

**IN THE INCOME TAX APPELLATE TRIBUNAL
“B” BENCH : BANGALORE**

**BEFORE SHRI JASON P BOAZ, ACCOUNTANT MEMBER AND
SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER**

ITA Nos.528 to 530/Bang/2018
Assessment years : 2008-09, 2009-10, 2010-11

M/s. Brigade Enterprises Ltd., 29 th & 30 th Floors, World Trade Centre, Brigade Gateway Campus, 26/1, Dr. Rajkumar Road, Malleshwaram, Rajajinagar, Bangalore – 560 055. PAN: AAACB 7459 F	Vs.	The Deputy Commissioner of Income Tax, Circle – 1(1)(2), Bangalore.
APPELLANT		RESPONDENT

Appellant by	:	Shri. B. R. Sudheendra, CA
Respondent by	:	Shri. R. N. Siddappaji, Addl. CIT

Date of hearing	:	09.01.2019
Date of Pronouncement	:	08.02.2019

ORDER

Per Jason P Boaz, Accountant Member

These three appeals by the assessee are directed against the separate orders of CIT(A)-1, Bangalore, for Assessment Years 2008-09 to 2010-11. Since common issues are involved, these appeals were heard together and we

deem it appropriate to dispose them off by way of a common order for the sake of convenience.

2. Briefly stated, the facts of the case are as under:

2.1.1 For Assessment Year 2008-09, the assessee filed its return of income on 29.09.2008, declaring income of Rs.27,75,32,946/-. The return was selected for scrutiny and the order of assessment was passed under section 143(3) of the Income Tax Act, 1961 (in short, 'the Act') vide order dated 31.03.2010, wherein, *inter alia*, the Assessing Officer (AO) made disallowances under section 14A of the Act r.w.r. 8D(2)(ii) and 8D(2)(iii) of the IT Rules, 1962 (Rules) amounting to Rs.63,60,000/- and Rs.1,01,60,000/- (totally amounting to Rs.1,65,20,000/-). On appeal, the CIT(A) vide order dated 29.10.2010 allowed the assessee partial relief, *inter alia*, confirming the aforesaid disallowances under section 14A r.w.r. 8D(2)(ii)/(iii). On further appeal by the assessee, a Co-ordinate Bench of this Tribunal in its order in ITA No.1279/Ban/2010 dated 12.01.2012 set aside the issue of disallowances under section 14A r.w.r. 8D to the file of the AO for consideration afresh; by keeping in view the guidelines laid down by the Hon'ble Bombay High Court in the case of Godrej & Boyce Manufacturing Company Ltd., (2010) 328 ITR 81 (Bom).

2.1.2 In the set aside proceedings, the AO passed an order of assessment under section 143(3) r.w.s. 254 of the Act dated 25.03.2013, repeating the earlier disallowances under section 14A of the Act r.w.r. 8D(2)(ii) and 8D(2)(iii) of the Rules amounting to Rs.63,60,000/- and Rs.1,01,60,000/- respectively. The appeal filed by the assessee against the aforesaid disallowances made in the order of assessment, were dismissed by CIT(A)-1, Bangalore, vide the impugned order dated 31.10.2017. Aggrieved by the aforesaid order of the CIT(A) for Assessment Year 2008-09, the assessee is in appeal before the Tribunal.

2.2.1 **For Assessment Year 2009-10,** the assessee filed its return of income on 30.09.2009, followed by a revised return on 09.10.2010 declaring income of Rs.71,82,54,006/- and Book Profits were computed at Rs.71,53,81,256/-. The return was selected for scrutiny and the order of assessment completed under section 143(3) of the Act vide order dated 28.12.2011 wherein the assessee's income was determined at Rs.73,61,05,940/-, which, *inter alia*, included disallowances under section 14A r.w.r. 8D(2)(ii) amounting to Rs.15,27,310/- and under Rule 8D(2)(iii) amounting to Rs.1,09,99,962/- (totally amounting to Rs.1,25,27,272/-). On appeal, the CIT(A) vide order dated 14.11.2012, *inter alia*, deleted the disallowance under section 14A r.w.r. 8D(2)(ii) amounting to Rs.15,27,310/- and upheld the disallowance made under section 14A r.w.r. 8D(2)(iii)

amounting to Rs.1,09,99,962/-. Revenue filed an appeal before the Tribunal against the relief granted by the CIT(A) and the assessee filed a cross objection in respect of the additions/disallowances confirmed by the CIT(A). A Co-ordinate Bench of this Tribunal vide order in ITA No.236/Bang/2013 dated 21.03.2014, upheld the CIT(A)'s order in deleting the disallowance under section 14A r.w.r. 8D(2)(ii) amounting to Rs.15,27,310/-. In respect of the assessee's C.O, the Tribunal, *inter alia*, set aside the disallowance under section 14A r.w.r. 8D(2)(iii) amounting to Rs.1,09,99,963/- to the file of the AO to be decided afresh, with similar directions as issued in its order for Assessment Year 2008-09 (supra).

2.2.2 In the set aside proceedings, the AO passed the order of assessment under section 143(3) r.w.s. 254 of the Act vide order dated 30.12.2016, repeating the disallowance of Rs.1,09,99,963/- under section 14A r.w.r. 8D(2)(iii). The assessee's appeal filed before the CIT(A) was dismissed vide the impugned order dated 31.10.2017. Being aggrieved by the aforesaid order of CIT(A) for Assessment Year 2009-10, the assessee is in appeal before the Tribunal.

2.3.1 **For Assessment Year 2010-11**, the assessee filed its return of income on 15.10.2010, followed by a revised return of income on 31.03.2012 declaring total income of Rs.6,27,87,633/- and Book Profits at Rs.44,88,35,625/-. The return was selected for scrutiny and the order of

assessment was completed under section 143(3) of the Act vide order dated 26.02.2013, wherein the assessee's income was determined at Rs.43,48,83,703/-; which, *inter alia*, included disallowances of Rs.4,41,216/- under section 14A r.w.r. 8D(2)(ii) and of Rs.12,38,740/- under section 14A r.w.r. 8D(2)(iii), totally amounting to Rs.16,79,956/-. On appeal, the CIT(A) vide order dated 09.06.2014, *inter alia*, deleted the disallowance of Rs.4,41,216/- made under section 14A r.w.r. 8D(2)(ii) and upheld the disallowance of Rs.12,38,740/- made under section 14A r.w.r. 8D(2)(iii). On cross appeals by Revenue and the assessee before the Tribunal, a Co-ordinate Bench thereof vide order in ITA No.1275/Bang/2014 dated 08.07.2015 upheld the order of the CIT(A) in deleting the disallowance under section 14A r.w.r. 8D(2)(ii); but set aside the issue of disallowance under section 14A r.w.r. 8D(2)(iii) to the file of the AO with similar directions as rendered by the Tribunal in its orders for the earlier Assessment Years 2008-09.

2.3.2 In the set aside proceedings, the AO passed the order of assessment under section 143(3) r.w.s. 254 of the Act vide order dated 30.12.2016, once again making the disallowance of Rs.12,38,740/- under section 14A r.w.r. 8D(2)(iii). On appeal, the CIT(A) dismissed the assessee's appeal vide order dated 31.10.2017.

3. Aggrieved by the orders of CIT(A)-1, Bangalore, dated 31.10.2017 for Assessment Years 2008-09 to 2010-11, the assessee filed the appeals for these three Assessment Years before the Tribunal. The revised grounds of appeal that are to be adjudicated in these appeals for Assessment Years 2008-09 to 2010-11 as under:

1. **General:-** *The order passed by the learned CIT(A) to the extent prejudicial to the appellant is bad in law and liable to be quashed.*

2. **Disallowance under section 14A:-** *The learned CIT(A) has erred in confirming the disallowance under section 14A read with rule 8D(2)(iii) and rule 8D(2)(iii) amounting to Rs. 63,60,000 and Rs. 1,01,60,000 respectively totaling to Rs. 1,65,20,000. On facts and circumstances of the case and law applicable, computation of disallowance under section 14A read with rule 8D(2)(ii) & (iii) and the impugned addition is bad in law and liable to be deleted.*

Prayer:- *In view of the above and other grounds to be adduced at the time of hearing, the appellant prays that the order passed by the learned CIT(A) to the extent prejudicial to the appellant be quashed or in the alternative the aforesaid grounds be allowed.*

3.2 Assessment Year 2009-10

1. **General:-** *The order passed by the learned CIT(A) to the extent prejudicial to the appellant is bad in law and liable to be quashed.*

2. **Disallowance under section 14A:-** *The learned CIT(A) has erred in confirming the disallowance under Section 14A-read_ with rule 8D(2)(iii) amounting to Rs. 1,09,99,963. On facts and circumstances of the case and law applicable, computation of disallowance under section 14A read with rule 8D(2)(iii) and the impugned addition is bad in law and liable to be deleted.*

3. **Prayer:-** *In view of the above and other grounds to be adduced at the time of hearing, the appellant prays that the order passed by the learned CIT(A) to the extent prejudicial to the appellant be quashed or in the alternative the aforesaid grounds be allowed.*

3.3 Assessment Year 2010-11

1. **General:-** *The order passed by the learned CIT(A) to the extent prejudicial to the appellant is bad in law and liable to be quashed.*
2. **Disallowance under section 14A:-** *The learned CIT(A) has erred in confirming the disallowance under section 14A read with rule 8D(2)(iii) amounting to Rs. 12,38,740. On facts and circumstances of the case and law applicable, computation of disallowance under section 14A read with rule 8D(2)(iii) and the impugned addition is bad in law and liable to be deleted.*
3. **Prayer:-** *In view of the above and other grounds to be adduced at the time of hearing, the appellant prays that the order passed by the learned CIT(A) to the extent prejudicial to the appellant be quashed or in the alternative the aforesaid grounds be allowed.*

4. Disallowance under section 14A of the Act r.w.r. 8D(2)(ii) of Rules – only for Assessment Year 2008-09 and under Rule 8D(2)(iii) for all three Assessment Years

4.1 In respect of the disallowance under section 14A of the Act r.w.r. 8D(2)(ii) of the Rules amounting to Rs.63,60,000/- for Assessment Year 2008-09, the learned AR for the assessee placed reliance on the decision of Co-ordinate Benches of this Tribunal for Assessment Years 2009-10 and 2010-11 in the assessee's own case (supra), upholding the deletion thereof made by the CIT(A). It was submitted that the AO has rendered a clear finding in the order of assessment that proceeds from the issue of shares by way of IPO were invested in mutual funds and consequently contended that since the interest expenditure has no relation to the earning of exempt income, disallowance should not have been made under section 14A r.w.r. 8D(2)(ii).

In support of this contention, reliance was placed on the decision of the Hon'ble Karnataka High Court in the case of CIT Vs. Microlabs Ltd., (2016) 383 ITR 490, wherein it was held that where availability of profit, share capital and reserves and surplus was much more than the investments made by the assessee, no disallowance of interest expenditure under section 14A of the Act could be made. Drawing the attention of the Bench to the relevant audited financial statements, the learned AR showed share capital and reserves and surplus to be higher than the investments made by the assessee in the year under consideration.

4.2 As regards the disallowance under section 14A of the Act, r.w.r. 8D(2)(iii) of the Rules for Assessment Years 2008-09 to 2010-11, the learned AR of the assessee placed reliance on the decision of the Special Bench of ITAT, Delhi Bench in the case of ACIT Vs. Vireet Investments (P) Ltd., (2017) 82 taxmann.com 415 (Delhi-Special Bench-ITAT) and submitted that only investments which have actually yielded exempt income during the year under consideration should be considered in computing the disallowance under section 14A of the Act r.w.r. 8D(2)(iii) of the Rules.

4.3 Per contra, the learned DR for Revenue placed reliance on the orders of the authorities below to justify the disallowances made under section 14A r.w.r. 8D(2)(ii) for Assessment Year 2008-09. According to the learned DR, the proceeds of Rs.703 Crores from issue of shares by IPO is a

borrowing, on which the assessee incurred an expenditure of Rs.36.70 Crores for raising the share capital, and proceeds to the extent of Rs.403.67 Crores were invested in Mutual Funds which generated exempt dividend income of Rs.7.63 Crores. According to the learned DR, in view of the above, the disallowance under section 14A r.w.r. 8D(2)(ii) has been rightly upheld by the CIT(A). With respect to the disallowances made under section 14A r.w.r. 8D(2)(iii) for Assessment Years 2008-09 to 2010-11, the learned DR supported the orders of the authorities below.

4.4.1 We have heard the rival contentions and perused and carefully considered the material on record; including the judicial pronouncements cited (supra).

4.4.2 As regards the **disallowance under section 14A of the Act r.w.r. 8D(2)(ii) of the Rules, amounting to Rs.63,60,000/- for Assessment Year 2008-09**, it is an undisputed fact that the proceeds of Rs.703 Crores received on issue of share capital by way of IPO was invested in Mutual Funds and the assessee had incurred an expenditure of Rs.36.70 Crores in connection with the issue of share capital. The authorities below have rendered a finding that the proceeds from the issue of shares has been invested in mutual funds, to the extent of approx. Rs.405.21 Crores which have yielded exempt income. In this factual matrix of the case, it is evidently clear that the assessee had adequate funds from share capital and reserves and surplus i.e., Rs.927.64

Crores for making investment in mutual funds and therefore the interest expenditure on borrowings amounting to Rs.3.57 Crores cannot be considered for making disallowance u/s 14A r.w.r. 8D(2)(ii) in the year under consideration. We find that the Hon'ble Karnataka High Court in the case of CIT Vs. Microlabs Ltd., (2016) 383 ITR 490 (KAR), following the decision of the Hon'ble Bombay High Court in the case of CIT Vs. HDFC Bank Ltd., (2014) 366 ITR 505 (Bom), held that when non-interest bearing funds like share capital and reserves and surplus available to the assessee are more than the investments in tax exempt securities, no disallowance of interest expenditure can be made under section 14A of the Act. In the case on hand, from the above facts on record, it is evident that share capital and reserves and surplus available to the assessee are more than the investments in tax free securities. In that factual view of the matter and respectfully following the decision of the Hon'ble Karnataka High Court in the case of CIT Vs. Microlabs Ltd., (supra), we are of the considered opinion that the disallowance under section 14A of the Act r.w.r. 8D(2)(ii) of the Rules amounting to Rs.63,60,000/- is not in accordance with law and accordingly delete the same. Consequently, the grounds raised by the assessee challenging the disallowance under section 14 of the Act r.w.r. 8D(2)(ii) of the Rules for Assessment Year 2008-09 are allowed.

4.5.1 As regards the **disallowances under section 14A of the Act r.w.r. 8D(2)(iii) of the Rules amounting to Rs.1,01,60,000/- for Assessment**

Year 2008-09; Rs.1,09,99,963/- for Assessment Year 2009-10 and Rs.12,38,740/- for Assessment Year 2010-11, the contention urged by the learned AR for the assessee was that the AO has taken the entire investments as per the assessee's Balance Sheets for the respective three years under consideration for computing the said disallowance. According to the learned AR, the 'Schedule of Investments' for these three years also included investments in shares of subsidiary companies, associate companies, mutual funds and other unlisted shares; some of which have not resulted in the earning of any exempt income during the relevant year concerned. The learned AR submitted that only those investments which earned exempt income during the year concerned should be considered for computing the disallowances under section 14A r.w.r. 8D(2)(iii). In support of this contention, the assessee placed reliance on the decision of the Special Bench of ITAT-Delhi Bench. The case of ACIT Vs.Vireet Investments (P) Ltd., (2017) 82 taxmann.com 415.

4.5.2 We have heard the rival contentions and perused and carefully considered the material on record; including the judicial pronouncements cited therein. Admittedly, the assessee has earned exempt dividend income from investments amounting to Rs.7,63,21,447/- in Assessment Year 2008-09, Rs.11,55,53,320/- in Assessment Year 2009-10 and Rs.24,26,499/- in Assessment Year 2010-11 and did not suo moto disallow in its accounts any

amount on account of expenditure incurred in earning such exempt dividend income. The AO, after considering the explanations put forth by the assessee that no disallowance was warranted u/s 14A of the Act, proceeded to make disallowances u/s 14A r.w.r. 8D(2)(iii) for all three Assessment Years as laid out in para 4.5.1 of this order (supra). On appeal, the same was upheld by the CIT(A).

4.5.3 According to the averments in the grounds (supra), the assessee, *inter alia*, submits that the disallowance u/s 14A r.w.r. 8D(2)(iii), if at all called for, ought to be restricted to those investments which yielded the exempt income earned by the assessee in the year under consideration. In the decision of the Special Bench of ITAT Delhi in the case of Vireet Investments (P) Ltd., (supra), the issue for consideration before the special Bench was similar to the one before us; i.e., whether or not the investment, which did not yield any exempt income, should OR should not enter into the computation under Rule 8D(2)(iii) of Income Tax Rules, 1962 (in short 'the Rule'). The Special Bench, after consideration of this issue, in para 11-16 of its order, held that for computing the disallowance u/R 8D(2)(iii) 'only those investments are to be considered for computing average value of investment which yielded exempt income during the year.' The operative part of this decision of the Special Bench at paras 11 to 11.18 are extracted hereunder:

“11. We have considered the submissions of both the parties and have perused the record of the case. The basic issue for consideration is that the investment, which did not yield any exempt income, should enter or not enter into the computation under Rule 8D, while arriving at the average value of investment, income from which does not or shall not form part of the total income.

11.1. In the present case, our decision is restricted only to the extent of interpretation of language employed in Rule 8(2)(iii). The submission of ld. counsel for the assessee is that this issue is now covered by the decision of the Hon'ble Delhi High Court in the case of CIT Vs. Holcin India (P) Ltd. (supra), wherein it has been held that if no dividend income was earned, section 14A couldnot be invoked.

The Hon'ble Delhi High Court has referred to the decisions, which we have noted earlier i.e.:

- M/s Shivam Motors (P) Ltd. ITA 88 of 2014 (All.);
- Winsome Textile Industries Ltd. 319 ITR 204 (P&H)
- M/s Lakhani Marketing ITA 970 of 2008 (P&H)
- Corrttech Energy Pvt. Ltd. 223 Taxman 130 (Guj.).
- CIT Vs. Hero Cycles Ltd. 323 ITR 518.

11.2. The submission of ld. Principal CIT(DR) is that ITAT in the case of Delhi Special Bench in the case of Cheminvest Ltd. (supra) has specifically held that even if there is no exempt income, the provisions of section 14A are applicable in view of the decision of Hon'ble Supreme Court in the case of Rajednra Prasad Moody (supra). His submission is that the decision of Hon'ble Delhi Court reversing the decision of Special Bench in Cheminvest should not be followed because that is contrary to the principles laid down in Rajendra Prasad Modi(supra).

11.3. It is against these submissions, we first refer to the facts as were obtaining in these two decisions

11.4. In the case of Cheminvest Ltd. (supra), the assessee had borrowed funds of Rs. 8,51,65,000/- and during the previous year relevant to assessment year 2004-05 paid interest of Rs. 1,21,02,367/- thereon. Out of this unsecured loan, the assessee invested a sum in purchase of shares, which was shown as investment for the purpose of long term capital gains. The AO disallowed interest proportionate to the investment in shares, though no exempt income was earned during the year. The CIT(A)

affirmed this but held that the net interest debited to the P&L A/c was required to be apportioned and not the gross interest expenditure. The Tribunal held that interest expenditure incurred by the assessee was for borrowing used for the purposes of investment in shares, both held for trading as well as investment purposes. Irrespective of whether or not there was any yield of dividend on the shares purchased, the interest incurred was relatable to earning of dividend on the shares purchased. The dividend income being exempted from tax by virtue of section 10(34) of the Act, the interest paid on borrowed capital utilized in purchase of shares, being the expenditure incurred in relation to dividend income not forming part of the assessee's total income, was held to be not an allowable deduction. In coming to the conclusion, the Special Bench primarily relied on the ratio laid down by the Hon'ble Supreme Court in the case of Rajendra Prasad Moody (supra).

11.5. In the case of Rajendra Prasad Moody (supra), the facts were that the assessees were brothers and each of them had borrowed moneys for the purposes of making investment in shares of certain companies. During the relevant assessment year they paid interest on the moneys borrowed but did not receive any dividend on the shares purchased with these moneys. Both of them made a claim for deduction of the amount of interest paid on borrowed moneys but this claim was negated by the ITO and on appeal by the AAC on the ground that during the relevant assessment year the shares did not yield any dividend and, therefore, interest paid on the borrowed moneys could not be regarded as expenditure laid out or expended wholly and exclusively for the purposes of making or earning income chargeable under the head 'income from other sources', so as to be allowable as a permissible deduction u/s 57(iii). The Tribunal, however, on further appeal, disagreed with the view taken by the taxing authorities and upheld the claim of each of the two assessees for deduction u/s 57(iii).

11.6. In the backdrop of these facts the Tribunal's order was upheld by the Hon'ble High Court and Hon'ble Supreme Court. The Hon'ble Supreme Court, inter alia, held that it is the purpose of the expenditure that is relevant in determining the applicability of section 57(iii) and that purpose must be making or earning of income. It was further held that section 57(iii) does not require that this purpose must be fulfilled in order to qualify the expenditure for deduction. It does not say that the expenditure shall be deductible only if any income is made or earned. There is in fact nothing in the language of section 57(iii) to suggest that the purpose, for which the expenditure is made, should fructify into any benefit by way of return in the shape of income.

11.7. Thus, in both the decisions viz. in the case of Cheminvest Ltd. (supra), and in the case of Rajendra Prasad Moody (supra), the issue related to allowability of expenditure which had direct nexus with the

earning of income. The borrowing in both the cases has not been disputed being for acquiring shares. Hon'ble Delhi High Court has specifically held in para 21 as under:-

“21. There is merit in the contention of Mr. Vohra that the decision of the Supreme Court in Rajendra Prasad Moddy (supra) was rendered in the context of allowability of deduction under Section 57(iii) of the Act, where the expression used is ‘for the purpose of making or earning such income’. Section 14A of the Act on the other hand contains the expression ‘in relation to income which does not form part of the total income.’ The decision in Rajendra Prasad Moody (supra) cannot be used in the reverse to contend that even if no income has been received, the expenditure incurred can be disallowed under Section 14A of the Act.”

11.8. In the case of Holcin India (P) Ltd. (supra) the facts were that the respondent- assessee was a subsidiary of Holder ind Investments Ltd., Mauritius, which was formed as a holding company for making downstream investments in cement manufacturing ventures in India. In the return of income filed for the Assessment Year 2007-08, the respondent-assessee declared loss of Rs. 8.56 Crores approximately. The respondent-assessee had declared revenue receipts of Rs. 18,02,274/- which included interest of Rs. 726/- from Fixed Deposit Receipts and profit on sale of fixed assets of Rs. 16,52,225/-. As against this, the respondent assessee had claimed administrative and miscellaneous expenditure written off amounting to Rs. 8.75 Crores. For the Assessment Year 2008-09, the assessee had filed return declaring loss of Rs. 6.60 Crores approximately. The assessee had declared revenue receipts in the form of foreign currency fluctuation difference gain of Rs. 12,46,595/-. It had claimed expenses amounting to Rs. 7.02 Crores as personal expenses, operating and other expenses, depreciation and financial expenses.

11.9. In both the assessment orders, the Assessing Officer held that the respondent-assessee had not commenced business activities as they had not undertaken any manufacturing activity or made downstream investments. It was observed that the respondent-assessee, after receiving approval of Foreign Investment Promotion Soard (FIPS) dated 20.12.2000 acquired shares capital of Ambuja Cement India Ltd. This, the Assessing Officer felt, was not sufficient to indicate or hold that the respondent-assessee had started their business. He, accordingly, disallowed the entire expenditure of Rs. 8.75 Crores for the Assessment Year 2007-08 and Rs.7.02 Crores for the Assessment Year 2008-09 11.10. Ld. CIT(A) did not agree with the findings of Assessing Officer that the business of the respondent- assessee had not been set up or commenced. The CIT(A) observed that the respondent-assessee had been set up with the business objective of making investment in cement industry after due

approval given by the Government of India, Ministry of Commerce and Industry vide letter dated 18.12.2002 and 20.12.2012. It was observed that in fact, the respondent-assessee was not to undertake any manufacturing activity themselves. After considering the FIPS approval and the purchase of shares in the said company of Rs. 1850.91 crores, ld. CIT(A), inter alia, observed that the assessee was engaged in the business of holding of investment and was entitled to claim expenditure provided. There was a direct connection between expenditure incurred and business of the assessee company. However, he pointed out that since the business of the respondent assessee was to act as a holding company for downstream investment and as it was an accepted fact that they had incurred expenses to protect their business and explore new avenues of investment, the provisions of section 14A were applicable.

11.11. The Hon'ble High Court observed that the reasoning given by the CIT(A) was ambiguous and unclear and on clarity being sought from the Revenue it was pointed out that "the stand of the assessee contained a contradiction to the extent that on the issue of setting up of business, it was stated that the assessee had incurred expenditure on acquiring the shares, therefore, the assessee could not now take different stand than the one taken in the first issue".

11.12. The Hon'ble High Court, after considering in detail the decision of ld. CIT(A) finally observed in para 13 as under:

13. We are confused about the stand taken by the appellant-Revenue. Thus, we had asked Sr. Standing Counsel for the Revenue, to state in his own words, their stand before us. During the course of hearing, the submission raised was that the shares would have yielded dividend, which would be exempt income and therefore, the CIT(A) had invoked Section 14A to disallow the entire expenditure. The aforesaid submission does not find any specific and clear narration in the reasons or the grounds given by the CIT(A) to make the said addition. Possibly, the CIT(A), though it is not argued before us, had taken the stand that the respondent-assessee had made investment and expenditure was incurred to protect those investments and this expenditure cannot be allowed under Section 14A.

11.13. Thus, Hon'ble Delhi High Court primarily decided the issue regarding applicability of section 14A even if no dividend income was earned. The Hon'ble High court in paras 14 to 16 of its decision observed as under:

14. On the issue whether the respondent-assessee could have earned dividend income and even if no dividend income was earned, yet Section 14A can be invoked and disallowance of expenditure can be made, there are three decisions of the different High Courts directly on

the issue and against the appellant-Revenue. No contrary decision of a High Court has been shown to us. The Punjab and Haryana High Court in Commissioner of Income Tax, Faridabad vs. MIs. Lakhani Marketing Incl., ITA No.970/2008, decided on 02.04.2014, made reference to two earlier decisions of the same Court in CIT vs. Hero Cycles Limited, [2010]323 ITR 518 and CIT vs. Winsome Textile Industries Limited, [2009] 319 ITR 204 to hold that Section 14A cannot be invoked when no exempt income was earned. The second decision is of the Gujarat High Court in Commissioner of Income Tax-I vs. Corrttech Energy (P.) Ltd. [2014] 223 Taxmann 130 (Guj.). The third decision is Of the Allahabad High Court in Income Tax Appeal No. 88 of 2014, Commissioner of Income Tax (Ii) Kanpur, vs. MIs. Shivam Motors (P) Ltd. decided on 05.05.2014. In the said decision it has been held:-

"As regards the second question, Section 14A of the Act provides that for the purposes of computing the total income under the 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 the Act. Hence, what Section 14A provides is that if there is any income which does not form part of the income under the Act, the expenditure which is incurred for earning the income is not an allowable deduction. For the year in question, the finding of fact is that the assessee had not earned any tax free income. Hence, in the absence of any tax free income, the corresponding expenditure could not be worked out for disallowance. The view of the CIT(A), which has been affirmed by the Tribunal, hence does not give rise to any substantial question of law. Hence, the deletion of the disallowance of Rs.2,03,752/- made by the Assessing Officer was in order"

"15. Income exempt under Section 10 in a particular assessment year, may not have been exempt earlier and can become taxable in future years. Further, whether Income earned in a subsequent year would or would not be taxable, may depend upon the nature of transaction entered into in the subsequent assessment year. For example, long term. capital gain on sale of shares is presently not taxable where security transaction tax has been paid, but a private sale of shares in an off market transaction attracts capital gains tax: It is an undisputed position that respondent assessee is an investment company and had invested by purchasing a substantial number of shares and thereby securing right to management. Possibility of sale of shares by private placement etc. cannot be ruled out and is not all improbability. Dividend may or may not be declared. Dividend is declared by the company and strictly in legal sense, a shareholder has no control and cannot insist on payment of dividend. When declared, it is subjected to dividend distribution tax.

16. what is also noticeable is that the entire or whole expenditure has been disallowed as if there was no expenditure incurred by the respondent-assessee for conducting business. The CIT(A) has positively held that the business was set up and had commenced. The said finding is accepted. The respondent-assessee, therefore, had to incur expenditure for the business in the form of investment in shares of cement companies and to further expand and consolidate their business. Expenditure had to be also incurred to protect the investment made. The genuineness of the said expenditure and the fact that it was incurred for business activities was not doubted by the Assessing Officer and has also not been doubted by the CIT(A).

11.14. Now the position of law as stands is that the decision of Hon'ble Jurisdiction High Court is directly on the point in dispute whereas the decision of Hon'ble Supreme court in the case of *Rajendra Prasad Moody (supra)* has been rendered in the context of section 57(iii), the applicability of which has been ruled out by Hon'ble Delhi High Court in the case of *Cheminvest (supra)*.

11.15. Under Article 227 of the Constitution of India, the courts function under the supervisory jurisdiction of Hon'ble High Court. The decisions rendered by Hon'ble High Court are binding on all subordinate courts working within its jurisdiction. In this regard we may refer to the following decisions:

(i) *CIT V. Thana Electricity Supply Ltd. (1994) 206 ITR727 (Bom.)*, wherein on the issue of "whose decision is binding on whom", the Hon'ble Bombay Court considered in detail the hierarchy of the courts and has observed as under:

"It is also well-settled that though there is no specific provision making the law declared by the High Court binding on subordinate courts, it is implicit in the power of supervision conferred on a superior Tribunal that the Tribunals subject to its supervision would conform to the law laid down by it. It is in that view of the matter that the Supreme Court in *East India Commercial Co. Ltd. v. Collector of Customs, AIR 1962 SC 1893* (at page 1905) declared "We, therefore, hold that the law declared by the highest court in the State is binding on authorities or Tribunals under its superintendence, and they cannot ignore it.

.. ." This position has been summed up by the Supreme Court in *Mahadeolal Kanodia v. Administrator General of West Bengal, AIR 1960 SC 936* (at page 941) as follows :

"Judicial decorum no less than legal propriety forms the basis of judicial procedure. If one thing is more necessary in law than any other thing, it is the quality of certainty. That quality would totally disappear if judges of co-ordinate jurisdiction in a High Court start overruling

one another's decisions. If one Division Bench of a High Court is unable to distinguish a previous decision of another Division Bench, and holding the view that the earlier decision is wrong, itself gives effect to that view, the result would be utter confusion. The position would be equally bad where a judge sitting singly in the High Court is of opinion that the previous decision of another single judge on a question of law is wrong and gives effect to that view instead of referring the matter to a larger Bench."

The above decision was followed by the Supreme Court in Baradakanta Mishra v. Bhimsen Dixit, AIR 1972 SC 2466, wherein the legal position was reiterated in the following words (at page 2469) :

"It would be anomalous to suggest that a Tribunal over which the High Court has superintendence can ignore the law declared by that court and start proceedings in direct violation of it. If a Tribunal can do so, all the subordinate courts can equally do so, for there is no specific provision, just like in the case of Supreme Court, making the law declared by the High Court binding on subordinate courts. It is implicit in the power of supervision conferred on a superior Tribunal that all the Tribunals subject to its supervision should conform to the law laid down by it. Such obedience would also be conducive to their smooth working; otherwise there would be confusion in the administration of law and respect for law would irretrievably suffer."

(ii) CIT V. Sunil Kumar (1995) 212 ITR 238 (Raj.), it was observed as under:

"The point which has been raised could have been considered to be debatable because other High Courts have taken a different view. But since the view taken by this court is binding on the Tribunal and other authorities under the Act in this State, it could not be considered to be a debatable point in view of the decision of this court in the case of CIT v. M.L. Sanghi (1988) 170 ITR 670."

(iii) Indian Tube Company Ltd. V. CIT & others (1993) 203 ITR 54 (Cal.) , it was observed as under:

"In the impugned order, respondent No.1 has rejected the petitioner's contention by stating that, although the Calcutta High Court had held that an assessee was entitled to interest on such refund calculated up to the date of the order passed consequent upon an appeal or revision of the original assessment, this view had not been accepted by the Bombay High Court, the Allahabad High Court and the Kerala High Court. Respondent No.1, accordingly, chose to accept the view of the Bombay, Allahabad and Kerala High Courts in preference to the view of the Calcutta High Court. In my view, the order of respondent No.1 cannot be sustained on the simple ground that respondent No. 1 is an authority operating within the State of West Bengal and is bound by the decisions of the High Court of this State (see CIT v. Indian Press Exchange Ltd. [1989] 176 ITR 331 (Cal) ; East India Commercial Co. Ltd. v. Collector of Customs AIR 1962 SC 1993, paragraph 29). In that view of the matter, the impugned order

must be set aside and the Commissioner is directed to consider the matter afresh in keeping with the decisions of this court after giving the petitioners an opportunity of being heard. At least 48 hours' clear notice must be given to the petitioners. The Commissioner will communicate the final order to the petitioner within eight weeks from the date of hearing."

(iv) *CIT Vs. J.K. Jain (1998) 230 ITR 839 (P&H), observing as under:*

"We have carefully examined the records and have heard learned counsel representing the parties. We are in respectful agreement with the view expressed by the Allahabad High Court in Omega Sports and Radio Works' case [1982] 134 ITR 28, as also the decision of this court in Mohan Lal Kansal's case [1978] 114 ITR 583. Following the decision in the two cases referred to above, we hold that it was not a case of divergence of opinion inasmuch as the opinion expressed by this court was binding upon the Tribunal."

11.16. Therefore, in our considered opinion, no contrary view can be taken under these circumstances. We, accordingly, hold that only those investments are to be considered for computing average value of investment which yielded exempt income during the year.

11.17. As far as argument relating to meaning to be ascribed to the phrase 'shall not' used in Rule 8D(2)(iii) is concerned, the Revenue's contention is that it refers to those investments which did not yield any exempt income during the year but if income would have been yielded it would have remain exempt. There is no dispute that if an investment has yielded exempt income in a particular year then it will enter the computation of average value of investments for the purposes of Rule 8D(2)(iii). The assessee's contention that if there is no certainty that an income, which is exempt in current year, will continue to be so in future years and, therefore, that investment should also be excluded, is hypothetical and cannot be accepted.

11.18. In view of above discussion, the matter is restored back to the file of AO for recomputing the disallowance u/s 14A in terms of above observations."

4.5.4 Respectfully following the decision of the Special Bench of ITAT, Delhi, in the case of ACIT Vs. Vireet Investments (P) Ltd., (2017) 82 taxmann.com 415 (Delhi-Trib) (SB), we also hold that only those investments

are to be considered for computing average value of investment which yielded exempt income during the Assessment Years 2008-09 to 2010-11 under consideration for working out the disallowance u/s 14A r.w.r. 8D(2)(iii) in the case on hand. However, in our view, since this judicial pronouncement of the Special Bench of ITAT (supra) was passed on 16.06.2017 which is subsequent to the passing of orders of assessment for Assessment Years 2008-09 to 2010-11 which are before us, we restore this issue to the file of the AO only for the purpose of recomputing the disallowance u/s 14A r.w.r. 8D(2)(iii) of the Rules by restricting the disallowance thereunder i.e., for computing the average value of investments only to those investments which yielded the exempt income earned by the assessee during the Assessment Years under consideration; as has been held and directed by the ITAT, Delhi Special Bench in the case of Vireet Investments (P) Ltd., (supra). We hold and direct accordingly. Consequently, the assessee's appeal on this issue is partly allowed for statistical purposes.

5. In the result, the assessee's appeals for assessment years 2008-09 to 2010-11 are partly allowed for statistical purposes.

Pronounced in the open court on 08.02.2019.

Sd/-
(PAVAN KUMAR GADALE)
Judicial Member

Sd/-
(JASON P BOAZ)
Accountant Member

Bangalore.

Dated: 08.02.2019.

/NS/

Copy to:

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|-------------------------|---------------|
| 1. Appellant | 2. Respondent |
| 3. CIT | 4. CIT(A) |
| 5. DR, ITAT, Bangalore. | 6. Guard file |

By order

Assistant Registrar
ITAT, Bangalore.