 16,76,296/- has already been reversed. Therefore, there is no question of bad debts.
23	ICICI Bank	42,04,331.38	According to letter received on 21.10.2013 the total payment of Rs. 42,04,331/- has been made by ICICI bank before 15.01.2007. No such amount is outstanding after 15.01.2007.
24	Intergold (India) Ltd	1,88,067.50	According to company letter dated 06.10.2013 payment of Rs. 01,56,250/- plus service tax of Rs. 15,038/- totaling to Rs. 1,72,188/- has been made to Allied Digital against Bill No. ADS/187/2005-06 on 10.06.2005.
25	Kingfisher Airline Ltd	3,66,29,706.95	Reply awaited.
26	Mahindra & Mahindra Ltd	1,24,088.00	According to company letter dated 08.10.2013 payment of Rs. 1,24,088/- has been made to the ADSL against invoice no. 84409608 through cheque no. 35570 dated 21.02.2011 drawn on HDFC Bank, Mumbai.
27	Maruti Udyog Ltd	2,63,764.00	According to company letter dated 15.10.2013 the amount of Rs. 04,19,266/- against invoice no. ADS/4418/2006-07 has been made vide cheque no. 38831 dated 23.03.2007 drawn on City Bank payable at Delhi.
28	Micro inks Ltd	11,81,183.30	According to Company letter dated 23.10.2013 no outstanding amount is shown in company book. And no intimation from ADSL regarding write off of is received.

29	NIIT Technology Ltd	78,71,000.05	According to company's letter dated 30.10.2013 amount of Rs. 5,63,721/- against three vendor codes is outstanding as on 31.03.2011. But no information regarding writing off bad debts has been received.
30	Pfizer Ltd.	18,21,185.81	According to company letter dated 15.10.2013 the amount of Rs. 18,21,185/- against different invoices claimed by the assessee have been paid during F.Y. 2008-09. Presently no such debts is outstanding.
31	PJL Clothing India ltd	1,79,832.07	Reply yet to be received.
32	REI 6ten Retails Ltd	9,34,724.00	According to company letter dated 09.10.2013 the amount of Rs. 9,34,724/- is outstanding as on 31.03.2011. But no information regarding writing off bad debts have been received.
33	Reliance capital Ltd	3,81,338.93	According to company's letter dated 23.10.2013, no outstanding amount is shown in company's book. And no intimation from ADSL regarding write off has been received.
34	Reliance communication Ltd	49,51,511.50	According to company's letter dated 24.10.2013 out of six transactions only on transaction vide invoice No. ADS/7013/2007-08 for Rs. 1,78,004.43 is related to the party, which was processed for value of Rs. 1,77,986/-. Remaining five invoices relate to another concern of our group i.e. Reliance Communication Infrastructure Limited. The company has made payment of Rs. 1,73,946.66 on 10.07.2008 after deduction of tax.
35	Shara Airlines Ltd	1,55,056.80	Reply awaited
36	Shara Computer and Electronics Ltd	53,54,598.90	Reply awaited
37	State Bank of India(Patna)	70,297.25	Reply awaited
38	State Bank of India(Pune)	3,99,567.72	Reply awaited
39	Syntel India Private Limited	9,70,792.00	Reply awaited
40	The Clearing Corporation of India Ltd	11,23,654.75	According to company letter dated 08.10.2013 the invoices against which had debts has been claimed the payments have already been made during F.Y. 2006-07 and F.Y. 2007-08. Since the payments have already been made there is no question of bad debts.

20. In our considered view while considering the claim of bed debts the assessing officer is require to examine the claim in accordance with conditions prescribed sub-section (2) of section 36 of Income –tax Act.

None of the debtor would directly admits or deny its liability, which ultimately may bring them within in the preview of admission of their liability or under cessation of liability. Or in other way it may effect their defense if the dispute is pending before the court of law. It is settled law that once the debtor admitted its liability the limitation for recovery of dues would increased automatically under the Law of Limitation, against such debtor. Therefore, in our view the summary shown in the tabulated form is not helpful to the revenue. Even otherwise the assessee is the best person to decide the business expediency or to take decision whether they may continue to show the credit in their books of account against the creditors or write it off or not.

21. The Hon'ble Supreme Court in the case of T.R.F. Ltd. (*supra*) while considering the scope of section 36 of the Act after 1st April 1989 held as under:

"4. This position in law is well-settled. After April 1, 1989, it is not necessary for the assessee to establish that the debt, in fact, has become irrecoverable. It is enough if the bad debt is written off as irrecoverable in the accounts of the assessee. "

22. As we have noted earlier that the other additional condition is that the assessee had to fulfill to claim bad debt under section 36(1)(vii) of the Act has to satisfy clause (i) of sub-section (2) of section 36 of the Act. Section 36(2) is reads as under :

36. Other deductions. - (2) In making any deduction for a bad debt or part thereof, the following provisions shall apply -

- (i) no such deduction shall be allowed unless such debt or part thereof has been taken into account in computing the income of the assessee of the previous year in which the amount of such debt or part thereof is written off or of an earlier previous year, or represents money lent in the ordinary course of the business of banking or money-lending which is carried on by the assessee;

23.Clause (i) of sub-section (2) of section 36 of the Act itself provides that the claim for deduction as bad debt would not be allowed unless such debt or part thereof has been taken into account in computing the income of the assessee of the previous year in which the amount of such debt or part thereof is written off or of an earlier previous year. We have noted that the lower authorities have not disputed that such condition of section 36(2) is not satisfied. The assessee filed the ledger of all the parties in respect of which the debt was claimed as bad, the lower authorities have not commented on such ledger account. The assessee has specifically claimed throughout the proceedings that the amounts which are lying outstanding for more than a year have been written off in the books of account. Considering the above factual and legal position discussed above, we are of the view that there is no colorable device adopted by the assessee while making write off of the bad debts, the assessee has exercised their right within four corners of the law. Therefore, the grounds No.1 & 2 of appeal raised by the assessee are allowed.

24.Ground No.3 to 4 relates to disallowance under section 14A of the Act. We have noted that grounds No. 3 & 4 are identical to the grounds No. 3 &4 for appeal for assessment year 2010-11(in ITA No.3569/M/2016),

which we have restored to the file of assessing officer. Considering that fact that facts of appeal for the year under consideration are almost similar therefore, the ground No.3 &4 are restored to the assessing officer with similar direction.

25. Ground No.5 relates to addition of disallowance under section 14A Rule 8D to the book profit under section 115JB. We have noted that this ground of appeal is covered by the decision of Special Bench of Delhi Tribunal in ACIT Vs Vireet Investment [2017] 82 taxmann.com 415 (Delhi Tri- SB) wherein it was held that the computation under clause (f) of Explanation 1 to section 115JB(2), is to be made without resorting to computation as contemplated under section 14A read with rule 8D. Therefore, respectfully following the decision of Special bench this ground of appeal is also restored to work out the computation under section 115JB by following the decision of Tribunal in Vireet Investment (supra). In the result this ground of appeal is allowed for statistical purpose.

26. In the result, both the appeal filed by assessee is partly allowed.

Order pronounced in the open court on 29.06.2018.

Sd/-
G.S. PANNU
ACCOUNTANT MEMBER

Sd/-
PAWAN SINGH
JUDICIAL MEMBER

Mumbai, Date: 29.06.2018

SK

Copy of the Order forwarded to :

- | | |
|--------------------------------------|-----------------------------|
| 1. Assessee | 2. Respondent |
| 3. The concerned CIT(A) | 4. The concerned CIT |
| 5. DR "A" Bench, ITAT, Mumbai | |

6. Guard File

**BY ORDER,
Dy./Asst. Registrar
ITAT, Mumbai**