आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ - अहमदाबाद ।

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

BEFORE SHRI RAJPAL YADAV, JUDICIAL MEMBER
AND
SHRI WASEEM AHMED, ACCOUNTANT MEMBER

आयकर अपील सं./ ITA No. 1519 and 1520/Ahd/2016

निर्धारण वर्ष/Assessment Year: 2010-11 and 2012-13

AND

आयकर अपील सं./ ITA No. 857/Ahd/2017

निर्धारण वर्ष/Assessment Year: 2013-14

DCIT, Cir.(1)(1)(1) Ambawadi Ahmedabad.	Vs	M/s.Ausom Enterprise Ltd. Core House, Off. CG Road Nr.Parimal Garden Ellisbridge Ahmedabad 380006. PAN : AAACC 6250 F

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

Revenue by :	Shri S.K. Dev, Sr.DR
Assessee by :	Shri M.K. Patel, AR

सुनवाई की तारीख/Date of Hearing : 04/09/2018
घोषणा की तारीख /Date of Pronouncement : 15/10/2018

O R D E R

PER RAJPAL YADAV, JUDICIAL MEMBER : Present three appeals are directed at the instance of Revenue against orders of ld.CIT(A)-1, Ahmedabad dated 23.3.2016, 30.3.2016 and 24.1.2017 for the Asstt.Years 2011-12, 2012-13 and 2013-14 respectively. Since common issues are involved, therefore, these appeals were heard together and deem it appropriate to dispose of them by this common order.

2. Facts on all vital points are common. Therefore, for the facility of reference, we are mainly taking up facts from the Asstt.Year 2011-

3. First ground of appeal is verbatim same except variation in the amounts. The grievance of the Revenue is that the ld.CIT(A) has erred in deleting disallowances of Rs.7,43,24,689/-, Rs.4,06,52,387/- and Rs.4,06,52,387/- made by the AO out of claim of deduction under section 10AA of the Income Tax Act, 1961.

4. Brief facts of the case are that the assessee is engaged in the business of trading/speculation in bullion, commodities, shares and securities, currency derivatives, units mutual funds and derivatives. It has established a new SEZ unit. It has filed its return of income in the Asstt.Year 2011-12 on 30.9.2011 declaring total loss of Rs.(-)93,80,592/-. In the Asstt.Year 2012-13 return was filed in 29.9.2012 declaring total income at Rs.13,94,01,110/- and in the Asstt.Year 2013-14 assessee has declared NIL income in the return filed on 30.9.2013. The case of the assessee was selected for scrutiny assessment in all three years. Notices under section 143(2) were issued upon the assessee. During the accounting year relevant to the Asstt.Year 2011-12, the assessee has claimed deduction of Rs.7,43,24,689/- under section 10AA of the Act. The AO noticed that the assessee has included interest income of Rs.27,43,00,870/- in the profits of business of the undertaking. Similarly, in the Asstt.Year 2012-13, it has claimed deduction of Rs.4,06,52,387/- and included interest income at Rs.53,67,72,706/- in the business profits of the undertaking. In the Asstt.Year 2013-14, the assessee has claimed deduction under section 10AA of Rs.3,80,14,434/- and included interest

income at Rs.21,54,66,489/-. The ld.AO took into consideration section 10AA as well as explanation of the assessee. He observed that basically, the assessee has interest income which cannot be construed as profit derived from the undertaking, and if interest income is being excluded in all these three years, then the assessee would not be entitled for any deduction under section 10AA, because resultant profit would be loss. While taking into consideration *modus operandi* of the assessee, he observed that the assessee used to obtain letter of credit (LC) for a period of 360 days, whereas payment for export is received within a week or 15 days. Thus, instead of making payment, it kept on accumulating over the years on which interest was earned. In other words, the *modus operandi* of the assessee could be appreciated that it made import on credit period of 360 days against LC. For obtaining LC, it is required to offer fixed deposits receipts to the bank as security. On expiry of LC credit, bank liquidates FDR and makes payment to the importers. Exports were made for an immediate payment basis, therefore, as the purchases made on credit basis, the purchase value is higher than the prevailing rate on the date of payment. The assessee used to earn interest income on the FDRs. as well as on the export receipts received on immediate sales and deposited in the banks. The AO took a view that this interest income cannot be considered as derived from export of articles or things or services. Hence, he excluded interest income from the profits of undertaking, and thereafter held that the assessee would not entitle for deduction.

5. Dissatisfied with the assessment order, assessee carried the matter in appeal before the ld.CIT(A). It has filed detailed written submissions

and relied upon a large number of decisions rendered at end of the Tribunal as well as at the end of Hon'ble High Courts. The ld.CIT(A) has reproduced submissions of the assessee in the impugned order. Thereafter, the ld.CIT(A) recorded a finding that interest income disclosed by the assessee is to be treated as business income, because it has nexus with the export activities of the assessee. Accordingly, the ld.CIT(A) has allowed appeals of the assessee on this issue and deleted disallowance made by the AO. The assessee has been granted deduction in three years.

6. Before us, the ld.DR relied upon the order of the AO. On the other hand, the ld.counsel for the assessee contended that this issue has been settled by the Hon'ble Karnataka High Court's judgment rendered in the case of Motorola India Electronis P.Ltd. Vs. CIT. He placed on record copy of the judgment from page nos.72 to 80 of the paper book. He also made reference to the following orders of the ITAT as well as judgment of Hon'ble Gujarat High Court:

i) Zaveri & Co. P.Ltd. Vs. CIT, 1395 & 1396/Ahd/2013;

ii) Asiastic Colour Chem India Ltd. Vs. ACIT, ITA No.551/Ahd/2008

iii) Hari Orgochem P.Ltd., ITA No.256 & 205 of 2000

iv) Empire Pumps P.Ltd., Vs. DCIT, ITA No.186, 187, 189 & 2003 & 371 of 2002 (Guj);

v) Indusa Infotech Services P.Ltd., Vs. DCIT, 45 taxmann.com 34

vi) Yokogawa India Ltd.,Civil Appeal No.8498 of 2013

7. We have duly considered rival contentions and gone through the record carefully. Issue before us is, whether interest income received by

the assessee on fixed deposit receipts made by it for the purpose of obtaining letter of credit is to be assessed as a business income or income from other sources. If it is to be assessed as business income, then it is to be considered as profit of the undertaking as eligible for deduction under section 10AA of the Act. We find that the ld.CIT(A) has made reference to order of the ITAT in the case of Zaveri & Co. P.Ltd., rendered in ITA No.1395 & 1396/Ahd/2013. The facts in that case are identical. We deem it appropriate to take note of discussion made by the ITAT in the Zaveri & Co. (supra) which reads as under:

> *"37. The undisputed facts relating to this issue are that the assessee imports goods on credit and re-exports the same from its SEZ unit. The import is made on a credit of 360/90 days against letter of credit. For obtaining the letter of credit, the assessee is required to offer fixed receipt to the bank as a security. On expiry of the letter of credit period, the bank liquidates the fixed deposit receipt and makes payment to the importer. Further, the exports are made on immediate payment basis. Therefore, as the purchases are made on credit basis, the purchase value is higher than the prevailing rate on the date of purchase from purchases which are made on immediate payment basis. The exports are made on immediate payment basis at the market value which is prevalent on the date of payment. Normally, the assessee's purchase value is therefore more than its sale value. However, as the assessee receives payment for sales immediately and the payment for purchases are made at a later date and interest income earned by the assessee during the intervening period on sale value, the transaction were considered as commercially expedient and results in overall income to the assessee. The interest income in question are interest income which are earned by the assessee on fixed deposit receipts which are kept or pledged by the assessee with its bank for obtaining the Letter of Credit against its purchases is not in dispute.*
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> *38. On the above undisputed facts, the interest income earned by the assessee was assessed as business income of the assessee by the Assessing Officer in the assessment order. This view of the Assessing Officer was considered as not a possible view by the Commissioner of Income Tax in the impugned order passed u/s 263 of the Act and the Commissioner of*

Income Tax had held that the interest are mandatorily assessable under the head "income from other sources".

39. We find that in the instant case, it is not in dispute that the interest income which were earned by the assessee were from fixed deposit receipts with bank which were made by the assessee in the course of its trading business of import for the purposes of re-export/for obtaining Letter of Credit for its purchases. We thus find that the relevant fixed deposit receipts on which interest were earned were business assets of the assessee acquired in the course and for the purposes of its business. The fixed deposit receipts being business assets, we find no reason as to why interest income earned from such fixed deposit receipts could not be assessed as business income of the assessee. Our above view finds support from the recent decisions of the Hon'ble Karnataka High Court in the case of CIT &anr. Vs. Motorola India Electronics (P) Limited (2014) 265 CTR 94 (Kar.) wherein it was held that:

> *"No doubt Sub-section 10(B) speaks about deduction of such profits and gains as derived from 100% EOU from the export of articles or things or computer software. Therefore, it excludes profit and gains from export of articles. But Subsection (4) explains what is the profit derived from export of articles as mentioned in Sub-section (1). The substituted Subsection (4) says that profits derived from export of articles or things or computer software shall be the amount which bares to the profits of the business of the undertaking and not the profits and gains from export of articles. Therefore, profits and gains derived from export of articles are different from the income derived from the profits of the business of the undertaking. The profits of the business of the undertaking includes the profits and gains from export of the articles as well as all other incidental incomes derived from the business of the undertaking. It is interesting to note that similar provisions are not there while dealing with computation of income under Section 80HHC. On the contrary there is specific provision |ke Section 80HHB which expressly excludes this type of incomes. Therefore, in view of the said provisions, it is clear that, what is exempted is not merely the profits and gains the export of articles but also the income from the business of the undertaking. In the instant case, the assessee is a 100% EOU, which has exported software and earned the income. A portion of that income is included in EEFC account. Yet another portion of the amount is*

invested within the country by way of fixed deposits, another portion of the amount is invested by way of loan to the sister concern which is deriving interest or the consideration received from sale of the import entitlement, which is permissible in law. Now the question is whether the interest received and the consideration received by sale of import entitlement is to be construed as income of the business of the undertaking. Though it does not partake the character of a profit and gains from the sale of an article, it is the income which is derived from the consideration realized by export of articles. In view of the definition of 'Income from Profits and Gains' incorporated in Subsection (4), the assessee is entitled to the benefit of exemption of the said amount as contemplated under Section 10B of the Act. Therefore, the Tribunal was justified in extending the benefit to the aforesaid amounts also. We do not find any merit in these appeals."

41. The other connected issue is that as per the view of the Commissioner of Income Tax, the interest income in question being derived by the assessee from Indian Bank, the same is to be excluded while computing profits derived from the export of articles or things or services for the purpose of section 10AA of the Act. Sub-section (7) of section 10AA provides the manner in which the profits derived from "export of articles or things or services" is to be computed for the purposes of section 10AA of the Act. Therefore, in view of the above specific provision in the section itself, "profits derived from the export of articles or things or services" cannot be computed in any other manner. Sub-section (7) of Section 10AA reads as under:

"For the purposes of sub-section (1), the profits derived from the export of articles or things or services (including computer software) shall be the amount which bears to the profits of the business of the, undertaking, being the Unit, the same proportion as the export turnover in respect of such articles or things or services bears to the total turnover of the business carried on [by the undertaking]:

[Provided that the provisions of this sub-section [as amended by section 6 of the Finance (No. 2) Act, 2009 (33of 2009)] shall have effect for the assessment year beginning on the 1st day of April, 2006 and subsequent assessment years.]"

42. Thus, a perusal of the aforesaid sub-section takes us to the "profits of the business of the undertakings". Now, the profits of the business of the undertakings are to be computed as per the provisions of chapter-lVD of the Act and the only adjustment which is permitted by the legislature to be made to such profits of the business is to apportion the same in the proportion of exports turnover of the eligible services to the total turnover of the business carried on by the assessee. It is significant to note here that the specific provision like explanation (baa) of section 80HHC which provides for exclusion of 90% of interest income from the profits of business to arrive at the profits of the business has not been provided by the legislature in section 10AA of the Act. In absence of such a provision enacted by the Parliament in section 10AA of the Act, it is not possible for any other person to read such provision in section 10AA of the Act. Hon'ble Supreme Court in the case of Sm. Tarulata Shyam Vs. CIT (1971) 108 ITR 345 (SC) held that there is no scope for importing in the statute words which are not there. Further, Hon'ble Supreme Court in the case of CIT Vs. Shann Finance Private Limited (1998) 231 ITR 308 (SC) went on to hold that in interpreting statute, court cannot proceed to make good the deficiencies if there be any. The court interpret the statute as it stands, and in case of doubt, in a manner favorable to taxpayer. Thus, we find no provision in the statute on the basis of which it can be held that the interest income which forms part of the profits of the business is to be excluded for arriving at profits derived from "export of articles or things or services" as prescribed under sub-section (7) of section 10AA of the Act. Our above view also finds support from the decision of the Bangalore Bench of the Tribunal in the case of Rajesh Exports Limited v/s. ACIT, (2008) TIOL-457-ITAT-Bangalore wherein it was held that:

"In the light of the aforesaid discussion, it seems to us that the expression "profits of the business of the undertaking" appearing in section 10B(4) has to be construed in a wider sense than the expression "profits and gains as are derived by a hundred per cent export-oriented undertaking from the export of articles or things" appearing in section 10B(1) of the Act. We have already noticed that sub-section (1) has been expressly made subject to the provisions of the Section. Therefore, the meaning to be ascribed to the words used in that sub-section should be controlled or tempered by the language used in sub-section (4). So constructed it appears to us that the profits of the business of the undertaking includes not merely the profits derived by or from the undertaking, but also

include any profits or income which are incidental to the carrying on of the business of the undertaking."

To the same effect is the decision of the Hon'ble Karnataka High Court in the case of Motorola India Electronics (P) Limited (supra)."

8. Similarly, Hon'ble Gujarat High Court in the case of Hari Orgochem P.Ltd., in tax Appeal No.256 & 205 of 2000 held that interest from bank FDR kept as margin has to be assessed as business income, and eligible for deduction under section 32AB, though in that case the issue relates to admissibility of deduction under section 32AB, 80HHA and 80I of the Income Tax Act, but the question was, whether interest income earned on margin money kept with the bank for availing letter of credit is to be assessed as a business income or not. Similarly, in the case of ACIT Vs. Asiatic Colour Chem India Ltd. (supra) again considered identical issue of taxability on the income earned on FDRs made for obtaining letter of credit. Such interest income was considered as business income of the undertaking, and if interest income is to be considered as business income of the undertaking, then the formula for calculating deduction under section 10AA would be applicable on the interest income also. The profit derived from export is to be calculated as per formula provided in section 10AA of the Act.

$$\textit{Export Profit} = \frac{\textit{Profits of the Undertaking X Export Turnover}}{\textit{Total Turnover}}$$

9. The ld.AO took profits of business undertaking at NIL, and thereafter multiplied with Export turnover and divided by total turnover of the business. Since profits of the business of the undertaking is calculated at NIL hence, he calculated the profits derived

from export at NIL. Otherwise, after including interest, profit derived from an export activity would work out according to the claim made by the assessee. It is also pertinent to mention that identical issue considered by the Hon'ble Karnataka High Court in the case of Motorola India Electronics P.Ltd. (supra). In that case the assessee had interest income from deposits lying in EEFC account and interest income earned on inter-corporate loans out of the funds of the undertaking. Such interest income was considered as business income of the assessee's undertaking. Thus, we are of the view that the ld.CIT(A) has rightly considered the judgment relied upon by the assessee, and has rightly held that interest income earned by the assessee on FDRs. for obtaining LC is the business income of the undertaking which is to be taken into consideration while calculating deduction under section 10AA of the Act. It appears that the ld.CIT(A) has mentioned a wrong amount for the Asstt.Year 2013-14. The deduction claimed by the assessee was at Rs.3,80,14,434/- whereas in the ground, the Revenue has made a mention of the amount agitated in the Asstt.Year 2012-13. Nevertheless, in principle, we are holding that interest income earned by the assessee is to be assessed as business income of the undertaking eligible for claim of deduction under section 10AA of the Act. Thus, this ground of appeal is rejected in all three years.

10. Next common issue in all three years is, whether brought forward loss and unabsorbed depreciation is to be set off before calculating deduction admissible under section 10AA of the Act or not. The ld.counsel for the assessee at the very outset submitted that the issue in dispute is squarely covered by the decision of Hon'ble Gujarat High

Court rendered in the case of Indusa Infotech Services P.Ltd., 45 taxmann.com 34. He also submitted that it is covered by judgment of Hon'ble Supreme Court in the case of Yokogawa India Ltd., Civil Appeal No.8498 of 2013. He placed on record copies of these decisions. On the other hand, the ld.DR unable to controvert this contention of the ld.counsel for the assessee.

11. Hon'ble Gujarat High Court in the case of CIT Vs. Indusa Infotech Services P.Ltd. (supra) has formulated the following question:

> *"Whether the Appellate Tribunal has substantially erred in holding that deduction u/s. 10A to be allowed first before setting off unabsorbed loss and depreciation of non-eligible business unit of the assessee ?"*

12. Hon'ble Gujarat High Court has decided this question in favour of the assessee i.e. upholding allowance of deduction under section 10A before set off of any balance unabsorbed loss and depreciation of non-eligible business units of the assessee. Somewhat similar issue has been considered by the Hon'ble Supreme Court in the case of Yokogawa India Ltd. (supra) and the question framed by the Hon'ble Supreme Court reads as under:

(i) *Whether Section 10A of the Act is beyond the purview of the computation mechanism of total income as defined under the Act. Consequently, is the income of a Section 10A unit required to be excluded before arriving at the gross total income of the assessee?*

(ii) *Whether the phrase "total income" in Section 10A of the Act is akin and pari materia with the said expression as appearing in Section 2(45) of the Act?*

(iii) *Whether even after the amendment made with effect from 1.04.2001, Section 10A of the Act continues to remain an exemption section and not a deduction section?*

(iv) Whether losses of other 10A Units or non 10A Units can be set off against the profits of 10A Units before deductions under Section 10A are effected?

(v) Whether brought forward business losses and unabsorbed depreciation of 10A Units or non 10A Units can be set off against the profits of another 10A Units of the assessee.

13. Hon'ble Supreme Court has held that for the purpose of calculation of deduction under section 10AA it has to be computed prior to set off of these unabsorbed deprecation, brought forward loss of other units. Relevant discussion reads as under:

> *"16. From a reading of the relevant provisions of Section 10A it is more than clear to us that the deductions contemplated therein is qua the eligible undertaking of an assessee standing on its own and without reference to the other eligible or non-eligible units or undertakings of the assessee. The benefit of deduction is given by the Act to the individual undertaking and resultantly flows to the assessee. This is also more than clear from the contemporaneous Circular No. 794 dated 9.8.2000 which states in paragraph 15.6 that,*
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> > *"The export turnover and the total turnover for the purposes of sections 10A and 10B shall be of the undertaking located in specified zones or 100% Export Oriented Undertakings, as the case may be, and this shall not have any material relationship with the other business of the assessee outside these zones or units for the purposes of this provision."*
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> *17. If the specific provisions of the Act provide [first proviso to Sections 10A(1); 10A (1A) and 10A (4)] that the unit that is contemplated for grant of benefit of deduction is the eligible undertaking and that is also how the contemporaneous Circular of the department (No. 794 dated 09.08.2000) understood the situation, it is only logical and natural that the stage of deduction of the profits and gains of the business of an eligible undertaking has to be made independently and, therefore, immediately after the stage of determination of its profits and gains. At that stage the aggregate of the incomes under other heads and the provisions for set off and carry forward contained in Sections 70, 72 and 74 of the Act would*

be premature for application. The deductions under Section 10A therefore would be prior to the commencement of the exercise to be undertaken under Chapter VI of the Act for arriving at the total income of the assessee from the gross total income. The somewhat discordant use of the expression "total income of the assessee" in Section 10A has already been dealt with earlier and in the overall scenario unfolded by the provisions of Section 10A the aforesaid discord can be reconciled by understanding the expression "total income of the assessee" in Section 10A as 'total income of the undertaking'.

18. For the aforesaid reasons we answer the appeals and the questions arising therein, as formulated at the outset of this order, by holding that though Section 10A, as amended, is a provision for deduction, the stage of deduction would be while computing the gross total income of the eligible undertaking under Chapter IV of the Act and not at the stage of computation of the total income under Chapter VI. All the appeals shall stand disposed of accordingly."

14. Respectfully following Hon'ble Gujarat High judgment as well as Hon'ble Supreme Court's judgments, we do not find any error in the order of the ld.CIT(A) on this issue in all the years.

15. Next issue relates to whether the disallowance made under section 14A could be added back in the book profit for the purpose of section 115JB of the Act. Recently, we have adjudicated this issue in the case of Gujarat Fluorochemicals Ltd. Vs. DCIT in ITA No.805/Ahd/2017 order dated 13.8.2018. The discussion made by the Tribunal in that case reads as under:

"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;*
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> > *"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.*
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> *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:-*
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> > *"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?*
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> > *-----*

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:

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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:*
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> *"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."

16. Respectfully following order of the Co-ordinate Bench (supra) as well as Special Bench, we hold that even if some addition has been confirmed under section 14A, then also it could not be adjusted in the book profit for the purpose of section 115JB.

17. In the assessment year 2012-13 and 2013-14, the assessee has raised one more grounds of appeal, wherein it has pleaded that disallowance made out of claim under section 10AA should not be adjusted in the book profit for the purpose of section 115JB. The ld.CIT(A) has deleted this adjustment on the ground that the disallowance itself has been deleted.

18. With the assistance of the ld.representatives, we gone through the record carefully. We do not find any error in the order of the ld.CIT(A), because we have already deleted disallowance made under section 10AA. Once there is no amount available for disallowance, no question arises for making adjustment in the book profit. This ground of appeal is rejected in both the years.

19. Next issue relates to disallowability of certain expenditure with the aid of section 14A r.w.s 8D relatable to earning of tax free income.

20. With the assistance of the ld.representative we have gone through the record. It emerges out from the record that the assessee has dividend income amounting to Rs.1,02,050/-, Rs.2,53,000/- and Rs.3,05,265/- in the Asstt.Year 2011-12 to 2013-14 respectively. The ld.AO has made disallowance of Rs.4,43,563/-, Rs.8,31,680/- and Rs.4,44,563/- under section 14A read with rule 8D of the Income Tax

Act. On appeal, before the ld.CIT(A) it was contended by the assessee that dividend income has been made by it from its securities held as stock in trade. Since shares were held as stock-in-trade and dividend income is incidental to the business, therefore, no disallowance under section 14A of the Act r.w. 8D of the Rules ought to be made. For buttressing his contention, the assessee relied upon order of the ITAT in the case of Zaverilal Virjibhai Mandalia Vs. ACIT, 152 TTJ (Ahd)(UD) 20; Yatish Trading Co. P.Ltd. Vs. ACIT, 129 ITD 237 (Mum) and CCI Vs. JOT, 250 CTR (Kar) 291. The ld.CIT(A) has accepted contentions of the assessee and deleted the disallowance.

21. With the assistance of ld.representatives, we have gone through the record. In recent judgment, Hon'ble Supreme Court has upheld the disallowance of expenditure relatable to tax free income even if such income is incidental income. In this regard, we would like to make reference to the decision of Hon'ble Supreme Court in the case of Max opp Investment Ltd. vs. DCIT, [2018] 91 taxmann.com 154 (SC). In view of this latest decision of Hon'ble Supreme Court, view taken by the ld.CIT(A) on the strength of ITAT order is not sustainable. However, considering the meager tax free income it is not justifiable to disallow the expenditure more than the tax free income. We can make reference to the decision of Hon'ble Gujarat High Court in the case of Correctch Energy P.Ltd., 223 taxmann 130 and Delhi High Court decision in the case of Cheminvest Ltd. Vs. CIT, 378 ITR 33. Considering the above, we would like to observe that if we estimate adhoc disallowance for expenditure ought to be incurred for earning tax free income, such estimated expenses are to be worked out Rs.10,000/-; Rs.20,000/-;

Rs.30,000/- in the Asstt.Years 2011-12, 2012-13 and 2013-14 respectively, *qua* dividend income of Rs. 1,02,050/-, Rs.2,53,000/- and Rs.3,05,265/-. In view of the above discussion grounds of appeal of the Revenue are partly allowed.

22. In the result, the appeals of the Revenue are partly allowed.

Pronounced in the Open Court on 15th October, 2018.

Sd/-	**Sd/-**
(WASEEM AHMED)	**(RAJPAL YADAV)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**