आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ - अहमदाबाद ।

IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD – BENCH 'D'

BEFORE SHRI RAJPAL YADAV, JUDICIAL MEMBER
AND
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER

आयकर अपील सं./ **ITA No.805/Ahd/2017**
*निर्धारण वर्ष/***Asstt. Year: 2012-2013**
AND
ITA No.2744/Ahd/2017
Asst.Year : 2013-2014

Gujarat Fluorochemicals Ltd. 2nd Floor, ABS Tower Old Padra Road Vadodara 390 007. PAN : AAACG 6725 H	Vs.	DCIT, Cir.1(1)(1) Vadodara.

अपीलार्थी/ (Appellant)		*प्रत्यर्थी/* (Respondent)

Assessee by :	Shri S.N. Soparkar and Shri Parin Shah, AR
Revenue by :	Shri O.P. Vaishnav, CIT-DR

*सुनवाई की तारीख/*Date of Hearing : 12/07/2018
*घोषणा की तारीख /*Date of Pronouncement: 13/08/2018

*आदेश/***O R D E R**

PER RAJPAL YADAV, JUDICIAL MEMBER : Present two appeals are directed at the instance of the assessee against orders of the AO dated 23.2.2017 and 30.10.2017 passed under section 143(3) r.w.s. 92CA r.w.s. 144C(13) of the Income Tax Act, 1961 in the assessment years 2012-13 and 2013-14.

2. Common issues are involved in both the years. Therefore, we deem it appropriate to hear both the appeals together and dispose of them by this common order.

3. First common issue involved in both years relates to disallowance of expenditure required to be made under section 14A of the Income Tax Act read with Rule 8D of the Income Tax Rules, 1962.

4. Brief facts of the case are that the assessee has filed its original return electronically on 29.11.2012 and 30.11.2013 declaring total income at Rs.6,51,35,70,910/- and book profit under section 115JB of the Act of Rs.7,01,62,08,886/- in the assessment year 2012-13. The return was revised on 31.3.2013 whereby the assessee has disclosed total income under the regular provision at Rs.6,13,41,16,740/-. In the assessment year 2013-2014, it has declared income at Rs.5,08,02,43,451/- under normal provisions and book profit under section 115JB at Rs.5,92,25,89,084/-. In this year also the assessee has revised its return of income on 31.3.2014 and declared total income under the normal provision at Rs.5,02,43,93,321/-. The case of the assessee in both the assessment years were selected for scrutiny assessment and notice under section 143(2) were served upon the assessee. It is pertinent to note that the assessee-company at the relevant time was engaged primarily in manufacturing of chemicals and gases. After hearing, the ld.AO has passed draft assessment orders in both the years under section 143(3) r.w.s. 144C(1) on 29.3.2016 and 29.12.2016 respectively. The assessee filed objections before the ld.DRP who has disposed of the objection of the assessee and issued necessary directions to the AO. On receipt of order of DRP, the ld.AO has passed the impugned orders on 23.2.2017 and 30.10.2017 in the assessment years 2012-13 and 2013-14 respectively.

5. On scrutiny of the accounts, it revealed to the AO that the assessee has made investments, which has resulted tax free income to the assessee. According to the AO, in the assessment year 2012-13

Rs.233.46 lakhs have been shown as dividend income and claimed as exempt from tax under the Act. Similarly, in the assessment year 2013-14 such dividend has been noticed by the AO at Rs.43.35 lakhs. He directed the assessee-company to explain, whether any expenditure pertained to such income has been added back and if not why expenses as per section 14A r.w.s. Rule 8D should not be disallowed. In response to the query of the AO, the assessee has filed almost verbatim explanation except variation in the quantum. These submissions of the assessee have been reproduced by the AO in the assessment orders. At this stage, before adverting to the various explanation given by the assessee as well as reasons assigned by the AO for calculating disallowance we deem it appropriate to take note of the details of investment made by the assessee in these assessment years. They read as under:

Sr. No.	*Particulars*	*March 2013*	*March 2012*	*March 2011*
1.	*Investment in Subsidiary Companies*	*16734.92*	*16042.00*	*13490.03*
2.	*Investment in Joint Venture Company*	*1325.89*	*1324.64*	*1324.64*
3.	*Investment in Venture Capital Fund*	*2434.57*	*3150.78*	*3200.78*
4.	*Investment in Equity of other companies*	*12453.98*	*14158.74*	*15512.37*
5	*Investment in Mutual Fund*	*20500.00*	*500.01*	*24925.03*
	Total	*53449.36*	*35176.17*	*58452.85*

6. In response to the query of AO, it was contended by the assessee that it has identified expenditure of Rs.87,96,337/- and 76,88,997/- relatable to earning of exempt income in the Asstt.Years 2012-13 and 2013-14 respectively. The assessee has bifurcated of this expenditure which includes security transaction tax, DEMAT charges, estimated management expenditure, PMS fees. The assessee has estimated

expenditure relatable to management at Rs.75.00 lakhs in each assessment year. The assessee has further contended that Rule 8D is not to be applied arbitrary or unreasonably but can be applied only if the assessee's method of identifying expenditure and adding back the same is not to the satisfaction of the AO. In support of its contentions, it put reliance upon the decision of Hon'ble Bombay High Court in the case of Godrej & Boyce Mfg. Co. Ltd. Vs. DCIT, (2010) 328 ITR 81. Assessee further contended that it has more interest free funds than the investment. It filed details of funds available with it and how the investments have been made. In support of its contentions, he relied upon the decision of the Hon'ble Gujarat High Court in the case of CIT Vs. UTI Bank Ltd., 215 Taxman 8. It also relied upon the decision of Hon'ble Bombay High Court in the case of CIT Vs. Reliance Utilities & Power Ltd. 313 ITR 340. The ld.AO was not satisfied with the contentions of the assessee and he proceeded to disallow the expenditure incurred in accordance with Rule 8D of Income Tax Rules 1962. The working made by the AO in both these years read as under:

Assessment Year : 2012-13

Interest Expenses for computation u/s 14A r.w. Rule 8D	*Rs. 40,09,78,000/-*	*A*
Investment as on 31.3.2012 (1)	*Rs. 3,48,15,42,000/-*	
Investment as on 31.3.2011 (2)	*Rs. 5,83,92,10,000/-*	
Avg. Investment[(1)+(2)/2]	*Rs. 4,66,03,76,000/-*	*B*
Assets as on 31.3.2012 (a)	*Rs.34,59,04,38,000/-*	
Assets as on 31.3.2011 (b)	*Rs.29,23,69,32,000 /-*	
Avg. Assets [(a)+(b)/2]	*Rs.31,91,36,85,000/-*	*C*

(i) The amount of expenditure directly relating to income which does not form	*1034356 + 109393 + 152588*	*12,96,337/-*

part of total income		
(ii) Expenses incurred on interest attributable to exempt income [(A x B)/ C]	*(400978000 x 4660376000) / 31913685000*	*Rs. 5,85,55,076/-*
(iii) Expenses being 0.5% of average investments. [0.5% of B]	*0.5 x 4660376000 / 100*	*Rs.2,33,01,880/-*
Total Disallowance u/s 14A r.w. Rule 8D of the Act		*Rs. 8,31,53,293 /-*
Less :-		
The amount of expenditure directly relating to income disallowed by the assessee	*12,96,337/-*	
Additional disallowance made by the assessee of other expenses on estimation basis (Without following Rule 8D of Income Tax Rules-1962)	*75,00,000/-*	
TOTAL DISALLOWANCE		*Rs. 7,43,56,956/-*

Assessment Year : 2013-14

Interest Expenses for computation u/s 14A r.w. Rule 8D	58,07,04,000	A
Investment as on 31.3.2012 (1)	5,34,49,36,000	
Investment as on 31.3.2011 (2)	3,51,76,17,000	
Avg. Investment[(1)+(2)/2]	4,43,12,76,500	B
Assets as on 31.3.2012 (a)	37,26,91,52,000	
Assets as on 31.3.2011 (b)	34,59,04,38,000	
Avg. Assets [(a)+(b)/2]	35,92,97,95,000	C

(i) expenditure directly relating to income which does not form part of total income		1,88,997
(ii) Expenses incurred on interest attributable to exempt income [(A x B)/ C]	58,07,04,000 X 4,43,12,76,500 / 35,92,97,95,00	7,16,19,111

	0	
(iii) Expenses being 0.5% of average investments. [0.5% of B]	0.50 X 4,43,12,76,500 100	2,21,56,383
Total Disallowance u/s 14A r.w. Rule 8D of the Act		9,39,64,491
The amount of expenditure directly relating to income disallowed by the assessee	1,88,997	
Additional disallowance made by the assessee of other expenses on estimation basis (Without following Rule 8D of Income Tax Rules-1962)	75,00,000	
TOTAL DISALLOWANCE		8,62,75,494

7. Dissatisfied with the proposed disallowance in the draft assessment order the assessee filed objection before ld.DRP. It reiterated its contentions as were raised before the AO. It contended that major investments are strategic investments i.e. in subsidiary companies and joint ventures. It has also pointed out that in the assessment years 2012-13, investment has been reduced in comparison to the investment stood as on 31.3.2011. Investment in March, 2011 was at Rs.584.53 whereas it has been gone done to 351.76 crores as on 31.3.2012, though again in the assessment year 2013-14 investment has been increased.

Basically, the assessee has raised two fold of contentions. It has submitted that its capital and reserves are much higher than the amount of investments therefore, no disallowance out of interest expenditure ought to be made. For buttressing this contention, it has filed a chart showing reserve and capital as much higher than the investment. It has also demonstrated that no borrowing has been

made when investments were made by it. For buttressing, it has produced fund-flow statement showing interest on loans. The ld.DRP has gone through all these details, but did not find merit in the contentions of the assessee. According to the ld.DRP borrowings and internal accruals are being credited in the same account and mixed funds have been created. It considered it as interest bearing mixed funds, and therefore held that Rule 8D is applicable. The ld.DRP made reference to a large number of decisions and upheld the working made by the AO except a little variation. Directions given by the ld.DRP in the assessment year 2013-14 are as under:

> *"With regard to the error in computation of disallowance u/s 14A as per Rule 8D pointed out by the assessee is concerned, the Panel agrees that the investment in venture capital funds (the interest of which is taxable) fixed maturity plan and investment in equity shares of group companies based abroad, the dividend from which is taxable and mutual funds need to be excluded from the investment income from which does not make part of total income. The AO is directed to rework the computation on the basis of these directions."*

8. Before us, while impugning orders of Revenue authorities, the ld.counsel for the assessee contended that the AO has not recorded any satisfaction as to how expenditure worked out by the assessee relatable to earning of exempt income are not sufficient for earning such income. He emphasised that the assessee has not made any borrowings for investment. Therefore, interest expenditure cannot be worked out for disallowance. He pointed out that in the assessment year 2012-13, the assessee has reserve and surplus and deferred tax liability of Rs.2272.44 crores whereas investment was of Rs.351.76 crores. Similarly, in the assessment year 2013-14, total reserves and surplus and deferred tax liability is Rs.2653.57 crores and investment is Rs.534.50 crores. On the strength of Hon'ble Gujarat High Court decision in the case of CIT Vs. UTI Bank Ltd. as well as of the Hon'ble

Bombay High Court in the case of CIT Vs. Reliance Utilities & Power Ltd. (supra), he submitted that even where the mixed funds are there, if the assessee has far more interest free funds in the shape of reserves and surplus, then a presumption is to be drawn that investment was made from interest free funds. The interest expenditure cannot be calculated on notional basis for making disallowance. He further contended that the ld.DRP has not made any reference to this plea, rather devoted its energy in explaining the outcome of section 14A read with Rule 8D of the Income Tax Rules. According to the ld.counsel, there is no dispute about applicability of section 14A on the case of the assessee. Dispute relates to quantification of the expenditure required to be made. In this connection, the ld.DRP ought to have taken into consideration the interest free funds available with the assessee, and thereafter ought to have decided, whether any expenditure could be allocated for earning exempt income.

9. In his next fold of contention, he submitted that in the assessment year 2012-13 exact tax free dividend income was Rs.1.55 crores out of total Rs.233 lakhs considered by the AO. In the assessment year 2013-14 such dividend income was Rs.43.35 lakhs. The Revenue authorities have made disallowance of expenditure at Rs.7.43 cores in the assessment year 2012-13 and Rs.4.93 crores in the assessment year 2013-14. He contended that in the case of Correctch Energy P.Ltd., 223 taxmann 130, the Hon'ble Gujarat High Court has held that if there is no dividend then there could not be any disallowance under section 14A. In the light of this decision, if facts of the present case are examined, then at the most, disallowance if any required to be made then it should not be made more than the dividend income. According to the ld.counsel for the assessee, how an assessee would incur a sum of Rs.4.93 cores of expenditure for earning dividend income of Rs.43.35 lakhs. He further pointed out that the ld.AO has

made reference to the decision of ITAT, Special Bench in the case of Cheminvest Ltd. Vs. ITO, 121 ITD 318 (Delhi)(SB). This decision has been reversed by the Hon'ble High Court and the judgment of Hon'ble Delhi Court reported in 378 ITR 33. The Hon'ble Delhi High Court in this case has considered judgment of Hon'ble Gujarat High Court in the case of Correctch Energy P.Ltd.(supra). The issue before the Hon'ble High Court was, whether the disallowance under section 14A of the Act can be made in a year in which no exempt income has been earned or received by the assessee. In this way, the ld.counsel for the assessee agreed that if disallowance to the extent of exempt income in the shape of dividend is being restricted, then the assessee has no objection.

10. On the other hand, the ld.DR relied upon the order of the DRP and submitted that in the assessment year 2013-14, the ld.DRP has examined this issue in detail and thereafter concurred with the AO.

11. We have considered rival contentions and gone through the record carefully. Before we embark upon an inquiry on the facts of the present case, in order to determine the amount of expenditure requires to be disallowed under section 14A read with rule 8D for earning tax free income, we deem it appropriate to take note of section 14A. It reads as under:

> *14A. (1) For the purposes of computing the total income under this Chapter, no deduction shall be allowed in respect of expenditure incurred by the assessee in relation to income which does not form part of the total income under this Act.*
>
> *(2) The Assessing Officer shall determine the amount of expenditure incurred in relation to such income which does not form part of the total income under this Act in accordance with such method as may be prescribed17, if the Assessing Officer, having regard to the accounts of the assessee, is not satisfied with the correctness of the claim of the assessee in respect of such expenditure in relation to income which does not form part of the total income under this Act.*

> *(3) The provisions of sub-section (2) shall also apply in relation to a case where an assessee claims that no expenditure has been incurred by him in relation to income which does not form part of the total income under this Act :*
>
> *Provided that nothing contained in this section shall empower the Assessing Officer either to reassess under section 147 or pass an order enhancing the assessment or reducing a refund already made or otherwise increasing the liability of the assessee under section 154, for any assessment year beginning on or before the 1st day of April, 2001.*

12. A perusal of this section would indicate that sub-section-1 contemplates that deduction of expenditure incurred by an assessee in relation to income which does not form part of taxable income shall not be allowed. Sub-section (2) casts an obligation on the AO to first examine the claim made by the assessee in its books of accounts and if he is not satisfied with the correctness of the claim, then he would work out the expenditure for disallowance. It is also pertinent to note that in order to remove subjectivity involved in calculating the expenditure, Rule 8D has been provided on the statute book providing a uniform formula for such calculations. The ld.DRP has made a lucid analysis of section 14A in its order passed in the assessment year 2013-14. It has observed that sub-section (3) of section 14A further provides that even if an assessee claims that no expenditure was incurred in order to exempt income, then also sub-section (2) can be applied. As far as interpretation and construction of scope and ambit of section 14A read with rule 8D made by the ld.DRP on the strength of various authoritative pronouncements are concerned, there is no dispute. Dispute between the parties relates to actual working on the basis of meaning explained by the DRP. When the ld.DRP has applied the scope and its application on the facts of the case of the assessee, then it failed to apply correctly. The ld.DRP has totally ignored the judgment of the Hon'ble High Court in the case of CIT Vs. UTI Bank Ltd. (supra) – rather it has not made any discussion on it. Similarly, it has ignored judgment

of Hon'ble Bombay high Court in the case of Reliance Utilities & Power Ltd. (supra). The judgment of Hon'ble Bombay High Court in the case of Reliance Utilities (supra) has been followed by the Hon'ble Gujarat High Court in the case of CIT Vs. UTI Bank (supra). The question of law considered by the Hon'ble Bombay High Court in the case of Reliance Utilities and Power Ltd. (supra) reads as under:

> *"Whether on the facts and in the circumstance of the case and in law the Hon'ble Tribunal was justified in holding that the assessee-company had sufficient funds of its own for making the investments without using the interest bearing funds even though the Balance Sheet of the assessee-company as at 31-3-1999 shows that the assessee-company has no reserve or own funds for making the investments in the sister concern and therefore, borrowed funds have been utilized and interest on these borrowed funds are rightly disallowed by the Assessing Officer ?"*

13. The Hon'ble High Court has answered this question in favour of the assessee and conclusion drawn in the judgment reads as under:

> ***"10.*** *If there be interest-free funds available to an assessee sufficient to meet its investments and at the same time the assessee had raised a loan it can be presumed that the investments were from the interest-free funds available. In our opinion the Supreme Court in East India Pharmaceutical Works Ltd.'scase (supra) had the occasion to consider the decision of the Calcutta High Court in Woolcombers of India Ltd.'s case (supra) where a similar issue had arisen. Before the Supreme Court it was argued that it should have been presumed that in essence and true character the taxes were paid out of the profits of the relevant year and not out of the overdraft account for the running of the business and in these circumstances the appellant was entitled to claim the deductions. The Supreme Court noted that the argument had considerable force, but considering the fact that the contention had not been advanced earlier it did not require to be answered. It then noted that in Woolcombers of India Ltd.'s case (supra) the Calcutta High Court had come to the conclusion that the profits were sufficient to meet the advance tax liability and the profits were deposited in the overdraft account of the assessee and in such a case it should be presumed that the taxes were paid out of the profits of the year and not out of the*

overdraft account for the running of the business. It noted that to raise the presumption, there was sufficient material and the assessee had urged the contention before the High Court. The principle therefore would be that if there are funds available both interest-free and overdraft and/or loans taken, then a presumption would arise that investments would be out of the interest-free fund generated or available with the company, if the interest-free funds were sufficient to meet the investments. In this case this presumption is established considering the finding of fact both by the CIT (Appeals) and ITAT."

14. Hon'ble Court have laid down that if there be funds available; both interest free, overdrafts and loans taken, then a presumption would arise that investment would be out of interest free funds generated or available with the company. The ld.DRP has failed to take note of the ratio laid down in these decisions. It proceeded on the presumption that since funds are mixed, therefore, it is presumed that direct interest expenditure cannot be worked out and Rule 8D is to be applied. Whereas, the stand of the assessee is that its interest free funds is far more than the investment. For example, in the assessment years 2012-13, it was having interest free funds of Rs.2272.44 crores and their investment was of Rs.351.76 crores. Similarly, in the assessment year 2013-14, interest free funds are of Rs.2653.57 crores against investment of Rs.534.52 cores. A chart showing availability of these funds and details of investment has been placed on page no.11 of the paper book. It has annexed as annexure A/4 filed before the ld.DRP. The assessee has also compiled the details showing loans and interest for F.Y.2012-13. Similar exercise has been made in the F.Y.2011-12. These details were filed before the ld.DRP. Thus, the assessee has demonstrated that it was having sufficient interest free funds which can take care of these investments. Therefore, no interest expenditure is to be disallowed with the help of Rule 8D.

15. Next fold of dispute relates to working out of administrative expenses relatable to earning of exempt income.

16. As pointed out by the ld.cousnel for the assessee that Hon'ble Gujarat High Court (in Corrotech) and Hon'ble Delhi High Court in (Chemvest) have concurred with each other that if there is no dividend income or tax free income in a year then no disallowance u/s.14A can be made. This explication was amplified and employed subsequently by ITAT to construe that working of expenditure for disallowance u/s.14A should not exceed more than dividend income itself. In the case of Joint Investment Pvt. Ltd. Vs. CIT (ITA No.117/2015 decided on 25.2.2015) Hon'ble Delhi High Court has observed that by no stretch of imagination can section 14A or Rule 8D be interpreted so as to mean that entire tax exempt income is to be disallowed. The ITAT, Ahmedabad has restricted the disallowance equivalent to exempt income (ITA No.3266/Ahd/2015, ITA No.261/Ahd/2012, ITA No.1281/Ahd/2012 decided on 7.12.2016. The ld.counsel for the assessee agreed for disallowance to the extent of dividend income earned by it in both the years. However, that would give an excessive relief to the assessee in the assessment year 2013-14 because assessee itself has disallowed a sum of Rs.75 lakhs whereas dividend income is only Rs.43.35 lakhs. Thus, we confirm disallowance to the extent of Rs.1.55 crores (Rupees One Crore Fifty Five Lakhs) in the assessment year 2012-13, which is equivalent to the dividend income, whereas in the assessment year 2013-14 the assessee itself disallowed a sum of Rs.75 lakhs which can take care of administrative expenditure of earning dividend income at Rs.43.35 lakhs. Accordingly, both these grounds are partly allowed. We confirm disallowance at Rs.1.55 crores (Rupees One Crore and Fifty Five Lakhs) in the assessment year 2012-

13 and Rs.75 lakhs (Rupees Seventy Five Lakhs in the assessment year 2013-14. Rest of the disallowances made by the AO are deleted.

16. Next common issued involved in both years is, whether the amount disallowed under section 14A read with rule 8D deserves to be added back in the book profit for the purpose of section 115JB. In other words, whether the additions which have been confirmed by the Tribunal at Rs.1.55 crores in the assessment year 2012-13 and Rs.75 lakhs in the assessment year 2013-14, deserves to be added back in the book profit computed for the purpose of section 115JB.

17. The ld.counsel for the assessee at the very outset contended that this issue is covered in favour of the assessee by the judgment of Hon'ble Gujarat High Court in the case of CIT Vs. Alembic Ltd. in Tax Appeal No.1249 of 2014 as well as decision of Hon'ble Bombay High Court in the case of CIT Vs. Bengal Finance & Investment P.Ltd., in Tax Appeal No.337 of 2013. He placed on record copies both these decisions. Apart from the above, he placed upon reliance Special Bench decision of the ITAT in the case of CIT Vs. Vireet Investment P.Ltd. 165 ITD 27. On the other hand, ld.CIT-DR relied upon the order of DRP.

18. We have duly considered rival contentions and gone through the record carefully. We find that ld.DRP has relied upon the order of the ITAT, Mumbai in the case of DCIT Vs. Viraj Profiles Ltd., (2016) 46 ITR (Trib) 0626 (Mum) and held that addition required to be made in the book profit could be calculated as per Rule 8D of the Income Tax Rules. The ld.DRP thereafter made reference to decision of Hon'ble Delhi High Court in the case of CIT Vs. Geotze India Ltd., 361 ITR 505. According to the ld.DRP, this decision has been considered by the Special Bench in the case of Vireet Investment P.Ltd. (supra) but placed reliance upon Hon'ble Bombay High Court in the case of Vodafone India Services

P.Ltd. ACIT, 361 ITR 0531 (Bom) and held that DRP is not bound by the ratio laid down by the Special Bench. The discussion made by the DRP on this issue in the assessment year 2013-14 reads as under:

> *"10.3 In the case of Viraj Profiles Ltd. [2015] 64 taxmann.com 52 (Mum Trib), the Hon'ble Bench has elaborately discussed the issue and held that the disallowance is liable to be calculated as per Rule 8D of the Rules. After discussing the decisions which have also been relied on by the appellant, the Hon'ble Bench has concluded that;*
>
> > *"In view of our foregoing discussion, we find no infirmity with the orders of the AO and we hold that the AO has rightly disallowed the expenditure of Rs.73,07,018/- by invoking the provisions of Section 14a of the Act read with the Rule 8D of Income Tax Rules. 1962 for computing book profit u/s. 115JB(2) of the Act read with clause (f) to Explanation 1 to clause 115JB(2) of the Act. We, therefore, set aside the orders of the CIT(A) and restore the orders of the AO. We order accordingly.*
>
> *10.4 In the case of CIT(Central-II) Vs Goetze (India) Limited, the Hon'ble Delhi High Court has in ITA No. 1179/2010 vide order dated 09.12.2013, held that the disallowance u/s 14A is to be taken into consideration for the purposes of calculating book profits u/s 115JA/115JB. The relevant Paras of the judgement are reproduced below:-*
>
> > *"36. By order dated 16th May, 2012, the following substantial questions of law were framed in the present appeals:-*
> >
> > *"(i) Whether the Income Tax Appellate Tribunal was right in holding that while computing book profit under Section 115JA (sic. Section 115JB) of the Income Tax Act, 1961, no disallowance under Section 14A was required to be made?*
> >
> > *-----*
> >
> > *37. Learned counsel for the respondents-assessee, during the course of hearing, has fairly conceded that the first question has to be answered in favour of the Revenue and*

against the assessee in view of specific provisions in the Explanation 1 below Section 115JB(2) clause(f).

The Assessing Officer it is stated had made an addition of Rs.88,292/- to the book profits towards expenditure incurred having nexus with dividend income, which were exempt under Section 10(33). Recording the said statement, the first question is answered in favour of the appellant-Revenue and against the respondent-assessee. "

10.5 The assessee has relied upon the judgement of ITAT special bench in the case of Vireet Investment Pvt. Ltd.. In this regard it is pertinent to mention that Hon'ble Bombay High Court in the case of Vodafone India Services Pvt. Ltd. vs. Additional Commissioner of Income Tax & Ors. (2014) 264 CTR 0030 (Bom) : (2013) 96 DTR 0193 (Bom) : (2014) 361 ITR 0531 (Bom) : (2014) 221 Taxman 0166 (Bom); has held that the proceedings before DRP are extension of assessment proceedings. Therefore they are not bound by the decision of Tribunals unlike CIT(A) as long as the issue is not acceptable on merit and/or the issue is being contested by the department. In this case, the decision of Hon'ble Delhi High Court in the case of Goetze (India) Ltd cited above is also in favour to the department on this issue which also shows that the view of AO confirmed by the Panel is a plausible view.

19. There were contradictory orders at the end of the Tribunal. Therefore, Special Bench was constituted to consider the following question:

"Whether expenditure incurred to earn exempt income computed under section 14A could not be added while computing book profit under section 115JB of the Act."

20. When the Special Bench has considered this question, it was confronted with two decisions of the Hon'ble Delhi High Court diagonally opposite to each other. One referred by the ld.DRP also in the present case, rendered in the case of CIT Vs. Geotze India Ltd. (supra) and other in the case of Pr.CIT Vs. Bhushan Steel. ITAT, Special Bench has

reproduced both these orders in Vireet Investment P.Ltd. (supra) and thereafter it considered as to which decision ought to be followed by a subordinate authority. The department advanced an argument that in the case Bhushan Steel, Hon'ble Delhi High Court failed to consider subsequent decision of CIT Vs. Geotze India Ltd. (supra). However, the Tribunal after placing reliance upon the decision of Hon'ble Supreme Court in the case of CIT Vs. Vegetable Products Ltd., 88 ITR 192 (SC) and other decisions has held that it is incumbent upon it follow the decision of Hon'ble Delhi High Court in the case of Bhushan Steel. In this case, Hon'ble Delhi High Court has held as under:

"*However*. Ld. Senior Counsel has relied on the decision in the case of *Bhushan Steel Ltd.* (*supra*) wherein it has been held as under:—

"*ITA 593/2015*

PR. CIT .....Appellant

Through: Mr. N.P. Sahni, Senior Standing counsel with Mr. Nitin Gulati, Advocate.

versus

BHUSHAN STEEL LTD

Respondent

Through: Ms. Kavita Jha, Advocate with Ms. Roopali Gupta, Advocate.

ORDER

29.09.2015

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** ** **

7. Question No. 6 concerns deletion of addition of Rs. 89,00,000 made by the AO for computation of the income for the purposes of Minimum Alternate Tax ('MAT') under Section 115 JB of the Act. This pertained to the expenditure incurred for earning exempt income

under Section 14A read with Rule 8D. The ITAT has rightly held that this being in the nature of disallowance, and with Explanation 115JB not specifically mentioning Section 14A of the Act, the addition of Rs. 89,00,000 was not justified. The view taken by the 1TAT cannot be faulted with. It is consistent with the decision in Apollo Tyres *Ltd. v. Commissioner of Income Tax 255 ITR 273 (SC) which held that "the Assessing Officer does not have the jurisdiction to go behind the net profit shown in the profit and loss account except to the extent provided in the Explanation to Section 115J." The Court declines to frame a question on the above issue.*"

21. Apart from the above, we have a binding precedent before us - One from Hon'ble jurisdictional High Court and other from the Hon'ble Bombay High court. The question considered by the Hon'ble Gujarat High Court in the case of Alembic Ltd. (supra) is as under:

"Whether on the facts and in the circumstances of the case and in law, the ITAT was justified in holding that adjustment made on account of disallowance u/s 14A of the Act in computation of book profit u/s 115JB of the Act is not as per law without appreciating that the amount disallowable under section 14A is covered under clause (f) of Explanation to section 115JB(2) and, thus, said amount has to be added back while computing amount of book profits?

22. The Hon'ble Gujarat High Court has replied this question as under:

"7. So far as issue Nos. (iii) and (iv) are concerned, the learned counsel for the assessee has relied on the decision of this court in the case of Commissioner of Income-tax-I v. Gujarat State Fertilizers & Chemicals Ltd., reported in (2013) 358 ITR 323 (Gujarat) where this court has held in paragraph Nos. 6 to 6.5 this court has observed as under:

"6. So far as the fourth question is concerned, it pertains to addition of Rs.1,14,43,040/- under Section 115JB of the Act being the expenditure estimated on earning of dividend income under Section 14A of the Act. 6.1 The Assessing Officer on referring to the said provision of Section 115JB(2) of the Act added the said amount considering that any

amount of expenditure relatable to the income exempted under Section 10 of the Act shall need to be added in the profit shown in the 'Profit and Loss Account'.

6.2 When the matter travelled to the CIT (Appeals), since it deleted the addition of Rs.1,14,43,040/- while deciding the question No.1, it consequently deleted such addition under Section 115JB of the Act on the ground that this would not serve any purpose.

6.3 The Tribunal decided the said issue as follows :

> *"94. We have considered the rival submissions and we find that similar issue was raised by Revenue as per ground No.3 above in respect of regular assessment of income and while deciding that ground, we have already upheld that disallowance of Rs.5 lakh in respect of administrative expenses will meet the ends of justice and no disallowance is called for in respect of interest expenditure. Hence, for the purpose of computing book profit u/s 115 JB of the Act also, we hold accordingly and confirm the addition of Rs.5 lakh. This ground of Revenue's appeal is partly allowed."*

6.4 As rightly held by both, the CIT (Appeals) and the Tribunal, this issue has a direct correlation with the first question. It was argued by the Revenue that while computing the book profit under Section 115JB of the Act, the disallowance of interest expenditure on exempt income was wrongly negatived by both the authorities on the ground that it was not the liability for expenses, but a liability relating to assets.

6.5 We find no fault in the approach adopted by both the authorities. The addition under Section 115JB of the Act of a sum of Rs.1,14,43,040/- when was made as an expenditure estimated on earning of dividend income under Section 14A of the Act, without reiterating the rationale of confirming deletion of such amount as has been elaborately done at the time of deciding question No.1, this deletion requires to be confirmed."

8. Taking into consideration the evidence on record and considering the decision of this court in the case of Commissioner of Income-tax-I vs. Gujarat State Fertilizers & Chemicals Ltd.

(supra), we are of the opinion that issue Nos. (iii) and (iv) required to be answered in favour of the assessee and against the revenue. In that view of the matter, we answer questions (iii) and (iv) referred to us in favour of the assessee and against the revenue. The appeal of revenue is dismissed.

23. Similarly, Hon'ble Bombay High Court has formulated following question in the case of Bengal Finance & Investments P.Ltd. (supra) and replied as under:

(b) Whether on the facts and in the circumstances of the case, and in law, the ITAT is justified in deleting the addition of Rs. 78,84,387/ under clause (f) of Explanation 1 to Section 115JB relying upon the decision in the case of Goetze (India) Ltd. v/s. CIT (2009) 32 SOT 101 (Del.), which has been followed by ITAT, Mumbai in the cases referred to in para 5 of the impugned order without appreciating that the above decision in the case of Goetze (India) Ltd. was rendered by the ITAT, Delhi Bench on completely distinguishable set of facts, peculiar to the said case?"

…….

4 So far as Question (b) is concerned, the impugned order of the Tribunal followed its decision in M/s. Essar Teleholdings Ltd. v/s. DCIT in ITA No. 3850/Mum/2010 to held that an amount disallowed under Section 14A of the Act cannot be added to arrive at book profit for purposes of Section 115JB of the Act. The Revenue's Appeal against the order of the Tribunal in M/s. Essar Teleholdings (supra) was dismissed by this Court in Income Tax Appeal No.438 of 2012 rendered on 7th August, 2014. In view of the above, question (b) does not raise any substantial question of law.

24. Respectfully following the above decision, we hold that no addition in the book profit would be made on the basis of calculations worked out under section 14A of the Act. We allow this ground of appeal in both the years and delete the additions.

25. Ground No.3 in the assessment years 2012-13 and 2013-14 is as under:

Assessment Year 2012-13

Ground no.3: The ld.DRP has erred in making addition of Rs.2,58,962 to the total income, comprising of addition of Rs.1,17,024/- on account of purchase of AHF from the associated enterprises and Rs.1,41,938 on account of sale of PTEE to the associated enterprise following adjustment made in the transfer pricing order u/s.92 CA(3) of the Income Tax Act."

Assessment Year 2013-14

"The ld.DRP has erred in making addition of Rs.28,45,713/- to the total income on account of sale of PTEE to the associated enterprise following adjustment made in the transfer pricing order u/s.92 CA(3) of the Income Tax Act."

26. The ld.counsel for the assessee did not press this ground of appeal in both years on account of smallness of the amount involved in it. In view of the stand of the assessee this common ground of appeals is rejected.

27. Ground NO.6 in the assessment year 2012-13 and ground no.4 and 5 in the assessment year 2013-14.

28. Grievance of the assessee in these grounds of appeal relate to denial of deduction under section 80IA(4) of the Income Tax act amounting to Rs.13,19,37,184/- and Rs.7,92,94,293/- in the assessment years 2012-13 and 2013-14 respectively.

29. Brief facts of the case are that the assessee has captive power plants at Ranjinagar and Dahej. At Dahej, assessee has coal based captive power plant and gas based captive power plant. According to the AO, it did not claim deduction under section 80IA originally in the assessment year 2013-14. However, after the decision of Hon'ble Chhattisgarh High Court in the case of CIT Vs. Godawari Power & Ispat Ltd., 223 TAXMANN 234 it has filed a submission claiming deduction. It also revised return of income on 31.3.2015 in the assessment year

2013-14. Similarly, in the assessment year 2012-13, it has enhanced its claim by way of a letter pointing out that the rate for determining the valuation of power generated by it for the purpose of allowing deduction, the rate should be adopted equivalent to the rate at which Madhya Gujarat Vij Company Ltd. ("MGVCL" for short) and Dakshin Gujarat Vij Company Ltd. ("DGVCL" for short) etc. are supplied the electricity to the assessee's manufacturing unit. The ld.AO did not adjudicate the issue in the assessment year 2012-13 for the enhancement of deduction in the draft assessment order. Before the ld,DRP, the assessee raised specific objection about the non-adjudication of the issue by the AO. Also it raised that enhanced rate should be adopted for determining the value of electricity at which deduction under section 80IA has to be granted. The ld.DRP rejected the contentions of the simply for the reason that the AO cannot entertain any claim for allowing deduction resulting in reduction in the total income returned by the assessee. The ld.DRP placed reliance upon the decision of the Hon'ble Supreme Court in the case of Goetze (India) Ltd. (supra). It further rejected the contentions of the assessee that the identical issue was decided by the ld.CIT(A) in the assessment year 2011-12 and the matter is pending before the Tribunal. Thus, according to the DRP, the issue has not attained finality therefore, the deduction under section 80IA cannot be granted on the enhanced amount claimed by the assessee during the assessment proceedings.

With regard to the assessment year 2013-14, the ld.DRP has observed that there is a little change in the statutory provision by virtue of section 80IA(8). The arm's length price of the goods sold by the assessee in the alleged captive power plant has to be determined. The ld.DRP thereafter observed that the TPO has determined value of the goods and services sold by its eligible units. According to the TPO captive power plant and electricity distributing companies are to be

pitted at different pedestal. According to the DRP, there is a material difference between captive power plant as a seller and distribution/transmission entity. Thus, differences are both in terms of functions performed as well as asset used. In the case of distribution and transmission entities, apart from assets used for generation of electricity huge investments have gone in laying in transmission and distribution infrastructure. These investments and related transmission and distribution function are totally missing in the CPP. It also observed that sale of electricity is regulated activity, thus, as per the law, CPP could have sold to a distribution licensee (through transmission utility). The benchmarking of sale of CPP at the rate at which non-eligible units brought electricity from the grid is thus incorrect. The ld.DRP under this misconception construed that the rate at which electricity supply-companies are purchasing the electricity should be applied for benchmarking the value of electricity sold by the CPP to its manufacturing units. In other words, the DRP was of the view that non-eligible units cannot be taken for the benchmarking for determining the value at which electricity was sold by the CPP. DRP has emphasized that manufacturing units could have different source of procurement of electricity; say – from CPP or from electricity boards. But as electricity producer, in a CPP, it could only be sold to distribution licensee holder. In this way, the ld.DRP observed that value of electricity cannot be benchmarked by adopting the rate at which manufacturing units of the assessee has been purchasing the electricity, rather, according to the DRP, the rate at which supplier companies are purchasing the electricity ought to be applied.

Before us, the ld.counsel for the assessee contended that this controversy has been silenced by the Hon'ble Gujarat High Court in the case of CIT, Gujarat Alkalis and Chemicals Ltd. He placed on record copy of the Hon'ble High Court's decision and contended that for the

purpose of computation of deduction admissible under section 80IA market price of the electricity supplied by a CPP is to be determined by adopting rate at which manufacturing unit has been purchasing the electricity from the open market. The ld.DR, on the other hand relied upon the order of the DRP, but unable to controvert the contentions raised by the assessee.

30. We have duly considered rival submissions and gone through the record carefully. Before us the dispute has two dimensions. In the first fold of dispute the issue is, whether the claim of the assessee for enhanced deduction can be entertained during the assessment proceedings by way of a letter. The ld.DRP after putting reliance on the judgment of Hon'ble Supreme Court in the case of Geotze India Ltd (supra) did not accept the claim of the assessee in the assessment year 2012-13. It has been brought to our notice that such claim can be made even before the ld.DRP in the form of objection. A reference to the decisions of ITAT, Mumbai and Bangalore Benches have been made; Asian Paints Vs. DCIT, Mumbai 88 taxmann.com 677, and Himalaya Drug Co. Vs. DCIT, Bangalore, 48 taxmann.com 65 (2017). The ld.counsel for the assessee also put reliance upon the decision of the Hon'ble Gujarat High Court in the cases of Mitesh Impex, 270 CTR 66. This decision propounds that when the taxability of the assessee is going to be effected, then it can raise a fresh plea before the appellate authorities. Taking a leaf from this reasoning, ITAT, Mumbai and Bangalore have propounded that fresh claim can be made even before the DRP. Thus, respectfully following these decisions, we uphold that in the assessment year 2012-13, the DRP ought to have entertained the claim of the assessee.

31. So far as the issue on merit is concerned, the Hon'ble Gujarat High Court in the case of Gujarat Alkalies and Chemicals Ltd. has considered the following question:

> *"(ii) Whether the Tribunal was right in law in allowing the assessees claim of deduction of Rs.1954 crores u/s.80IA(4) of the I.T.Act, 1961, when the assessee had adopted rate of power generation at Rs.4.73 per unit, rate on which the GEB supplied power to its consumers, ignoring the rate of rs.2.36 per unit, the rate on which power generating company supplied its power to GEB?"*

32. The Hon'ble High Court has replied this question by recording the following finding:

> *"3. Since both the issues are covered by various judgments of this Court, we do not find it necessary to record facts at any length. Division Bench of this Court by judgment dated 22.11.2011 in Tax Appeal No.2092/2010 in somewhat similar controversy observed as under :*
>
> > *"3. With respect to Question [B], the issue pertains to sub Section (8) of Section 80IA of the Income Tax Act, 1961. The assessee had a CPP Unit generating electricity, which was supplying it to a general unit. The electricity generated is being supplied to other consumers also. The CPP unit charged Rs. 5.40 ps. per unit from the general unit. The Assessing Officer applying sub-Section (8) of Section 80IA restricted the same to Rs. 5.32 ps. per unit and, thereby, restricted the deductions claimed by the assessee under Section 80IA of the Act. This restriction was primarily on the basis that the rate of Rs. 5.40 ps. charged by Gujarat Electricity Board (" GEB" for short) was inclusive of 8 paise per unit of electricity duty. This component of electricity duty the Assessing Officer discarded for the purposes of ascertaining market value of the electricity generated by the CPP Unit and supplied to its general unit.*
> >
> > *4. CIT (Appeals) confirmed the view of the Assessing Officer on the same line of reasoning. The Tribunal, however, on further appeal by the assessee, reversed the orders passed by the Revenue authorities referring to and relying upon the decisions of other Tribunals. The Tribunal was of the opinion that the market value of the electricity supplied by the CPP Unit to the general unit would be the same being charged by GEB from the consumers.*

5. Counsel for the Revenue contended that the component of 8 paise per unit was the electricity duty which GEB was not authorized to retain but had to pass on to the Government. In essence, GEB was only collecting 8 paise per unit as electricity duty for and on behalf of the Government. He submitted that the market value of the electricity should be reckoned on Rs. 5.32 ps. per unit as was done by the Revenue authority.

6. Under sub-Section(8) of Section 80IA of the Act, if it is found that where any goods or services held for the purposes of the eligible business are transferred to any other business carried on by the assessee or where any goods or services held for the purposes of any other business carried on by the assessee are transferred to the eligible business and in either case the consideration for such transfer does not correspond to the market value of such goods as on the date of the transfer, then for the purposes of deduction under Section 80IA in case of the eligible business as if the transfer had been made at the market value of such goods or services. It is in this context that the question of substituting the actual consideration by the market value comes into picture.

7. We may notice that the Tribunal did not accept the contention of the assessee that the electricity is neither goods nor services and that, transfer of electricity, therefore, would not be covered under sub-Section (8) of Section 80IA of the Act. However, in so far as the Tribunal's reasoning to adopt the market value of the goods at Rs. 5.40 ps. per unit is concerned, we find no error. Undisputedly, GEB supplied the electricity to its consumers at the same rate. This, therefore, was a market value of the electricity supplied by the CPP Unit to the general unit. The fact that this amount of Rs. 5.40 ps. comprises of a component of 8 paise, which was electricity duty, to our mind, would make no difference in so far as the market value is concerned. To a consumer, the price being paid remains 5.40 ps. per unit. The fact that the seller retains only Rs. 5.32 ps. out of the said collection and passes on 8 paise per unit to the Government in the form of electricity duty, to our mind, would make no difference. This question is, therefore, not required to be considered."

4. This was followed in case of CIT v. Shah Alloys Ltd. in Tax Appeal No. 2093/2010. This was reiterated in Tax Appeal No.1646/2010 in case of ACITv. Pragati Glass Works (P.) Ltd. (order dated 30.1.2012), in which following observations were made :

"7. To our mind, Tribunal has committed no error. Assessing Officer and CIT (Appeals) while adopting Rs. 4.51 per unit as the

value of electricity generated by eligible unit of assessee and supplied through its non eligible unit only worked out cost of such electricity generation. In fact CIT(Appeals) in terms recorded that Rs. 4.51 was computed as the reasonable value of the electricity generated by eligible unit of assessee. This amount included Rs. 4.17 per unit which was the cost of electricity generation and Rs. 0.34 per unit which was duty paid by the assessee to GEB for such power generation. Thus the sum of Rs. 4.51 per unit only represented the cost of electricity generation to the assessee. In Section 80IA(8) of the Act what is required to be ascertained is the market value of the goods transferred by the eligible business, when such transfer is by eligible business to another non eligible business of the same assessee and the consideration recorded in the accounts of the eligible business does not correspond to market value of such goods. Term "Market Value" is further explained in explanation to said sub-section to mean in relation to any goods or services, price that such goods or services will ordinarily fetch in the open market. To our mind sum of Rs. 4.51 per unit of electricity only represented cost of electricity generation to the assessee and not the market value thereof. It is not in dispute that the GEB charged Rs. 5 per unit for supplying electricity to other industries including non eligible unit of the assessee itself. Tribunal therefore, while adopting the said base figure and excluding excise duty therefrom to work out Rs. 4.90 as the market value of the electricity generated by the assessee, to our mind, committed no error. It can be easily seen that if the assessee were to supply such electricity or was allowed to do so in the open market, surely it would not fetch Rs. 4.51 per unit but Rs. 5 per unit as was being charged by GEB. Since the excise duty component thereof would not be retained by the assessee, Tribunal reduced the said figure by the nature of excise duty and came to the figure of Rs. 4.90 to ascertain the market value of electricity generated by the eligible unit and supplied to non eligible business of the assessee. No error was committed by the Tribunal. No question of law therefore, arises. Tax Appeal is dismissed."

5. Issue once again reached the Division Bench of this Court in case of CIT v. Alembic Ltd. in Tax Appeal No.471/2009 and connected appeals. The Division Bench referring to earlier judgments of the Court held as under :

"11. We have considered the submissions made by the learned counsel for the parties. We have also considered the case laws cited by the learned counsel for the assessee. Taking into consideration the judements of this court and other High Courts,

cited above, we are of the opinion that the Tribunal has rightly allowed the claim of the assessee. In that view of the matter, we do not find any infirmity in the order of the Tribunal. Therefore, we answer question (C) and (D) in favour of the assessee and against the revenue."

6. Issues are thus considered on number of occasions by the Court and held against the Revenue. Questions are answered against the Revenue. Both the tax appeals are therefore, dismissed."

This judgment of Hon'ble High Court is directly on the issue. Hon'ble Court has considered section 80IA(8), therefore, it is not justifiable at the end of ld.DRP to ignore the judgment of Hon'ble jurisdictional High Court.

33. Respectfully following the authoritative pronouncements of the Hon'ble jurisdictional High Court, we allow these grounds of appeal. We direct the AO to grant deduction under section 80IA(4) on the value of electricity supplied by the CPP to its manufacturing units by adopting the average rate of electricity supplied to the assessee by MGVCL, DGVCL.

34. We now take ground no.5 in the assessment year 2012-13 and ground no.8 in the assessment year 2013-14:

35. In the assessment year 2012-13, the assessee has pleaded that the ld.DRP has erred in not adjudicating the claim made by the assessee company to consider revenue earned on sale of carbon credits, net of expenses as a capital receipts and not subject to tax. Similarly, in the assessment year 2013-14, the assessee has pleaded that the DRP has erred in rejecting claim made by the assessee that revenue earned from sale of carbon credits is to be held as capital receipts. In other words, common issue in both the years is, whether receipts

received by the assessee on sale of carbon credits is to be assessed as a capital receipt or to be treated as revenue receipts.

36. Facts in both the years are common. The assessee has filed a note explaining the alleged carbon credits and how it has received the receipts. The note has been reproduced by the DRP in both the assessment years in its order. The note and the discussion made by the DRP on this issue are as under:

> *"Claim of deduction in respect of income from Carbon Credit being Capital receipt -*
>
> *During the year, the Company has received income from Carbon Credit of Rs. 441.69 crores. The said revenue is credited to Profit & Loss account and is included in Revenue from Operations. Please refer to Schedule 23 of the Annual accounts.*
>
> *We are enclosing herewith a detail note on this Carbon Credit. In the said note we have explained as under:*
>
> *GFL's Carbon Credit:*
>
> - *GFL operates a HCFC-22 plant at Village Ranjitnagar, District Panchmahals, Gujarat, India. During the production of HCFC-22, waste gas called HFC-23 is generated.*
> - *For each ton of HCFC-22 produced, approximately 2.9% of HFC-23 is generated. HFC-23 is a greenhouse gas (GHG) which has Global Warming Potential of 11,700 of CO2 per ton of HFC-23.*
>
> - *GFL's CDM project consists of incinerating HFC-23 instead of allowing it to be vented into the atmosphere, and thereby reducing GHG emissions*
> - *CERs awarded = Tones of GHG reduced *GWP of GHG*
> - *In the year 2005-2006, Gujrat Fluorochemicals Limited (GFL) has implemented a project for greenhouse gas emission reduction by thermal oxidation of the waste gas HFC-23 in India under Clean Development Mechanism of Kyoto Protocol.*
> - *GFL has installed, and operates and maintains a HFC-23 collection and thermal oxidation system (TO Plant) to incinerate HFC-23. The thermal oxidation system enabled GFL to avoid HFC-23 emissions (GHG emissions), which, in the*

absence of the project activity, would have been vented into the atmosphere.

- *Upon voluntary incineration of HFC-23, emission reduction is achieved and CERs are issued to GFL after complying with the specified monitoring plan approved by the UNFCCC. CERs are issued in electronic form. Once the CERs are generated through the project undertaken, they are credited to GFL's account in the CD Registry. From there, they are transferred to buyers. The same is reported as Sales in the Financial Accounts under the Chemical Segment. Unsold CERs are shown as Inventory at Cost.*
- *GFL has sold CERs mainly to multilateral institutions / international buyers and treated the same as business income since CERs are earned / generated from HCFC-22 plant which is the primary business of GFL and also offered the same for taxation at the normal rate of tax like any other sources of income. All the expenses incurred as stated above are claimed as deduction (including tax depreciation on TO plant).*

In this note, we have given the background of the carbon credits and how the carbon credits are received in the case of our Company. We had also explained the procedure of generation of carbon credits and steps taken and involved in receipt of such carbon credits. Thus, the carbon credits are issued by the CDM Executive Board, which operates under the UNFCCC and those are sold to international buyers for cash. We have also explained that the CERs are not received or allocated by Government. It will also be observed that in our case carbon credits are not received for using alternative fuel like non-fossil fuel which may be specific to wind energy business or other fuel switch or energy efficiency projects.

The claim is made that the said revenue from Carbon Credit is not taxable as income but a capital receipt not liable to tax. Hence, while computing total income, the said receipt, net of expenses, may please be excluded as capital receipt. This claim is based on the ITAT order in the case of My Home Power Limited, Hyderabad Bench, which is now confirmed by the Hon'ble Andhra Pradesh High Court.

We may state that such claim, that Carbon Credit revenue is Capital receipt not liable to tax, and hence should be excluded from total income, was made during the course of assessment proceedings for A.Y. 2010-11 and 2011-12 also. In the Assessment order, the AO has not accepted the said claim. The

Company, has filed appeals for both the years before CIT(A). One of the grounds of appeal is regarding such claim. During the course of appellate proceedings for A.Y. 2010-11, the CIT(A) has called for the remand report from Assessing officer on the issue. A copy of the said remand report was provided to us and we were asked to make our submissions on the said remand report. We have made our detailed submission dated 02-01-2015 to the CIT(A). The copy of the said submission is enclosed for ready reference in which we have provided our replies to the AOs observations in the remand report and the entire issue is discussed in detail. We rely on the same.

Therefore, in view of the above it is requested that at the time of assessment, carbon credit revenue of Rs. 441.69 crores credited in the profit and loss account, net of expenses, may please by excluded, being a capital receipt and not liable to tax on the basis of various ITAT orders and High Court decision in the case of My Home Power Limited.

Enclosures:

1. Note on Carbon Credit.
2. Copy of the remand report dated 25.11.2014 for A.Y. 2010-11
3. Copy of the reply dated 02.01.2015 submitted to CIT(A) in response to above remand report during appellate proceedings for A.Y. 2010-11.

24. Discussion and Direction of DRP; :

24.1 It is seen from draft order that issue is not discussed in the draft assessment order, since the claim was made by the assessee during the course of the proceedings itself, as per letter dated 28/01/2015. The DRP has noted that there is no variation of income on this issue in the draft assessment order, which is prejudicial to the interest of Revenue. Thus, in strictly legal terms, the said objection doesn't fall under the provisions of Section 144C of the I.T. Act 1961.

24.2 Also in the case of Goetze (India) Ltd. (284 ITR 323), the Hon'ble Supreme Court has held that the Assessing Officer cannot entertain any claim for allowing deduction resulting in a reduction in the total income returned, which is not claimed in the original return or a revised return.

24.3 On merits, the DRP has noted the CIT (A)'s order of earlier 2 years and concurs with the findings of the CIT (A), that such carbon credit receipts GFL are taxable. The relevant excerpts of the order of the CIT(A) for A.Y. 2011.12 A.Y. 2010-11 are reproduced hereunder:-

From CIT (A) order for AY 2011-12; /

"9. 1 This issue has .been decided in appellant 's own case for the A Y 2010-1 1 vide order dated 30-10.2015 in Appeal No. CAB-11321201415. In this order the revenue earned from the sale of carbon credits, net of expenses has been held to be taxable in the hands of the appellant. Moreover, it is seen that in the current year such revenue also includes profit earned on account of trading of such carbon credits which are revenue in nature under all circumstances. Hence, following the decision of the earlier order and considering the fact that the appellant is also engaged in the trading of carbon credits, it is held that such revenue in the current year is also taxable in the hands of the appellant as income from business. Alternatively, this is also taxable as short term capital gain as has been held in the appellate order of AY 2010-11. Hence, this ground of appeal is dismissed"

From CIT(A)order for AY2010-11

"11.1 In the present case too, the appellant had profit motive in the establishment of the CDM project. Hence it is held that it is carrying on the business of generation of CERS through this CDM project and accordingly, the revenue on account of sale of such CER. is taxable as profits and gains of business being carried on by the appellant. 11.2 Without prejudice to the finding given above that revenue earned from sale of carbon credits is taxable as income from the business Hi the hands of the appellant, even if it is treated as a capital receipt then also it will be taxable in the hands of the appellant as income from capital gain on account of transfer ofCERs. This is due to the fact that in the case of the appellant, the cost of acquisition of CERS has already been determined. Thus, even if the appellant's contentions are accepted, it is to be held that these CERS are capital assets in the hands of the appellant and are having determined cost. Under such situation, the receipt received on account of transfer of such capital assets will be taxable in the hands of the appellant as short term or long term capital gain. Since, in the case of the appellant, all such CERS have been transferred within three years of date of acquisition of fire same, hence the entire sale

consideration net of expenses is taxable as short term capital gain. Accordingly there will be no difference on the tax to be levied on the income of the appellant under such situation also. Thus in the alternate situation also, there shall be no change in the total income of the appellant.

11.3 On the basis of these discussions, it is held that the revenue earned by the appellant company on account of sale of CERs is its income taxable under the head income from business. Hence, this ground of appeal is dismissed."

24.4 In view of the above the claim Of the assessee that carbon credit receipt are not liable to tax is rejected and accordingly, no directions are issued to the AO on this ground of objection."

37. In the assessment year 2012-13, this claim was of Rs.876.14 crores. The ld.counsel for the assessee while impugning orders of the Revenue authorities below contended that the issue in dispute is squarely covered by decision of Hon'ble Gujarat High Court in the case of Alembic Ltd. (supra). He placed on record copy of the Hon'ble Gujarat High Court decision in Tax Appeal Nos.553 and 554 of 2017 decided on 28.8.2017. He also pointed out that this issue has been considered by the Hon'ble Karnataka High Court in the case of CIT Vs. Subhash Kabil Power Corporation Ltd., (2016) 287 CTR(Kar) 147; (2016) 69 taxmann.com 394 (Kar). The Hon'ble Karnataka High Court has also relied upon the decision of Hon'ble Andhra Pradesh High Court in the case of CIT Vs. My Home Power Ltd., (2014) 46 taxmann.com 314 (AP). Apart from the above, he further contended that w.e.f. 1-4-2018, a special provision has been enacted in the shape of section 115BBG which prescribe levy of tax at the rate of 10% on income from transfer of carbon credit. He took us through explanatory statement of Finance Act, 2017.

38. We have duly considered rival contentions and gone through the record carefully. Issue before us is, whether receipts received by the assessee on sale of alleged carbon credit is revenue in nature or capital

in nature. An identical question was formulated by the Hon'ble Gujarat High Court in the case of CIT Vs. Alembic Ltd. (supra). The question framed is as under:

> *(4) Whether on facts and in the circumstances of the case and in law, the ITAT erred in treating the income from realisation of carbon credits as capital in nature, despite the fact that the realization from carbon credits has been treated by the assessee itself as revenue income and offered to tax?"*

39. The question has been replied by the Hon'ble High Court is as under:

> *"6. The last surviving question pertains to the treatment that the assessee's income from trading of carbon credits should be given. The Tribunal held that receipts should in the nature of capital receipts and therefore would not invite tax. This issue has been examined by two High Courts. The Karnataka High Court in the case of CIT Vs. Subhas Kabini Corporation Ltd., reported in (2016) 385 ITR 592 (Karn) and Andhra Pradesh High Court in the case of Commissioner of Income-tax Vs. My Home Power Limited reported in (2014) 365 ITR 82(A) have held that receipts of carbon credit are in the nature of revenue receipts. Following the decisions of said two High courts, this question is also not considered."*

It is to be noted here that the Hon'ble Gujarat High Court has thereafter issued a corrigendum in the above order in OJMCA/1/2018 in Tax Appeal No.553 of 2017 wherein the applicant pointed out an advertent mistake in paragraph-6. The Hon'ble Court rectified the typographic/inadvertent mistake vide order dated 9.3.2018. It reads as under:

> *"Through this application, the assessee points out that in our judgment dated 28.08.2017, while dismissing Revenue's Tax Appeals, we had inadvertently recorded in Paragraph-6 that several High Courts have held "that receipts of carbon credit are in the nature of revenue receipts". This is clearly a typographical/ inadvertent error. The above quoted portion of paragraph-6*

would, therefore, be corrected and read as under – "that receipts of carbon credit are in the nature of capital receipts". The applicant stands disposed of accordingly."

40. In view of the above, it is to observe that at the level of Tribunal, the order in the case of Subhash Kabini Power Corporation Ltd. (supra) which has been affirmed by the Hon'ble Karnataka High Court (was also authorized by the Judicial Member while posted at Bangalore). Apart from the above, we would like to make reference to the explanatory statement of Finance Act, 2017. It reads as under:

"Carbon credits is an incentive given to an industrial undertaking for reduction of the emission of GHGs (Green House gases), including carbon dioxide which is done through several ways such as by switching over to wind and solar energy, forest regeneration, installation of energy-efficient machinery, landfill methane capture, etc. The Kyoto Protocol commits certain developed countries to reduce their GHG emissions and for this, they will be given carbon credits. A reduction in emissions entitles the entity to a credit in the form of a Certified Emission Reduction (CER) certificate. The CER is tradable and its holder can transfer it to an entity which needs Carbon Credits to overcome an unfavorable position on carbon credits.

Income-tax Department has been treating the income on transfer of carbon credits as business income which is subject to tax at the rate of 30%. However, divergent decisions have been given by the courts on the issue as to whether the income received or receivable on transfer of carbon credit is a revenue receipt or capital receipt.

In order to bring clarity on the issue of taxation of income from transfer of carbon credits and to encourage measures to protect the environment, it is proposed to insert a new section 115BBG to provide that where the total income of the assessee includes any income from transfer of carbon credit, such income shall be taxable at the concessional rate often per cent (plus applicable surcharge and cess) on the gross amount of such income. No expenditure or allowance in respect of such income shall be allowed under the Act.

This amendment will take effect from 1st April, 2018 and will, accordingly, apply in relation to the assessment year 2018-19 and subsequent years."

41. Thus, taking into consideration resolution of litigation on this issue by the Legislature itself, which had made provision for taxation of such receipts at the rate of 10% from the assessment year 2018-19 as well as authoritative pronouncements of Hon'ble jurisdictional High Court, we are of the view that receipts received by the assessee on sale of carbon credit are to be treated as capital receipts and not liable to tax. The ld.DRP has assigned one more reasons for not entertaining claim of the assessee particularly in the assessment year 2012-13 is that such claim was not in the return of income, rather it was made during the course of assessment proceedings. On the strength of Hon'ble Supreme Court judgment in the case of Goetez India Ltd.(supra), we are of the view that the AO cannot entertain any claim for allowing deduction resulting in a reduction of total income returned, which is not claimed in the original return or a revised return. To this reasoning of the DRP, we are of the view that we have considered this aspect while dealing with the issue regarded enhancement claim made under section 80IA of the Act. We have made reference to the decision of the ITAT, Mumbai and Bangalore Benches as well as Hon'ble High Gujarat High Court in the case of Mitesh Impex (supra) and held that if a particular item is going to affect taxability of assessee, then a fresh claim can be entertained by the first appellate authority or by the DRP. Thus, we overrule this reasoning of the DRP and direct the AO to treat these receipts in both assessment years as capital receipt.

42. The ground no.2 in the assessment year 2012-13 is that the ld.CIT(A) has erred in making addition of Rs.38,84,898/- on account of late payment of employees contribution to provident fund.

43. As the facts emerge from the record, the AO noticed that assessee has deducted an amount of Rs.38,84,898/- towards P.F. contribution from its employees' but did not deposit in the Government account within the time prescribed in the respective Act. The AO has noticed such details payments made by the assessee in his order. It reads as under:

Month	*Employee's contribution to*	*Amount*	*Due date*	*Payment date*
April- 11	*Provident Fund & Family Pension Fund*	*1722105*	*20.05.2011*	*24.05.2011*
Sept- 11	*Provident Fund & Family Pension Fund*	*2147672*	*20.10.2011*	*31.10.2011*
Feb-12	*Provident Fund & Family Pension Fund*	*11271*	*20.03.2012*	*02.05.2012*
June- 11	*Labour Welfare Fund*	*3276*	*15.07.2011*	*26.07.2011*
Dec.- 11	*Labour Welfare Fund*	*574 (203 + 574)*	*15.01.2012*	*Not paid till 31.03.2013*
Total		*38,84,898/-*		

Assessee has given the following reasons for the delay as under:

1 *Employees Contribution to PF of Rs.17,22,105/-*

In the payment of April 2011, the clearing Stamp endorsed by the bank on the challan was visible as 27.05.2011, but actual date of clearing was 21.05.2011 (Copy of Challan is attached at page no. 182. The cheque of PF payment for the month of April 2011 was tendered to bank on 18.05.2011 and was cleared on 20.05.2011(Copy of Bank statement is attached at page no. 183). Since, Cheque was tendered and cleared before due date there was no delay in depositing PF for the month of April, 2011.

*2 **Employees Contribution to PF of Rs.21,47,672/-***

/n respect of delay in payment of PF for the month of September 2011, the first cheque of Rs. 44,47,781 (Rs. 21,47,672 Employees

contribution + Rs. 23,00,109 Employer's contribution) was cleared by bank on 14.10.2011 and refunded on 19.10.2011 vide Bankers cheque no 964025 dated 15.10.2011 (Copy of Bankers cheque is attached).We made application to PF office for address change on 24.10.2011(Copy of application is attached). Thereafter, the technical issue of address change was resolved by PF office and a fresh cheque was required to be issued which was cleared on 02.11.2011 by the bank. Copies of bank statements of relevant dates are attached at page no. 189 to 191.

3 ***Employees Contribution to PF of Rs.15,121/-***

There were two payments made for the month of February, 2012, one paid in time before due date in case of regular employees. The other payment was for newly joined employees whose application for PF number was made but PF number was not allotted by the PF office. The, differential payment was made on allotment of PF number."

44. The ld.AO did not accept these reasons given by the assessee, and therefore, following judgment of the Hon'ble Gujarat High Court in the case of CIT Vs. Gujarat state Road Transport Corporation, 41 taxmann.com 100 (Guj) disallowed the claim of the assessee.

45. After considering submissions of the both the sides, we find that though the Hon'ble Gujarat High Court in the case of Gujarat State Road Transport Corporation (supra) has held that if the payment to PF and ESI are not being made within the due date prescribed under those Act, then deduction will not be available to the assessee. However, in the present case, so far as payment of Rs.21,47,672/- is concerned, from the explanation of the assessee, it is discernible that it has made payment before the due date, but on account of certain technical objection, cheques deposited have been returned, which ultimately after removal of objection was cleared. Thus, it could be construed that payment was within the due date and therefore, deduction ought to be granted to the assessee. We allow the claim of the assessee *qua* Rs.21,47,672/-.

46. So far as payment of Rs.17,22,105/- and Rs.15,121/- are concerned, we find that the Revenue authorities have not verified the details furnished by the assessee. The reasons explained by the assessee cannot be bruised aside. Therefore, we send back the issue of addition *qua* these two payments to the file of AO for verification of the details of payments. If on verification the reasons assigned by the assessee are found to be correct, then, the AO is directed to give benefit of section 43B of the Act to the assessee.

47. Ground no.4 in the assessment year 2012-13 and ground no.6 in the Asstt.Year 2013-14. Both these grounds are inter-connected with each other. Therefore, they are taken up together. Grievance of the assessee is that the ld.DRP has erred in making an addition of Rs.436,80,00,000/- on protective basis in the assessment year 2012-13 and substantive basis in the assessment year 2013-14. Along with these grounds, the assessee has taken sub-grounds, which are multiple arguments taken by it. Therefore, we do not deem it necessary to make reference of these pleas taken in the grounds of appeal at this stage.

48. Brief facts of the case are M/s.Inox Renewable Ltd. ("IRL" for short) is 99.98% subsidiary of assess-company. The assessee company has sold its entire wind energy business to IRL for a sum of Rs.1 crore on 30.3.2012. According to the assessee it has completed documentation and handed over possession to the vendee. In Asstt.Yar 2012-13, the assessee has shown long term capital loss of Rs.1,23,78,585/- on account of slump sale, but it did not claim this loss as deduction while computing total income being long term capital loss and carried forward in the computation. On scrutiny of this transaction, the ld.AO has observed that two days after the alleged transaction, IRL

got revalued and considered fair market value of the assets at Rs.437.80 crores as on 1.4.2012. The AO thereafter observed that by way of a Finance Act, 2012 (Bill No.11 of 2012) presented in the Lok Sabha on 16.3.2012, new sections 50D and section 92BA have been inserted which are applicable w.e.f. assessment year 2013-14. According to the section 50D the capital gain on sale of such capital asset is to be determined by adopting fair market value of the capital assets on the date of transfer. Under this conception of law, the ld.AO has tried his best to shift the date of transfer from the assessment year 2012-13 to 2013-14.

49. Before us the facts are not in dispute. The dispute relates to two fold issues viz. (a) whether capital gain on slump sale is to be determined by taking into consideration fair market value of the assets transferred, (b) which is the correct assessment year for taxation of such capital gain/loss ?. Before adverting to the determination of year of taxability, we would like to take the amount of capital gain which is taxable in the hands of the assessee. It is pertinent to observe that basically the ld.AO has made reference to a large number of documents and circumstances in order to demonstrate that transaction has taken place in the accounting year relevant to the assessment year 2013-14, and if the transaction is considered as taken place in the assessment year 2013-14, then according to the understanding of the AO, applicability of section 50D and 92BA is to be examined, which is according to his understanding applicable on the facts of the present case. Therefore, the first we would like to determine the correct amount of capital gain/loss arising to the assessee, even after application of sections 50D and 92BA of the Act.

50. Thus, before we embark upon an inquiry as to find out amount of capital gains arisen to the assessee on slump sales of its wind energy

division to IRL and in which assessment year capital gain is to be taxed, we deem it appropriate to take note of relevant provisions. Section 2(42C) provides definition of expression "slump sale". According to this definition, "slump sale" means the transfer of one or more undertakings as a result of the sale for a lump sum consideration without values being assigned to the individual assets and liabilities in such sales. *Explanation 1* added to this section further provide; for purpose of this claim; "undertaking" shall have the meaning assigned to it in *Explanation 1* to clause (19AA). For the removal of doubts, it is hereby declared that determination of the value of an asset or liability for the sole purpose of payment of stamp duty, registration fees or other similar taxes or fees shall not be regarded as assignment of values to individual assets or liabilities.

51. Section 48 of the Act provide mode of computation of capital gain. It contemplates that income chargeable under the head of "Capital Gains" shall be computed by deducting from the value of consideration received or accruing as a result of transfer of capital assets following amounts viz. (i) expenditure incurred wholly and exclusively in connection with such transfer, and (ii) the cost of acquisition of the asset and the cost of any improvement thereto. It is important to note that gain on slump sales used to generate lots of litigations because the assessee would exclude such gain from charge of tax under capital gain on the plea that there is no machinery provision for computing the cost of acquisition of the undertaking/division as in the slump sale, only lump sum consideration is to be fixed without assigning any value to separate assets constituting the undertaking or division, then mechanism provided in section 48 would fail. On the other hand, the Revenue would tax the difference under section 41(1) of the Income Tax Act. Similarly, section 49 also does not contain any machinery provision for ascertaining cost of acquisition of an undertaking sold on

slump sale basis. In order to silence this controversy, section 50B was introduced by Finance Act, 1999 w.e.f. 1.4.2000. This section has a bearing on the controversy in hand, therefore, it is imperative to take note of section 50B, which reads as under:

"50B Special provision for computation of capital gains in case of slump sale.—(1) Any profits or gains arising from the slump sale effected in the previous year shall be chargeable to income-tax as capital gains arising from the transfer of long-term capital assets and shall be deemed to be the income of the previous year in which the transfer took place :

Provided that any profits or gains arising from the transfer under the slump sale of any capital asset being one or more undertakings owned and held by an assessee for not more than thirty-six months immediately preceding the date of its transfer shall be deemed to be the capital gains arising from the transfer of short-term capital assets.

(2) In relation to capital assets being an undertaking or division transferred by way of such sale, the "net worth" of the undertaking or the division, as the case may be, shall be deemed to be the cost of acquisition and the cost of improvement for the purposes of sections 48 and 49 and no regard shall be given to the provisions contained in the second proviso to section 48.

(3) Every assessee, in the case of slump sale, shall furnish in the prescribed form along with the return of income, a report of an accountant as defined in the Explanation below sub-section (2) of section 288 indicating the computation of the net worth of the undertaking or division, as the case may be, and certifying that the net worth of the undertaking or division, as the case may be, has been correctly arrived at in accordance with the provisions of this section.

Explanation.—For the purposes of this section, "net worth" means the net worth as defined in clause (ga) of sub-section (1) of section 3 of the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986).'.

52. A plain reading of section would show that capital gains on slump sale are to be computed by deducting net worth of the undertaking/division from the slump sale consideration received on sale of such undertaking/division. Originally, expression "net worth" was defined by way of *Explanation* that for the purpose of this section, net worth as defined in clause (ga) of sub-section (1) of section 3 of Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986).

53. By way of Finance Act, 2000, this *Explanation* was substituted by way of *Explanation 1 and 2* extracted (supra). Object of this explanation was to provide a method for computing net worth of an undertaking/division sold on slump sale basis. *Explanation* 1 contemplates that net worth to be the aggregate value of assets of the undertaking or division as reduced by the value of liabilities of such undertaking. *Explanation* 2 was inserted with an object to compute the aggregate value of total assets. A bare reading of this *Explanation* would show that it has basically three compartments; clause (a) is concerned with computation of depreciable assets; clause (b) value of capital assets in respect of which whole expenditure has been allowed as a deduction under section 35AD of the Act, and clause(c) is a residuary clause in respect of assets which do not fall within (a) or clause (b) of this *Explanation.* Thus, scheme of this section would suggest that if sub-section 2 is looked into with *Explanation* 1 and 2 than it would reveal that it provide mode of computation of capital gain on transfer of an undertaking by way of slump sale. The cost of acquisition would be taken "net worth" of the assets transferred under this section.

54. Let us advert to the facts of the present case. As far as quantification of slump sale consideration at Rs.1 crores and acceptance by the AO, they are not in dispute. Transfer of wind energy business by

way of slump sales has also not been disputed. The dispute between the assessee and the Revenue comprised of two folds viz. Whether it be construed that transfer has taken place in accounting year relevant to assessment year 2013-14, and therefore, on the strength of section 50D the sale consideration received could be deemed equivalent to fair market value of the assets. Before deciding the controversy about the year of taxability, let us take into consideration whether sale consideration shown by the assessee can be replaced with fair market value alleged to be computed by IRL on 2.4.2012. The ld.counsel for the assessee on the strength of the following decisions submitted that there is no provision for replacing the full value of consideration shown by the assessee with fair market value:

> *"1. High Court decision CIT Vs. Gaurangibiben S. Shodhan, 367 ITR 238 (Guj)*
> *2. Jurisdictional Ahmedabad ITAT order in the case of ACIT Vs. M/s.Aakash Association;*
> *3. Supreme Court, CIT Vs. George Henderson and Co. Ltd., 66 ITR 622 SC;*
> *4. CIT Vs. Shivakami Co.P.Ltd., SC 159 ITR 0071;*
> *5. Rupees Finance & Management Ltd. Vs. ACIT, Mumbai, ITAT (2008) 27 CCH 0111 Mum Trib. (2008) 119 TTJ 0643;*
> *6. CIT Vs. Smt. Nandini Nopany, Calcutta High Court (1998) 230 ITR 679 (Cal);*
> *7. Bombay high Court, CIT Vs. M/s.Morarjee Textiles Ltd."*

55. He further contended that the ld.AO has tried his best to shift the date of transfer from the assessment year 2012-13 to 2013-14 in order to take benefit of section 50D for adopting fair market value of the assets as sale consideration. He pointed out that applicability of section 50D has been explained by the Hon'ble Bombay High Court in the case of CIT Vs. Morarjee Textiles Ltd. rendered in tax appeal no.738 of 2014. He placed on record copy of the decision dated 24.1.2017.

56. On the other hand, the ld.DR relied upon orders of the Revenue authorities. In the assessment year 2012-13, ld.DRP has considered this issue elaborately, but ultimately recorded the following finding:

> *"16.9 Further, it is noted by the DRP that the assessee company has calculated the Capital Gains by taking a sale consideration of just Rs. 1 Crore only for the entire Wind Energy Buisness. The DRP has noted that Fair Market Valuation of the Wind Energy Business was done by M/s Inox Renewable Limited on 01/04/2012 at Rs. 437.83 Crore. For this valuation of Rs. 437.83 Crore as on 31.03.2012 the DRP has relied heavily on the Valuation of the assets of the wind farm prepared by R.K. Patel & Co. Thus, for the calculation of the Capital Gain, the sale consideration is taken as Rs. 437.8352 Crore instead of just Rs. 1 Crore. Accordingly, the Capital Gain is worked out at Rs. 43 5,59,73,415/-as against the returned Capital loss of Rs. 1,23,78,585/-. In view of the above detailed discussion, the AO is directed to tax on protective basis Capital Gains worth Rs.435,59,73,415/-. "Needless to mention here that during the DRP proceedings, the assesse was show caused as to why not Capital Gains should not be worked out in the current year under consideration by using the fair market value of Rs. 437.83 Crore. The DRP has also noted that the AO has in the A.Y. 2013-14 taxed an amount of Rs. 436.8 crores as Short Term Capital Gain on a substantive basis, vide his order dated 29.12.2016."*

57. The Hon'ble Gujarat High Court in the case of Gauranginiben S. Shodan, 45 taxmann.com 356 (Guj) has observed that section 48 of the Income tax Act talks about expression "full value of consideration received". Therefore, it could not be replaced by fair market value with aid of DVO's report. Hon'ble Court has considered circumstances in which the full consideration of sale consideration could be replaced. In that connection, reference to section 50C was made wherein it has provided that if a capital asset being land and building or both are sold and consideration received or accruing as a result of such transfer, which is less than the value adopted or assessed by the authority of a State Government for the purpose of stamp duty valuation, then full

value of sale consideration received or accruing as a result of such transfer provided in section 48 would be deemed equivalent to the amount on which stamp duty was paid. Thus, this full value of consideration could be replaced by way of deeming provision provided in section 50C which is relatable to transfer of capital assets in the shape of land or building or both. No such provision has been provided with regard to slump sales of an undertaking or division as a going concern. Other decisions are also to this effect.

58. Let us take note of section 50D of the Income Tax Act. It reads as under:

> "50D. *Fair market value deemed to be full value of consideration in certain cases.*—Where the consideration received or accruing as a result of the transfer of a capital asset by an assessee is not ascertainable or cannot be determined, then, for the purpose of computing income chargeable to tax as capital gains, the fair market value of the said asset on the date of transfer shall be deemed to be the full value of the consideration received or accruing as a result of such transfer.".

This section has been inserted w.e.f. assessment year 2013-14 to provide that where the consideration received or accruing as a result of transfer of a capital asset by an assessee is not ascertainable or cannot be determined, then for the purpose of computing the income chargeable to tax as a capital gain, fair market value of the said asset on the date of transfer shall be deemed to be the full value of the consideration received or accruing as a result of such transfer. While introducing this section, memorandum explaining the provisions of the Finance Bill 2012 provides as under:

> *"Capital gains are calculated on transfer of a capital asset, as sale consideration minus cost of acquisition. In some recent rulings, it has been held that where the consideration in respect of transfer of an asset is not determinate under the existing provisions of the Income-tax Act, then, as the*

machinery provision fails, the gains arising from the transfer of such assets is not taxable.

It is, therefore, proposed that where in the case of a transfer, consideration for the transfer of a capital asset(s) is not attributable or determinate then for the purpose of computing income chargeable to tax as gains, the fair market value of the asset shall be taken to be the full market value of consideration."

According to the assessee, section 50D confers powers to the AO to substitute fair market value of the capital assets for the full value of consideration only in the circumstances mentioned in the section i.e. consideration of transfer of wind energy business if not determinable or is unascertainable, in that case fair market value be adopted. In the case of the assessee, there is a stated or agreed consideration of Rs.1 crores in the agreement itself, which has been actually received or paid and on the basis of which capital loss under section 50B has been ascertained and returned by the assessee. The scope of section has been considered by the Hon'ble Bombay High Court in the case of Morarjee Textiles (supra) and the discussion made by the Hon'ble high Court in this respect reads as under:

"(c) At the hearing of the admission, the Revenue did not point out any facts which would evidence that the transaction was not genuine. In such a case where, the genuineness is not disputed with any evidence, it is not open to discard the documents and/or transaction on the basis of some supposed object/intent. In the present facts the Revenue accepts the documents but only substitutes the consideration. Therefore, the issue is whether such substitution of full consideration received by fair market value of the asset is permissible. As held by the Tribunal at the relevant time there was no authorities under the Act to substitute a full value received for sale of shares by fair market value in respect of stocks and shares. The power to substitute full consideration with of shares came into the statute only on introduction of section 50D with effect from 1st April, 2013. Moreover, such a power under Section 50D of the Act is only to be exercised if the Assessing Officer comes to a finding that the consideration received is not ascertainable or cannot be determined.

Moreover the decision of the Co-ordinate bench of the Tribunal in the case of MGM Shareholders Benefit Trust (supra) on identical facts situation has been accepted by the Revenue, as no appeal from the same has been filed by the Revenue.

(d) In the above view, the question as formulated does not give rise to any substantial question of law. Thus not entertained."

59. Hon'ble Court has specifically held that section 50D would be applicable after the AO comes to a finding that consideration received is not ascertainable or cannot be determined. We have extracted the finding of the ld.DRP. Nowhere such aspect is discernible. The ld.AO as matter of fact accepted the sale consideration at Rs.1 crore. He only replaced with fair market value on the basis of the fact that IRL has revalued the assets after such transfer. It is also pertinent to note that section 50B itself provides that such revaluation has to be ignored. Thus, even if it is to be construed for the sake of arguments that transaction has taken place in the assessment year 2013-14, then also the AO cannot replace the sale consideration disclosed by the assessee as per section 50D with fair market value. Since, we have held that fair market value considered by the AO to charge the assessee with capital gain cannot be adopted either with help of section 50D or in assessment year 2012-13.

60. As far as applicability of section 92BA is concerne,d let us take note of this section, which reads as under:

Section 92BA:

After section 92B of the Income-tax Act, the following section shall be inserted with effect from the 1st day of April, 2013, namely:—

'92BA. Meaning of specified domestic transaction.—For the purposes of this section and sections 92, 92C, 92D and 92E, "specified domestic transaction" in case of an assessee means any of the following transactions, not being an international transaction, namely:—

(i) any expenditure in respect of which payment has been made or is to be made to a person referred to in clause (b) of sub-section (2) of section 40A;

(ii) any transaction referred to in section 80A;

(iii) any transfer of goods or services referred to in sub-section (8) of section 80-IA;

(iv) any business transacted between the assessee and other person as referred to in sub-section (10) of section 80-IA;

(v) any transaction, referred to in any other section under Chapter Vl-A or section 10AA, to which provisions of sub-section (8) or sub-section (10) of section 80-IA are applicable; or

(vi) any other transaction as may be prescribed,

and where the aggregate of such transactions entered into by the assessee in the previous year exceeds a sum of five crore rupees.'

61. It is pertinent to note that the assessee is a transferee company and not claimed deduction under section 80IA in the assessment year 2013-14, because according to the assessee, it has transferred its wind energy business in the assessment year 2012-13. Sub-section (10) of Section 80IA used an expression "course of business between them is so arranged" it contemplates that there should be some material on record exhibiting arrangement by which profit by one company has been siphoned off to other one. No such arrangement has been demonstrated by the AO. Section 80IA(10) is applicable to the business transacted between two associate concerns which produce to the assessee more than ordinary profit which might be expected to arise in such eligible business. Here the assessee has not claimed deduction under section 80IA in the assessment year 2013-14. The AO has not pointed out any arrangement showing unusual profit to the assessee by way of transfer of an undertaking under section 50B. Had the AO demonstrated that arrangement between the assessee and IRL showed unusual profit to the assessee, which would grant higher deduction under section 80IA, he could re-compute that, but no such

circumstances are available. In brief, the profit or loss on sale of fixed assets of eligible undertaking are not entitled to deduction under section 80IA, and are not profit and gains of eligible business. Thus, this section will not applicable. The AO himself has not used this section, and he just made passing reference about the section.

62. The issue regarding year of taxability is just an academic issue. It will not going to affect materially. Nevertheless, we consider this aspect also, because kind of revenue involved in this issue would certainly goad the litigation upto the higher appellate forum.

63. With regard to year of taxability, the AO has narrated various circumstances and on cumulative settings of those circumstances, he harboured a belief that transaction has taken in the assessment year 2013-14 and not in assessment year 2012-13. During the course of hearing, we have confronted the assessee with regard to those circumstances as summarised by the ld.DRP, and on our direction, the assessee has compiled the details in tabular form showing reasons considered by the AO as well as DRP for treating the transactions taken place in the accounting year relevant to the assessment year 2013-14 vis-à-vis explanation given by the assessee as to why this transaction should be taken in the assessment year 2013-14. Such details have been filed in tabular form. It reads as under:

	DRP 'Order extract	Assesse's submission and Argument	Reference
1	The slump sale agreement has been drawn on 30.03.2012 at the head office and the signatories are Sh. Vivek Jam, Managing Director for GFL and Sh. Deepak Asher, Director for IRL. Both these persons as mentioned above are the main persons behind the Inox group	This is factually correct that slump sale agreement and possession letters are signed by Mr. Vivek Jain and Mr. Deepak Asher. Mr. Vivek Jain has signed in the capacity as a Managing Director of a transferor company i.e. GFL. Deepak Asher has signed as director of a transferee company i.e. IRL. Both these persons have signed the	Submission to DRP dated 16.09.2016

		documents on behalf of the respective companies and in their legal capacities as managing director and director.	
2	The possession certificate transferring the immovable/ movable assets of various projects located at various states i.e. Tamil Nadu, Gujarat, Rajasthan and Maharashtra was drawn on 30.03.2012 at the head office and not after due physical verification 'of the assets at site.	It will be observed that the transaction is between Holding company and its 99.98% Subsidiary company and is not between two unknown parties. Therefore, the condition of the business, assets, employees etc. was known to both the parities at any given point of time. Therefore, there was no specific need to do physical verification on any given date as contemplated in the show cause notice/Order as wind energy business including assets and liabilities of the undertaking was transferred on as is where is basis, on a slump sale basis. These documents are not just the paper work. It will be observed that BTA dated 30/03/2012 is the legally enforceable document executed by both the parties. The possession letter was executed in terms and BTA agreement as a part of closing activities. By signing the possession letter on 30/03/2012, GFL had given and IRL has taken over the actual possession of the transferred business and undertakings including employees. The constructive delivery and receiving possession of various assets and liabilities are sufficient and legally accepted mode to give complete effect to the transfer.	Submission to DRP dated 16.09.2016
3	The transferred business continued to be run by GFL, even after 30.03.2012, as the debit/credit notes for 1 day i.e. 3 1 .3.2012 were raised by GFL on IRL for accounting purpose.	The copies of debit note dated 31/03/2012 for Rs. 1,93,860 and credit note dated 31/03/2012 for Rs. 7,88,796 are submitted on page no. 923 to 928. The debit note is in respect of expenses pertaining to the wind energy business for one day. The expenses include insurance cost, 0 & M cost and salary cost of the transferred employees. Similarly, credit note is in respect of allocation of sales revenue of wind energy business for one day i.e. 31/03/2012 i.e. after the business	Page no 56 -57 from DRP Order

		was transferred to IRL and hence the income belongs to IRL. This being a broken period and income and expenses pertaining to a period after transfer belong to transferee as per clause 7 of BTA, such debit and credit notes were raised to account income and expenditure correctly. This cannot be a basis for not acceptance of the date of transfer contractually agreed, which is 30/03/2012. On the contrary, this actually confirms that the transfer took place on 30/03/2012 since income and expenditure after that date belonged to IRL and was transferred by GFL to IRL, accordingly. The transferred employees continued to run the business.	
4	The payment of Rs. 1 crore towards sale has been credited in the bank account of GFL on 03.04.2012.	As stated above the consideration of Rs. 1 crore was received by cheque dated 30.03.2012 and was also deposited in bank on the same date as per the pay-in-slip duly acknowledge by bank and cheque was cleared on 03.04.2012. Thus the consideration was received by cheque and deposited on 30th March itself.	Page no 48-49 from DRP Order
5	The effective date of the completion of the transfer has to be ascertained from the date of grant of statutory/ mandatory/ regulatory approvals for transfer or at least from the date of transfer.	Permissions for transfer of projects, lands, power purchase agreement, loans, insurance policies etc. was not a pre-condition of the transfer but were part of post-closing activities and complied in due course of time in the period ranging from financial years 2012-13, 2013-14 & even in 2014-15 and have no effect on the actual contractually agreed date of transfer. No prior permissions or approvals were required from the above parties or even from the banks for transfer of loans on the date of transfer and they were part of post-closing activity and have been actually transferred as a part	Para 6 (e) and (f) of submission dated 19.10.2016 Para 11 of the Submission dated

		of post-closing. RBI has also noted the transfer of loans from GFL to IRL. It will be clearly observed that the applications and permissions for transfer of project registration, lands, PPA, transfer of loans and insurance policies etc. were the part of post-closing activities and on which AO is placing heavy reliance are, on various different dates, spreading over a period of financial years 2012-13, 2013-14 and 2014-2015 even in some cases they were not required at all. This clearly proves that these dates are not of relevance in determining the actual date of transfer of wind energy business and undertakings, being part of post closure activities and not a pre-condition for the transfer of the capital asset i.e. Wind energy business. It will be observed that even for the same project, various permissions, approvals, registrations etc. have happened on different dates and not on the same date. In view of this, they were made as a part of post-closing activities and not pre-conditions of transfers. It will also be appreciated that in such a case of slump sale, it is always a running business and hence position of various assets and liabilities continue to change on day-to-day basis and in such case, unless single date is agreed as per contract for the transfer of the undertaking, it will not be possible to transfer business undertaking under slump sale basis. Secondly, if it is presumed that transfer takes place only when all the permissions are received, there will never be a single date of transfer since different permissions will be received on different dates, and it will be impossible to determine a date of transferfor the purpose of computing capital gains.	19.10.2019

6	The intimation dated 30.03.2012 to the Stock Exchange Mumbai was received by Bombay Stock Exchange Ltd, Mumbai on 12.04.2012 and by National Stock Exchange Ltd. Mumbai on 02.04.2012.	It will be observe that this letter and intimation are very important documents and intimation to stock exchanges under SEBI act and rule and are statutory intimations. Giving wrong information can lead to serious repercussion involving penalty and even delisting on the stock exchange. The letters are dated 30-03-2012 and submitted by email and fax on 30 March, 2012, and in hard copy on 2nd April, 2012 itself and not on 12th April, 2012 as observed by AO and clearly state that the wind energy business is transferred on 30-03-2012. Further, the stock exchanges have displayed on their website on 30 March itself about the transfer having taken place, and a copy of the said web-page is on record. We have given information to BSE & NSE stock exchanges regarding transfer of Wind Energy Business by GFL to IRL on 30th March, 2012 as per the letter dated 30th March, 2012. The intimations were also given by Fax. We are enclosing herewith a copy of the report downloaded from the site ofBSE and NSE. It is mentioned on BSE website on 30th March, 2012 at 19.30 *P.M by BSE that* *"Transfer of Wind Energy Business of the Company to Inox Renewables Ltd. Vadodara, a subsidiary of the Company. Gujarat Fluorochemicals Limited has informed BSE that the Company has transferred by way of slump sale, the wind energy business of the Company including all the undertakings therein to Inox Renewables Limited, a subsidiary of the Company"". Similarly it is mentioned on NSE website on 30th March, 2012 at 20.05 P.M by NSE that "Gujarat Fluorochemicals Limited has informed BSE that the Company has transferred by way of slump sale, the wind energy business of the Company including all the undertakings therein to Inox Renewables Limited, a subsidiary of the Company ".*	Page no 49-50 from DRP Order.

7	(i)The bank loan has been transferred in the books of account of both GFL and IRL on the year ending 31.03.2012, without obtaining concurrence from the banks. (ii) The letter to banks intimating the slum sale transactions and seeking approval to transfer of loan liability was written on 21.04.2012 by GFL. (iii) The revised agreement (novation agreement) between the bank, GFL &, IRL transferring the bank loan was entered oil 17.10.2012. (iv) The RBI approval to transfer foreign currency loan was obtained on 18.03.2013.	Transfer of bank loans - No document or Bank communication suggests/requires prior permission for this transaction. RBI and ICICI bank have not objected at all for the transfer of loan and also have not raised any queries regarding prior approval because it was not required at all. The observations of the AO in case of loan transfer are based on the part of the document. The AO is not giving due weightage to all the documents submitted. There are three separate loans from ICICI Bank which are related to the transaction under consideration. The sanction letter in respect of first loan (dated December 29, 2006) has a negative covenant "4. No consolidation, demerger, corporate restructuring without the approval of Lender in the event of default." (Emphasis provided). Thus, this clause makes it clear that the approval of ICICI Bank is required only in the case of default. In the instant case, there was no default and hence no approval was required. Further, in the sanction letters in respect of other two loans (both dated December 29, 2011) specific reference is made to transfer of assets to the GFLs subsidiary IRL as a part of re-organization. Further, in the loan agreements dated 25.1.2012 and 29.2.2012 for these two loans, there is a specific and clear permission to transfer the assets to Inox Renewables Limited as a part of restructuring process. From the above, it is clear that at the time of sanction of these two loans itself, ICICI Bank had permitted the said transfer of assets. Hence, there was no need for seeking a separate and prior approval. In accordance with the obligations assumed by GFL (as the Seller) under the BTA, after Closing, GFL	Para 19 of the Submission dated 19.10.2019

		made an application to ICICI Bank on 21st April, 2012 requesting the bank to transfer of above Transferred Facilities to IRL. GFL's letter to ICICI Bank stated that that pursuant to Board and shareholder resolutions, GFL has transferred its wind energy business on 30th March, 2012 through a slump sale to IRL hence all assets and liabilities of such wind energy business stand transferred to IRL with effect from 30thMarch, 2012. Pursuant to the GFL Letter, ICICI Bank Limited as lender to GFL, made an application to the Reserve Bank of India on 1stAugust, 2012 seeking the RBI's permission to allow them to transfer the transferred Facilities to IRL in the manner provided therein. GFL, IRL and ICICI Bank Limited entered into 3 (three) Novation agreements each dated 17thOctober, 2012 with respect to each of the Transferred Facilities. The following relevant clauses from Novation agreements and credit arrangement letters from ICICI Bank are reproduced for ready reference. It will be appreciated that the Novation agreements specifically make reference as under: *From Novation agreement dated 17 October 2012:* *"By virtue of a Business Transfer Agreement dated 30th day of March, 2012 executed between the Existing Borrower and the Novated Borrower (herein after referred to as "BTA" and annexed hereto as Annexure B), the Existing Borrower has transferred through a slump sale its wind energy business to the Novated Borrower on the terms as stipulated in the*	

		BTA including its rights and obligations under the Facility Agreement." Thus the bank has also recognized that the slump sale has taken place on 30th March 2012. Further, we refer to RBI letter dated 28-09-2012 as per which RBI has asked ICICI bank to submit the additional information and clarification regarding this transaction. ICICI bank has replied to RBI as per letter dated 08-10-2012. On the basis of the information submitted RBI has given no objection to ICICI bank as per letter dated 19-12-2012. In this letter RBI has advice ICICI bank. We advice that we have no objection from FEMA 1999 angle, to your constituent for transfer of External Commercial Borrowing (ECB) up to USD 60 million availed from ICIC Bank Singapore vide LRN 201203132 and USD 12.8 million availed from ICIC bank, Hong kong vide LRN 2007151 from Gujarat Fluorochemicals Limited (GFL) to Inox Renewables Limited (IRL) subject to AD to ensure that the ECB continues to adhere the extent ECB guidelines. We further advise you to file a revised form 83 indicating the said changes with the Director, Balance of Payment statistic Division, Department of statistics and information management, Reserve bank of India, Bandra-kurla Complex, and Mumbai-400051. In respect of LRN 201202101, your constituent may submit a revised form 83 for reduction in the amount of ECB from USD 40 million to USD 16.5 million and Inox Renewables Limited (IRL) may submit a new form 83 for availing ECB of USD 23.5 million from ICIC Bank Singapore subject	

		to AD to ensure that the ECB continues to adhere the extent ECB guidelines. This communication is issued from the foreign exchange angle under the provisions of FEMA and should not be construed to convey the approval by any other statutory authority of Government under any other laws / regulations." On 18thMarch, 2013, the RBI conveyed to ICICI Bank Limited that pursuant to the request made by ICICI Bank Limited for transfer of the Facilities to IRL, the RBI had made changes to its records and allotted new loan registration numbers ("LRN") in relation to the same. The aforesaid letter of the RBI ("RBI Letter") is enclosed herewith. Thus no document or Bank communication suggests that prior permission was required for this transaction. RBI and ICICI bank have not objected at all for the transfer of loan and also have not raised any queries regarding prior approval because it was not required at all.In fact, they have processed the transfer of loan, recognizing that the slump sale had already taken place on 30 March, 2012. Thus, from the above, it is clear that the lenders were aware of the transfer of the undertaking under slump sale to IRL and procedures were required to be completed as a part of post-closing activity and it was not the prior condition as stated in the notice. From the above facts, it is quite clear that there was no necessity for obtaining confirmations of prior approval from banks and RBI before transferring the loan in the books for the year ending 31/03/2012.	

8	The letter written by Ms Ernst &, Young (F) Ltd mentions that, "it is intended that the entire 230 MW shall be transferred from GFL to IRL as slump sale in F.Y. 2012-13".	With the above resolutions the process of transfer of wind energy business from GFL to IRL commenced. It was not necessary to mention in the resolution any specific date for the completion of the transfer. The letter written by Ms Ernst & Young (P) Ltd (E & Y) is dated 31/10/2011 and not .3 1/10/2010 as mentioned in the notice. E & Y are not our auditors, but were engaged as consultants for equity fund debt raising for wind energy business - Inox Renewables Limited. With a view to facilitate raising of capital (both debt and equity) in the wind energy business and to enhance focus on the wind energy business as a core business so as to enable it to grow, GFL had transferred the wind energy business under a 'Business Transfer Agreement' ("BTA") executed on 30th March, 2012 by way of 'slump sale' to its 99.985% subsidiary, Inox Renewables Limited ("IRL") for a lump sum consideration of Rs 1 crore. In this connection, E & Y was appointed as consultants for raising capital for the wind energy business. Even though, it is mentioned in the letter "it is intended that the entire 230MW shall be transferred from GFL to IRL as slump sale in FY 2012-13" it is mentioned in appendix A as a part of their understanding of our requirement. But this appendix A is attached to the letter dated August, 2011, i.e. the date before the actual BTA was entered on 30/03/2012. It is generally a business practice to take consultations on various issues and start discussions before the transaction actually happens. But the said discussions or consultations are not indicative of	Page no 54-55 from DRP Order.

		the dates of legally enforceable contract date and agreements. It will be observed that the process for transfer of wind energy business was even started much before earlier in 2011, and got completed on 30/03/2012. If this letter would have been dated after the actual date of BTA, then it would have been a different situation. The intention of doing slump sale transfer in a particular year has no relevance after the execution and action on BTA for slump sale. The date of transfer has to be ascertained on the basis of BTA and actual conduct of both the parties and not on the basis of the intentions stated in any other documents. . The AO is drawing conclusion that this letter suggest that this transaction was intended to be done in FY 2012-13. The AO is also observing that except BTA the assessee has not furnished any documentary evidence. As stated above the assessee has submitted all the document pertaining to the transaction like BTA, possession letter, copy of cheque of consideration, pay in slip for deposited in the bank, letters dated 30-03-12 intimating the transaction to BSE and NSE etc. We have explained in detail the background of this letter. E & Y are not our statutory auditor but they are our consultant advising only, for raising capital for the wind energy business.	
9	The application for issue of REC w.r.t. power generated in March, 2012 was applied for by GFL on 20.052012. GFL sold 2800 REC i.e.1000 REC on 25.04.2012 and 1800 REC on 27.06.2012 for Rs. 65.24 lakhs.	Accounting of income of Rs. 65.24 lakhs - The income of Rs. 65.24 lakh is accounted in the books of GFL because it was pertaining to the period before date of transfer. The document showing this REC pertaining to earlier periods are submitted. The date of sale of REC doesn't affect the period to which they pertain. The period to which they pertain determine to whom the income belongs are attached	Page no 55-56 from DRP Order.

		at page no. 946 to 950. Further, these are accounted upon sales in the subsequent financial year and disclosed as discontinued operations.	
10	The ownership of freehold land on which windmills are erected was transferred from GFL to IRL in the F.Y. 2012-13. For example, sale deed 'for land pertaining to GudhePanchgani, Maharashtra project was registered on January 2013 and sale deed for land pertaining to Thoothukudi, Tamil Nadu project was registered on October 2012	From the chart, it will be observed that in the case of Maharashtra, no permissions were required being a private land and registered sale deed is executed in January, 2013. In case of Sadiya, request letter to the Collector was submitted on 14/09/2013 i.e. during financial year 2013-14 and the permission is received on 08/01/2014 and sub-lease is transferred on 14/03/2014. In the case of Ossiya, request letter to the Collector was submitted on 11/02/2013 i.e. during financial year 2012-13 and the permission is received on 28/07/2014 and sub-lease is transferred on 04/08/2014 i.e. during the financial year 2014-15. In case of Tamil Nadu, being a private land, no permissions were required and registered sale deed is executed in October, 2012. In case of Barmer, letter dated 20/09/2012 was submitted to REC and after the receipt of the permission dated 14/03/2013, lease deed is executed on 1st April, 2013 i.e. in financial year 2013-14. In any case, all these are post-closing activities as per BTA.	Page no 57-58 from DRP Order.
11	The regulatory permission to transfer the registration of wind energy projects in Rajasthan was obtained from Rajasthan Renewable Energy Corporation on 12.09.2012	Permission to transfer wind energy projects - From the chart, it will be observed that there was no such requirement in case of projects in Maharashtra and Tamil Nadu. In case of Rajasthan projects also, the request letters dated 9th February, 2011 and 24th April, 2012 were submitted. They have issued letter dated 12th September, 2012. The request for transfer of project registration was filed on 9th February, 2011. As per the letter dated 12th September, 2012 from Rajasthan Renewable Energy Corporation Limited, they	Page no 58 from DRP Order.

		have confirmed the BTA and accepted the request for transfer of ownership from GFL to IRL and agreement referred is the same BTA agreement. In any case, these are post-closing activities as per BTA.	
12	Application to transfer the PPA was filed in F.Y. 2012-13 and the mandatory approval for the transfer of PPA from Rajasthan projects was obtained on 08.012013 from Jodhpur Discom, RDPPC and for Maharashtra project on 12.12.2012.	From the chart at page no 59 of the DRP order, it will be observed- that applications are made and permissions are received on various dates. In some cases, even no further transfer documents are required to be executed and just intimation were required to be given of transfer such as Sadiya and Ossiya. In any case, these are post-closing activities as per BTA.	Page no 58-59 from DRP Order.
13	The New India Assurance Company Ltd granted approval to IRL for replacement of the name of GFL by IRL in respect of the following policies only on 01.06.2012.	The copy of the letter dated 1st June, 2012 from New India Assurance Company Limited to IRL is enclosed. In this letter, the insurance company has acknowledged the receipt of slump sale agreement and after noting that the wind mill assets are transferred from GFL to IRL, they have confirmed the transfer of policies in the name of the IRL. The agreement referred is the same BTA agreement dated 30/03/2012. The insurance policies are continuing policies for a period and by this letter they have just confirmed transfer of policy to the new owner. The letter is not indicative of the fact that the assets are no transferred on 30/03/2012 but subsequently. It will be noted that even in case of transfer of car from one person to another, the policy gets transferred subsequently and not on the exactly same date. The AO has accepted the contention of assessee that the insurance policy gets transferred afterwards. This cannot be pre-condition at transfer of business and has no bearing on the transaction or the date of transferred. In any case, these are	Page no 59-60 from DRP Order.

		post-closing activities as per BTA.	

From the above, it will be clearly observed that the applications and permissions of transfer of project registration, lands, PPA and insurance policies are on various different dates spreading over a period of financial years 2012-13,2013-14 and even 2014-2015 and even -in some cases they were not required at all. This clearly proves that these dates are not of relevance in determining the actual date of transfer of wind energy business and undertakings being part of post closure activities and not a pre-condition for the transfer of the capital asset and they are procedural aspects. It will be observed that even for the same project, various permissions, approvals, registrations etc. have happened on different dates and not on the same date. In view of this, they were made as a part of post-closing activities and not pre-conditions of transfers. It will also be appreciated that in such a case of slump sale, it is always a running business and hence position of various assets and liabilities continue to change on day-to-day basis and in such case, unless single date is agreed for the transfer of the undertaking, it will not be possible to transfer business undertaking under slump sale basis. Therefore, there has to be a single contractually agreed date on which slump sale lakes place and procedural aspects are taken care thereafter. But that does not affect the date of transfer. This is the exact position in our case. Contractually as per the BTA and possession letter dated 30/03/2012, the business got transferred on 30/03/2012 only and hence there cannot be any other date of transfer of the business dependent on the procedural permissions mentioned above and fair value of assets etc."

64. Expression "transfer" has been defined in section 2(47) of the Income Tax Act. For the purpose of controversy in hand, we would like to make reference to sub-clauses (i) to (v) along with explanation 2 of section 2(47) of the Act. These clauses provide for transfer in relation to a capital asset include (i) the sale, exchange or relinquishment of the asset; or …. (v) any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to section 53A of the Transfer of Property Act. *Explanation* 2 attached with this clause reads as under:

Explanation 2.—For the removal of doubts, it is hereby clarified that "transfer" includes and shall be deemed to have always included disposing of or parting with an asset or any interest therein, or creating any interest in any asset in any manner

> whatsoever, directly or indirectly, absolutely or conditionally, voluntarily or involuntarily, by way of an agreement (whether entered into in India or outside India) or otherwise, notwithstanding that such transfer of rights has been characterised as being effected or dependent upon or flowing from the transfer of a share or shares of a company registered or incorporated outside India;

65. A perusal of this clause would indicate that sale, exchange relinquishment of the asset or extinguishment of any right in the asset would amount to transfer. Similarly, handing over possession or retaining the possession of an immovable property in part performance of a contract is also to be considered as transfer. Genuineness of agreement dated 30.3.2012 was not doubted by the AO. He also did not dispute the consideration of Rs.1 crore. Thus the question is, whether exhaustive mode of transfer provided in section 2(47) of the Act would not be assumed as taken place by virtue of execution of agreement dated 30.3.2012. The AO was of the view that cumulative settings of certain circumstances would indicate that this transfer is not taken place on 30.3.2012. Though he failed to identify a specific date on which he could construe the transfer, in very sweeping manner he made reference that this transfer would constitute in a financial year 2012-13 relevant to the assessment year 2013-14. We have analysised the circumstances pointed by the AO and the explanation given by the assessee extracted (supra). There is no dispute that IRL is a 99.98% subsidiary. Thus, both the parties at any given point of time were having complete knowledge of the conditions of business and business, assets, employees etc. There was no requirement as such physical verification of these assets. The representatives of both the assessee have put signatures and executed agreement. Therefore, there could not be any justification for doubting the genuineness of the agreement at the end of the AO by making reference that assets were spread over throughout the country and could not be physically verified. Similarly,

other objections made by the AO is that intimation given to Stock Exchange, Mumbai was received on 12.4.2012 and by National Stock Exchange, Mumbai on 2.4.2012. Habouring this opinion at the end of DRP as well as the AO has been refuted by the assessee in its explanation. The assessee pointed out that intended transfer was intimated to the stock exchange well in advance according to the guidelines of the SEBI Act. BSE website had displayed this intended transfer on 30.3.2012 itself.

66. The next objection assigned by the AO against non-completion of transfer is that the prior approval from the banks from whom loans were taken by the vendor have not been taken. To this assessee has given a detailed explanation. We have extracted at serial no.7 of the objection. The assessee has pointed out that it never defaulted the loans, and therefore, there is no need for taking such an approval from the bank. It took approval subsequently and nowhere has raised objection. Section 2(47) r.w.s. 50B nowhere contemplates such approval while transferring the assets. An analysis of all these objections in the light of explanation given by the assessee, we are of the view that sale taken place on 30.3.2012. When the rights have been transferred by way of slump sales, possession on papers given, cheques for consideration handed over and it was deposited in the bank, the rights have been settled on this date. Vendor relinquished its rights in the property. The circumstances narrated by the DRP as well as by the AO relates to peripheral procedural compliances for running wind energy business. For the sake of argument, let us take that IRL after acquiring assets did not carry this business, then would it require to take such peripheral approval from Rajasthan Government etc.? Thus, according to our understanding, the AO has endeavored to shift this transaction from the assessment year 2012-13 to 2013-14 only in order to explore the applicability of section 50D of the Act. At the cost

of repetition, we would like to mention that Hon'ble Gujarat High Court in the case of Gauranginiben S. Shodhan (supra) has specifically observed that full consideration received on transfer of capital asset could not be replaced with fair market value unless some procedure has been provided. For example, section 50C where a deeming provision has been provided. It is worth to note of Hon'ble High Court finding in this decision on this aspect as under:

> *"1. Taking the question of ascertaining the fair market value on the date of sale, we notice that section 48, which is also contained in chapter IV of the Act pertains to method of computation of capital gain. A detailed mechanism has been provided for such computation of the income chargeable under the head "Capital Gains". It provides, inter alia, that the income chargeable under the Head "Capital Gains", shall be computed by deducting from the full value of the consideration received or accruing as a result of the transfer of the capital asset, the amounts mentioned therein that is the expenditure incurred wholly and exclusively in connection with such transfer and the cost of acquisition of the asset and the cost of any improvement thereto. Main thrust of section 48 of the Act, therefore, is the full value of consideration received or accruing as a result of the transfer of the capital asset as reduced by expenditure mentioned therein and the cost of acquisition of the asset. Section 55 A, as we have noticed, refers to the reference to DVO for ascertaining the fair market value of a capital asset. Such ascertainment of fair market value with the aid of the DVO's report would have no relevance for the purpose of determining full value of consideration received or accruing as a result of the transfer of the capital asset for the purposes of section 48 of the Act.*
>
> *12. In that view of the matter, the reference to DVO for ascertaining the fair market value of the capital asset as on the date of the sale in the present case would be wholly redundant."*

67. We have made reference to the decision of Hon'ble Bombay high Court explaining the meaning of section 50D and conditions in which it could be applied. Thus, conditions are missing in the present case. Therefore, neither under section 50B nor section 50D, the AO can

replace full value of sale consideration with fair market value. In view of the above discussion, we hold that the transaction has taken place on 30th March, 2012. The capital gain on transfer of capital asset by way of slump sale is taxable on substantive in assessment year 2012-13 and not 2013-14. The full value of sale consideration would not be replaced with fair market value. In other words, the AO is directed to accept full value of sale consideration at Rs.1 crore disclosed by the assessee and not fair market value adopted by him. We allow both these grounds of appeal in both the years.

68. In the result, both appeals of the assessee are partly allowed.

Order pronounced in the Court on 13th August, 2018.

Sd/-	Sd/-
(AMARJIT SINGH)	(RAJPAL YADAV)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Ahmedabad; Dated 13/08/2018

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. *अपीलार्थी* / The Appellant
2. *प्रत्यर्थी* / The Respondent.
3. *संबंधित आयकर आयुक्त* / Concerned CIT
4. *आयकर आयुक्त(अपील)* / The CIT(A)
5. *विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण* / DR, ITAT,
6. *गार्ड फाईल* / Guard file.

आदेशानुसार/ BY ORDER,