

**IN THE INCOME TAX APPELLATE TRIBUNAL  
(DELHI BENCH 'E' : NEW DELHI)**

**BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER  
and  
SHRI KULDIP SINGH, JUDICIAL MEMBER**

**ITA No.4754/Del./2015  
(ASSESSMENT YEAR : 2005-06)**

M/s. NTPC Limited, vs. DCIT, Circle 13 (1),  
Core – 7, SCOPE Complex, New Delhi.  
7, Institutional Area, Lodhi Road,  
New Delhi – 110 003.

**(PAN : AAACN0255D)**

**ITA No.4183/Del./2015  
(ASSESSMENT YEAR : 2005-06)**

DCIT, Circle 13 (1), vs. M/s. NTPC Limited,  
New Delhi. Core – 7, SCOPE Complex,  
7, Institutional Area, Lodhi Road,  
New Delhi – 110 003.

**(PAN : AAACN0255D)**

(APPELLANT)

(RESPONDENT)

ASSESSEE BY : Shri Ved Jain, Advocate  
Shri Nischay Kantoor, CA  
REVENUE BY : Ms. Pramita M. Biswas, CIT DR

Date of Hearing : 11.04.2019  
Date of Order : 25.04.2019

**ORDER**

**PER KULDIP SINGH, JUDICIAL MEMBER :**

Present cross appeals filed by the assessee as well as by the revenue are being disposed off by way of composite order to avoid repetition of discussion.

2. The Appellant, DCIT, Circle 18(2), New Delhi (hereinafter referred to as the 'Revenue') by filing the present appeal sought to set aside the impugned order dated 26.03.2015 passed by the Commissioner of Income-tax (Appeals)-6, New Delhi, qua the assessment year 2005-06 on the grounds inter alia that :-

***“1. Whether on the facts and circumstances of the case & in law, the Ld. CIT(A) has erred in deleting the addition made by the AO by disallowing the claim of deduction amounting to Rs.13,50,80,21,000/- under section 80IA of the Income Tax Act, 1961.***

***2. Whether on the facts and circumstances of the case & in law, the Ld. CIT(A) has erred in deleting the addition made by the AO by disallowing the expenditure on assets not owned by the assessee amounting to Rs.20,60,00,000/-.***

***3. Whether on the facts and circumstances of the case & in law, the Ld. CIT(A) has erred in deleting the addition made by the AO by disallowing pre-commissioning sales amounting to Rs.58,30,00,000/-.***

***4. Whether on the facts and circumstances of the case & in law, the Ld. CIT(A) has erred in allowing relief to the assessee to the tune of Rs.40.42 crores by computing the disallowance by making retrospective application of Rule 8D of the I.T. Rules although the rule was introduced into the statute only in year 2008.***

***5. That the order of the Ld. CIT(A) is erroneous and is not tenable on facts and in law.”***

3. The Appellant, M/s. NTPC Limited (hereinafter referred to as the 'assessee') by filing the present appeal sought to set aside

the impugned order dated 26.03.2015 passed by the Commissioner of Income-tax (Appeals)-6, New Delhi, qua the assessment year 2005-06 on the grounds inter alia that :-

*“1. On the facts and circumstances of the case, the order passed by the learned CIT(A) is bad, both in the eye of law and on facts.*

*2.(i) On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in confirming the disallowance made by the Ld. AO to the extent of Rs.82.67 crores under section 14A read with Rule 8D of the I.T. Act*

*(ii) That the disallowance has been confirmed ignoring the explanation and the evidences submitted by the assessee.”*

4. Briefly stated the facts necessary for adjudication of the controversy at hand are : Assessee claimed deduction to the tune of Rs.14,90,23,24,000/- under section 80IA of the Income-tax Act, 1961 (for short ‘the Act’) which has been restricted to Rs.13,50,80,21,000/- by the Assessing Officer by considering the Combined Central Acts Power Station (CCGPS) Plant as single industrial undertaking on the basis of final inspection carried out at the NTPC Ltd. Faridabad Gas Power station on 02.09.2004. Assessee incurred an amount of Rs.20,60,00,000/- as expenditure on repair and maintenance of roads, water supply, rail connectivity and other infrastructure facilities not owned by the assessee and claimed the same as revenue expenditure u/s 37(1) of the Act. However, AO added back the said expenditure to the total income

of the assessee incurred on the assets not owned by the assessee on the grounds that assessee has not posted this expenditure into P&L account rather debited the same in computation of income nor the assessee has furnished anything about the nature of the expenditure to work out whether the same is revenue or capital passing the enduring benefit to the assessee.

5. Assessee recorded pre-commissioning expenses to the tune of Rs.119.1 crores included in fixed assets/capital work-in-progress after adjustment of pre-commissioning sales of Rs.58.3 crores resulting in the net pre-commissioning expenditure of Rs.60.08 crores. AO following the order passed in AY 2004-05 held that pre-commissioning expenditure has to be capitalized and any revenue receipt during the pre-commissioning period has to be taxed as income and thereby added back an amount of Rs.58.30 crores on account of pre-commissioning sales to the total income of the assessee under the head 'income from other sources'.

6. AO made addition of Rs.123,09,00,000/- u/s 14A of the Act by rejecting the plea raised by the assessee that no expenses have been incurred by the assessee to earn the exempt income.

7. Assessee carried the matter by way of an appeal before the Id. CIT (A) who has deleted the additions by allowing the claim of the assessee u/s 80IA of the Act; by allowing the expenditure on

assets not owned by the assessee; and by allowing pre-commissioning sales; however, Id. CIT (A) partly allowed the appeal by providing a relief of Rs.40.42 crores qua addition made by the AO u/ 14A of the Act, by partly allowing the appeal. Feeling aggrieved, both the assessee as well as Revenue have come up before the Tribunal by way of filing the present appeals.

8. We have heard the Id. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and orders passed by the revenue authorities below in the light of the facts and circumstances of the case.

**GROUND NO.1 IN  
ITA NO.4183/DEL/2015 (REVENUE'S APPEAL)**

9. Challenging the impugned order passed by the Id. CIT (A), Id. DR for the Revenue contended that the Id. CIT (A) has erred in deleting the addition by relying upon the order passed by his predecessor in assessee's own case for AY 2004-05 because facts of the year under assessment are distinguishable.. The Id. DR drew our attention towards final inspection carried out by the NTPC Faridabad Gas Power Station on 02.09.2004 wherein it was held that the assessee is not entitled for deduction u/s 80IA for the steam units as an industrial undertaking/enterprise as claimed by the

assessee and further contended that this fact was not there before the AO as well as ld. CIT (A) for AY 2004-05.

10. However, to repel this contention raised by the ld. DR, ld. AR for the assessee contended that final inspection dated 02.09.2004 carried out by NTPC Faridabad Gas Power Station was duly considered by the AO as well as ld. CIT (A) while passing the order for AY 2004-05 and drew our attention towards assessment order dated 27.02.2006 for AY 2004-05 passed u/s 143 (3) of the Act.

11. When we examine para 3.5 of the assessment order for AY 2004-05, available in the separate paper book, and inspection report dated 14.09.2004 prepared on the basis of inspection dated 02.09.2004 has been duly discussed and considered before passing the order. Furthermore, issue in question has already been decided in favour of the assessee for AY 2004-05 by the coordinate Bench of the Tribunal vide *order dated 04.05.2018*, available at pages 39 to 48 of the case law paper book, by duly considering the inspection report dated 02.09.2004 by returning following findings:-

*“5. After considering the submissions of both the parties and the material available on record, it is noticed that an identical issue having similar facts has already been adjudicated by the ITAT Delhi Bench' B', New Delhi in assessee's own case in ITA Nos. 1377 & 2188/Del/2002 for the assessment years 1998-99 and*

*1999-2000 respectively. The relevant findings have been given in paras 8 to 11 of the said order which read as under:*

*"8. Rival submissions of the parties have been considered carefully in the light of the materials produced as well as case law referred to. The question for our consideration is how to compute the profits derived from an industrial undertaking eligible for deduction under the aforesaid sections. There are no provisions in these sections for computing such profits. In the absence of such provisions, the profits of an industrial undertaking must be determined in accordance with the settled legal principles. As per the commercial accounting practice, the businessman would debit the profit and loss account either on the basis of expenditure actually paid or on the basis of liability incurred/accrued as per the mercantile method of accounting. There is no scope of notional expenditure in computing such profits. If no expenditure is incurred for use of any material or services, where is the question of debiting any amount on account of such notional expenses? Admittedly, the hot gas was freely available to the steam unit. If the assessee had not set up the steam unit, such hot gas would have to be exposed to the open atmosphere. There is no evidence that such hot gas can be sold in the open market. It is only because of the advanced technology that such hot gas, which otherwise goes waste, can be utilized for generating electricity. But that requires massive investment. What would happen if the assessee, in the national interest, allows a third party to use such gas free of any charges? Would the department reduce the profits of steam unit by notional expenditure? In our opinion, the answer would be clearly in the negative as no deduction can be allowed unless any expenditure is incurred. Therefore, in our humble opinion, no portion of the expenditure incurred by the gas units can be allocated to the steam unit.*

*9. Heavy reliance has been placed by the lower authorities on the provisions of sub-section (6) of section 80-I, which for the benefit of this order is being reproduced as under:-*

*“Section 80-I(6) : Notwithstanding anything contained in any other provisions of this Act, the profits and gains of an industrial undertaking or a ship or the business of a hotel or the business of repairs to oceangoing vessels or other powered craft to which the provisions of subsection (a) apply shall, for the purpose of determining the quantum of deduction under sub-section (1) for the assessment year immediately succeeding the initial*

*assessment year or any subsequent assessment year, be computed as if such industrial undertaking or ship or the business of the hotel or the business of repairs to ocean-going vessels or other powered craft were the only source of income of the assessee during the previous years relevant to the initial assessment year and to every subsequent assessment year up to and including the assessment year for which the determination is to be made."*

*We are afraid how the above provisions help the case of the revenue. On the contrary, it helps the case of the assessee. This provision has been relied upon by the Assessing Officer for the submission that profits of each unit has to be determined independently as if such unit were only source of income of the assessee. There is no dispute to such submission. According to such submission, profits of gas unit as well as steam unit must be determined independently as the sole source of income of the assessee and consequently, the expenditure incurred for the generation of electricity by gas unit cannot be shifted to any other unit even by the logic of the Assessing Officer. For the similar reasons, profit of the steam unit has to be determined independently on the basis of the expenditure incurred by such unit. Steam unit has not incurred by expenditure for acquiring hot gas. Therefore, the question of reducing the profits of such unit by any notional figure does not arise. Therefore, we reject the stand of the revenue that sub-section (6) of section 80-I permits the revenue to shift the expenses of one unit to another unit.*

*10. Further, heavy reliance has been placed by the revenue on the provisions of sub-section (8) of section 80-I and sub-section (9) of section 80-IA which, for the benefit of this order, are reproduced as under:*

*"Section 80-I (8): Where any goods held for the purposes of the business of the industrial undertaking or the hotel or the operation of the ship or the business of repairs to ocean-going vessels or other powered craft are transferred to any other business carried on by the assessee, or where any goods held for the purposes of any other business carried on by the assessee are transferred to the business of the industrial undertaking or the hotel or the operation of the ship or the business of repairs to ocean-going vessels or other powered craft and, in either case, the consideration, if any, for such transfer as recorded in the accounts of the*

*business of the industrial undertaking or the hotel or the operation of the ship or the business of repairs to oceangoing vessels or other powered craft does not correspond to the market value of such goods as on the date of the transfer, then, for the purposes of the deduction under this section, the profits and gains of the industrial undertaking or the business of the hotel or the operation of the ship or the business of repairs to oceangoing vessels or other powered craft shall be computed as if the transfer, in either case, had been made at the market value of such goods as on that date:*

*Provided that where, in the opinion of the Assessing Officer, the computation of the profits and gains of the industrial undertaking or the business of the hotel or the operation of the ship or the business of repairs to oceangoing vessels or other powered craft in the manner hereinbefore specified presents exceptional difficulties, the Assessing Officer may compute such profits and gains on such reasonable basis as he may deem fit.*

*Explanation. In this sub-section, "market value ", in relation to any goods, means the price that such goods would ordinarily fetch on sale in the open market.*

*Section 80-IA(9): Where any goods held for the purposes of the eligible business are transferred to any other business carried on by the assessee, or where any goods 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, if any, for such transfer as recorded in the accounts of the eligible business does not correspond to the market value of such goods as on the-date of the transfer, then, for the purposes of the deduction under this section, the profits and gains of such eligible business shall be computed as if the transfer, in either case, had been made at the market value of such goods as on that date:*

*Provided that where, in the opinion of the Assessing Officer, the computation of the profits and gains of the eligible business in the manner hereinbefore specified presents exceptional difficulties, the Assessing Officer may compute such profits and gains on such reasonable basis as he may deem fit.*

*Explanation.-In this sub-section, "market value", in relation to any goods, means the price that such goods would ordinarily fetch on sale in the open market. "*

*After going through the above provisions carefully, we are unable to uphold the stand of the revenue. Such provisions can be applied if it is established by the revenue that the gas unit transferred the steam unit and the consideration for the transfer of gas does not correspond to the market value as on the date of transfer. Market value has been defined as the price, which such goods would fetch on sale in the open market. No evidence, whatsoever, has been brought to our notice to show that there is any market for sale of such waste hot gas in India. There is also no evidence that such gas transported. Such gas, if not used, has to be exposed to the open atmosphere. Maybe such gas may find a market but as per the provisions of sub-section (8) of section 80-I and sub-section (9) of section 80-IA, the market value has to be seen as on the date of transfer. Since there is no evidence of any market for sale of such waste hot gas, we are unable to accept the stand of the revenue.*

*11. In view of the above discussion, it is held that the course adopted by the Assessing Officer for shifting a portion of expenses incurred by gas unit to the steam unit was not permissible in law and, therefore, cannot be approved. Consequently, the order of the CIT(A) confirming the above action of the Assessing Officer is set aside and the Assessing Officer is directed to allow deductions under sections 80-I and 80-IA without allocating any expenditure of gas unit to steam unit.”*

12. So, following the decision rendered by the coordinate Bench of the Tribunal on the identical issue, we are of the considered view that the arguments addressed by the Id. DR for the Revenue are misconceived and as such the assessee is entitled to deduction u/s 80I and 80IA without allocating any expenditure to the gas unit to steam unit. The Id. CIT(A) has duly thrashed this issue in the light of the findings returned by *Hon’ble Delhi High Court in WP (C) 14562/2006 dated 10.01.2013 in assessee’s own case for AY 2000-01* wherein Hon’ble High Court has held that both the gas turbine

or steam turbine generated electricity independently and inspection report dated 02.09.2004 does not indicate any new facts. So, we are of the considered view that the Id. CIT (A) has rightly decided the issue in favour of the assessee, hence ground no.1 of Revenue's appeal is determined against the Revenue.

**GROUND NO.2 IN**  
**ITA NO.4183/DEL/2015 (REVENUE'S APPEAL)**

13. Assessee claimed the deduction of expenditure of Rs.20,60,00,000/- u/s 37 of the Act incurred on the assets not owned by it but belongs to various State Governments like irrigation, PWD, Electricity Board and in a few cases Central Government like Indian Railways and the amount was paid to various Government Departments for constructing roads, water supply, rail connectivity and other infrastructure facility like extension of power lines etc. to facilitate smooth running of the business.

14. Ld. DR challenging the impugned order relied upon the assessment order and contended that when assets are not owned by the assessee, the expenditure cannot be allowed as revenue expenditure rather it was having enduring benefits to the assessee.

15. Ld. CIT (A) decided the issue in controversy in favour of the assessee by returning following findings :-

*“4.5.5 There is no dispute that NTPC has incurred the expenditure on construction of railway track, railway siding, electrification work, railway over bridge, approach road, power line, widening of road, water supply system, taxi stand and erection of sub station, the infrastructure facilities which were not owned by NTPC. The power plants of NTPC are mainly situated in remote areas, which are located at far-away places from the cities/ towns and highways. The expenditure on infrastructure facilities which are not owned by NTPC but are owned by State Government Authorities are incurred for smooth, efficient and successful operation of power plants of NTPC. The State/local authorities who are supposed to maintain the infrastructure/roads are not able to maintain such facilities in good working condition on which the development of the plant is dependant. These infrastructure facilities though not owned by NTPC, but are being used for operation of its normal business. All such expenditure has been incurred for the necessity and benefit of NTPC business for the purpose of running its business. In view of the above factual and legal position, the expenses incurred on capital assets not owned by the company is of the revenue nature which are allowable under section 37 of the I.T. Act based on the principle of commercial expediency. Therefore, the addition made by the AO on this account is legally not sustainable. The appeal is allowed in this ground in favour of the appellant.”*

16. We are of the considered view that there is no illegality or infirmity in the findings returned by the Ld. CIT (A) which are based upon the decision rendered by Hon'ble Supreme Court in case of *L.H. Sugar Factory & Oil Mills (P) Ltd. vs. CIT 125 ITR 293 (SC)* and Hon'ble Delhi High Court in cases of *Airport Authority of India vs. CIT - 2012-TIOL-09-HC-DEL-IT-LB* and *Bikaner Gypsums Ltd. vs. CIT - 187 ITR 39*, which are applicable to the facts and circumstances of the case as the

Hon'ble Supreme Court has held that when the roads were constructed around the factory with an amount incurred by the assessee existing on the land owned by Government of UP, the assessee did not acquire any asset of an enduring nature. Hon'ble Supreme Court has also held that assessee is having existing right to carry out the business, any expenditure made by it for smooth running of the business would not lead to acquisition of capital assets. So, we are of the considered view that the expenditure incurred by the assessee on construction of road, water supply, rail connectivity and other infrastructure activities on the assets not owned by it but owned by various Government Departments are revenue expenditure. So, ground no.2 of Revenue's appeals is determined against the Revenue.

**GROUND NO.3 IN**  
**ITA NO.4183/DEL/2015 (REVENUE'S APPEAL)**

17. AO disallowed pre-commissioning sales amounting to Rs.58,30,00,000/- out of pre-commissioning expenses of Rs.119.1 crores netted by the assessee, which has been deleted by the Id. CIT (A) by following the decision rendered in the earlier years for AYs 2003-04 & 2004-05.

18. The Id. DR for the Revenue challenging the impugned deletion by the Id. CIT (A) relied upon the order passed by the AO.

However, Id. AR for the assessee contended that this issue has since attained finality as the deletion of addition made by the Id. CIT (A) following the order by Id. CIT (A) for AY 2004-05 has been accepted by the Revenue as no appeal has been preferred.

19. Ld. CIT (A) decided this issue in favour of the assessee by following the decision of CIT (A) passed in AYs 2003-04 and 2004-05 by returning following findings :-

**“Decision of CIT (A) in AY 2003-04 :**

*"I have examined in detail the reason given by the AO for including the pre-commissioning sales without netting the pre-commissioning expenditure. He has relied on the judgment of Hon'ble Rajasthan High Court in the case of Sarraf Textiles Industries V s CIT (1996) 217 ITR 207.*

*This case is fully distinguishable from the facts in the case of the appellant. The business activity, as admitted by the AO has already commenced in this instant whereas in case of Sarraf Textiles Industries Ltd. the business activity was not carried out by the assessee and, therefore, the interest received was assessable as income from other sources.*

*Even if, the pre-commissioning sales were to be treated as income from other sources, the direct expenditure incurred on fuel and consumable has to be netted before charging the amount under The Income-tax Act, 1961.*

*The alternate claim made by the appellant with regard to allowance of deduction of netting of pre-commissioning expenses after adjustment of corresponding sales cannot be allowed since section 43(1) read with Explanation 10 clearly provides for reduction of the "actual cost" of the asset by the amount received directly or indirectly (by whatever name called) relating to the asset. In the case of the appellant, the SEB' s had met the part cost of the assets in the form of pre-commissioning sales.*

*In the circumstances, I am in agreement with the appellant's submission that in case of sale of electricity*

*prior to commercial operation any revenue from such sales (other than fuel cost) shall be taken for reduction in capital expenditure.*

*This ground of appeal is therefore allowed in favour of assessee."*

**Decision of CIT (A) for in 2004-05:**

*"I have examined the facts and legal position discussed by the A.O. in the assessment order, submission made by the appellant and also the order of CIT(A) passed for AY 2003-04. I agree with the decision of my predecessor on this issue. The ratio of the judgment in the case of Sarraf Textiles Industries is fully distinguishable from the facts in the case of the appellant, whereas the principals laid down by the Hon'ble Supreme Court in the case of Bokaro Steel is squarely applicable in the present case of the appellant.*

*In view of the above, I have no reason to disagree with the view expressed by my predecessor on the issue and accordingly decide the ground in favour of the appellant. As a result this ground of appeal is therefore allowed in favour of the appellant. Appellant accordingly gets relief of Rs. 43.60 crores."*

*As the addition is made by the AO following the assessment order of A Y 2004-05, therefore respectfully following the decision of Ld. CITCA) this ground of appeal is decided in favour of the appellant and the AO is directed to allow the netting off pre-commissioning sales against pre-commissioning expenses as claimed by the assessee and delete the addition made as income from other sources. The appeal is allowed in this ground."*

20. We are of the considered view that when undisputedly there is no change in the facts and circumstances of the case and the Revenue itself has thrashed the issue in detail by relying upon the decision of Hon'ble High Court, the deletion made by the Id. CIT (A) qua pre-commissioning expenses disallowed by the AO needs

no interference. Consequently, ground no.3 of Revenue's appeal is determined against the Revenue.

**GROUND NO.4 IN**  
**ITA NO.4183/DEL/2015 (REVENUE'S APPEAL)**  
**AND**  
**GROUNDS NO.2(i) & (ii) IN**  
**ITA NO.4754/DEL/2015 (ASSEESSEE'S APPEAL)**

21. Assessee earned an income of Rs.1466.12 crores form tax free interest bonds @ 8.5% and dividend income and claimed the same as exempt u/s 10 of the Act. However, the AO disallowed the amount of Rs.123.09 crores by working out the disallowance as under :-

**“Exempt Income X Operational Expenses**  
**Total Income**  
**Applying the above formula the disallowance u/s 14A in**  
**the case works out in the following manner :-**

		(Rs.in Crs.)
<b>Total Income</b>		
(i)	<b>Sales</b>	22540.2
(ii)	<b>Energy Internally consumed</b>	24.8
(iii)	<b>Other Income</b>	2357.5
		<b>24922.50</b>
	<b>Tax Free Income</b>	<b>1466.12</b>
<b>Operational Expenses</b>		
(a)	<b>Employees remuneration &amp; benefits</b>	883.50
(b)	<b>Admn.&amp; other expenses</b>	1209.06
		<b>2092.56</b>
<b>Disallowance u/s 14A of the I.T. Act 1961</b>		
<b><u>Exempt Income X Operational Expenses</u></b>		
<b><u>Total Income</u></b>		
<b><u>1466.12 X 2092.56</u></b>		
	<b>24922.50</b>	<b>= 123.09</b>

**I am also satisfied that the assessee has concealed the income and furnished inaccurate particulars of its income on this issue, penalty proceedings u/s 271(1)(c) have been initiated separately.**  
**(ADDITION : Rs.123,09,00,000/-)”**

22. However, Id. CIT (A) reduced the disallowance from Rs.123.09 crores to Rs.82.67 crores by restricting the disallowance to 0.5% of the average value of the tax exempt investment. However, both the assessee as well as Revenue have challenged the findings returned by the Id. CIT (A).

23. Ld. AR for the assessee challenging impugned order contended inter alia that since no expenditure has been incurred by the assessee in relation to the earning of the exempt income, no disallowance can be made u/s 14A of the Act; that no proper satisfaction has been recorded by the AO before rejecting the claim of the assessee that no expenditure has been incurred to earn the exempt income; that no borrowed funds used by the assessee for making such investments and the loan to the Government are continued from the earlier years; that case of the assessee is covered by its own case rendered by the Tribunal for AY 2004-05 and relied upon the decisions in (i) *CIT vs. Modi Rubber Ltd.* [2017] 79 taxmann.com 366 (Hon'ble High Court of Delhi); (ii) *Hon'ble Bombay High Court in the case of CIT Vs Reliance Utilities and Power Ltd.* 313 ITR 340 (SLP filed in this case by the Department has been dismissed by the Hon'ble Supreme Court in civil appeal no 11 of 2019); (iii) *Hon'ble Gujarat High*

*Court in the case of CIT Vs Suzlon Energy Ltd. (2013) 354 ITR 630; (iv) Hon'ble Punjab & Haryana High Court in the case of CIT vs Winsome Textile Industries Ltd. 319 ITR 204; (v) Ahmedabad ITAT dated 10.05.2013 in the case of DCIT Vs Gujarat Narmada Valley Fert. Co. Ltd. 2013-TIOL-405-ITAT-MUM; (vi) Mumbai ITAT in the case of Shopper's Stop Ltd. Vs ACIT 2011-TIOL-581-ITAT-MUM; and (vii) Ahmedabad ITAT dated 05/12/12 in the case of DCIT Vs Jay Chemical Industries Ltd. in ITA No. 97/Ahd/2012.*

24. Ld. DR for the Revenue contended that the disallowance is to be made even if no income is earned during the year and relied upon the decision rendered by the Special Bench of the Tribunal in *Cheminvest Ltd. vs. ITO (2009) 121 ITD 318 (Delhi)(SB)*. Ld. DR filed written submissions which have been made part of the record and has also relied upon the decisions in (i) *Indiabulls Financial Services Ltd. vs. DCIT – (2016) 76 taxmann.com 268 (Delhi)*; (ii) *DCIT vs. Viraj Profiles Ltd. – 156 ITD 72*; (iii) *NYK Line India Ltd. vs. ACIT – 175 TTJ 180*; (iv) *Super Auto Forge (P.) Ltd. vs. ACIT 156 ITD 467*; (v) *Vipin Malik vs. ACIT 45 ITR 589*; (vi) *Punjab Tractors Ltd. vs. CIT – 2017-TIOL-353-HC-P&H-IT*; (vii) *Godrej & Boyce Mfg. Company Ltd. – 394 ITR 449*

*(SC); and Maxopp Investment Ltd. vs. CIT (2018) 91 taxmann.com 154 (SC).*

25 Perusal of the balance sheet of the assessee, available at pages 4 to 38 of the paper book, goes to prove that the assessee is having sufficient own funds to the tune of Rs.41776 crores. It is also not in dispute that the assessee has made investment of Rs.16469 crores.

26. In the backdrop of the aforesaid facts and circumstances of the case, when we examine the issue in controversy AO as well as CIT (A) have failed to establish any nexus between the earning of tax free income and the expenditure incurred rather the entire addition has been made on estimation basis. Because the assessee is having far more sufficient own funds to the tune of Rs.41776 crores to make the investment as is evident from the financial statement brought on record.

27. Furthermore, the assessee has income of Rs.1394.90 crores being the interest income @ 8.5% on tax free bond, income from tax free loan to the Government to the tune of Rs.59.47 crores and dividend income from investment in joint venture and subsidiaries to the tune of Rs.11.75 crores. When we examine the balance sheet of the assessee, available at pages 4 to 38 of the paper book, the ld. CIT (A) has recorded wrong fact that the assessee has increased

investment in tax free bonds by Rs.140 crores during the year under assessment. Rather investment made in the tax free bond and loan to the Government was made long time back under one time settlement scheme.

28. Identical issue has already been decided in favour of the assessee in assessee's own case by the *coordinate Bench of the Tribunal in AY 2004-05* by returning following findings :-

***"14. After considering the submissions of both the parties and the material available on the record, it is noticed that an identical issue having similar facts has been adjudicated in the aforesaid referred to case of DCIT Vs Power Grid Corporation of India Ltd. wherein the relevant findings have been given in paras 10 to 11.5 which read as under:***

***"10. We have heard both the parties and gone through the facts of the case as also the aforesaid decisions relied on by the Id. AR on behalf of the assessee. Indisputably, the assessee did not incur any expenditure by way of interest for investment in tax free bonds. In fact, the tax free bonds were acquired on the orders of the Government on conversion of sundry debtors of State Electricity Boards, facing financial crunch. The AO disallowed 2.5 % of the administrative expenses for earning interest income from tax free bonds in the assessment years 2002-03 to 2004-05 while in assessment year 2007-08 disallowance has been made having recourse to provisions of rule 80 of the I. T Rules, 1962. There is no material before us, suggesting that the assessee incurred any expenditure by way of administrative expenses for earning interest income in these four assessment years nor the AO identified any item of such expenditure for earning the interest income. In these circumstances, the estimated disallowance made by the AO, without establishing the nexus between administrative expenses and interest income from tax free bonds, cannot be sustained.***

***11. We find-that the Hon'ble Bombay High Court in their decision dated 12.8.2010 in case of Godrej & Boyce Mfg. Co. Ltd. Mumbai while holding that Rule 80,***

*inserted w.e.f 24.3.2008 cannot be regarded as retrospective because it enacts an artificial method of estimating expenditure relatable to tax-free income and is applicable only w.e.f AY 2008-09, concluded that for the assessment years where Rule 8D does not apply, the AO will have to determine the quantum of disallowable expenditure by a reasonable method having regard to all the facts and circumstances. Thus, the disallowance made by the AO invoking Rule 8D of the IT Rules, 1962 in the AY 2007-08, is not justified.*

*11.1. Moreover, Hon'ble Supreme Court in their decision dated 6.7.2010 in CIT v. Walfort Share & Stock Brokers (P) Ltd., 326 ITR 1, inter alia, observed that for attracting section 14A of the Act there has to be a proximate cause for disallowance, which is its relationship with the tax exempt income. Hon'ble Apex Court observed in the context of provisions sec. 14A of the Act in the following terms:*

*"17. The insertion of section 14A with retrospective effect is the serious attempt on the part of the Parliament not to allow deduction in respect of any expenditure incurred by the assessee in relation to income, which does not form part of the total income under the Act against the taxable income (see Circular No. 14 of 2001, dated 22-11-2001). In other words, section 14A clarifies that expenses incurred can be allowed only to the extent they are relatable to the earning of taxable income. In many cases the nature of expenses incurred by the assessee may be relatable partly to the exempt income and partly to the taxable income. In the absence of section 14A, the expenditure incurred in respect at exempt income was being claimed against taxable income. The mandate of section 14A is clear. It desires to curb the practice to claim deduction of expenses incurred in relation to exempt income against taxable income and at the same time avail the tax incentive by way of exemption of exempt income without making any apportionment of expenses incurred in relation to exempt income. The basic reason for insertion of section 14A is that certain incomes are not includible while computing total income as these are exempt under certain provisions of the Act. In the past, there have been cases in which deduction has been sought in respect of such incomes which in effect would mean that tax incentives to certain incomes was*

*being used to reduce the tax payable on the non-exempt income by debiting the expenses, incurred to earn the exempt income, against taxable income. The basic principle of taxation to tax the net income i.e. gross income minus the expenditure. On the same analogy the exemption is also in respect of net income. Expenses allowed can only be in respect of earning of taxable income. This is the purport of section 14A. In section 14A, the first phrase is "for the purposes of computing the total income under this Chapter" which makes it clear that various heads of income as prescribed 'under Chapter IV would fall within section 14A. The next phrase is, "in relation to income which does not form part of total income under the Act". It means that if an income does not form part of total income, then the related expenditure is outside the ambit of the applicability of section 14A. Further, section 14 specifies five heads of income which are chargeable to tax. In order to be chargeable, an income has to be brought under one of the five heads. Sections 15 to 59 lay down the rules for computing income for the purpose of chargeability to tax under those heads. Sections 15 to 59 quantify the total income chargeable to tax. The permissible deductions enumerated in sections 15 to 59 are now to be allowed only with, reference to income which is brought under one of the above heads and is chargeable to tax. If an income like dividend income is not a part of the total income, the expenditure/deduction though of the nature specified in sections 15 to 59 but related to the income not forming part of total income could not be allowed against other income includible in the total income for the purpose of chargeability to tax. The theory of apportionment of expenditure between taxable and non-taxable has, in principle, been now widened under section 14A. Reading section 14 in juxtaposition with sections 15 to 59, it is clear that the words "expenditure incurred" in section 14A refers to expenditure on rent, taxes, salaries, interest, etc. in respect of which allowances are provided for (see sections 30 to 37).....”*

**11.2 Hon'ble Punjab & Haryana High Court in their decision in CIT vs. Hero Cycles Ltd., 323 ITR 518 have observed that disallowance under section 14A requires finding of incurring of expenditure and where it is found**

*that for earning exempted income no expenditure has been incurred, disallowance under section 14A cannot stand.*

*11.3 Hon'ble Kerala High Court in their decision in Catholic Syrian Bank Ltd.(supra) held that there being no precise formula for proportionate disallowance, no disallowance is called for out of administrative expenses until Rule 80 came in to force.*

*11.4 Hon'ble jurisdictional High Court in their decision in Printers House (P) Ltd. (supra) upheld the findings of the ITAT, holding that expenditure cannot be disallowed on the basis of a mere estimate as to what possibly could have been incurred to earn income exempted from tax.*

*11.5 In the light of view taken in the aforesaid decisions, especially when the Revenue has not placed before us any material in order to controvert the aforesaid findings of the ld. CIT(A) so as to enable us to take a different view in the matter nor even referred to us any material that impugned expenditure was incurred to earn tax free interest income, we are not inclined to interfere with the findings of the ld. CIT (A). In view thereof, ground no.2 in the appeal for assessment year 2003-04, ground nos. i to iii in the appeal for the AY 2002-03, ground no.2 in the appeal for assessment year 2004-05 and ground no.1 in the appeal for the AY 2007- 08, are dismissed."*

*15. Since, the facts of the assessee's case are similar to the facts involved in the case of DCIT, Circle-14(1), New Delhi Vs Power Grid Corporation of India Ltd. (supra). So, respectfully following the aforesaid referred to order dated 31.10.2011, we do not see any merit in this ground of the departmental appeal."*

29. Perusal of the order passed by the *coordinate Bench of the Tribunal in AY 2004-05* apparently goes to prove that identical issue as to disallowance of the expenditure made by the assessee to earn the exempt income from investment in tax free bonds has been decided in favour of the assessee wherein AO has disallowed 2.5%

of the administrative expenses for earning income from tax free bonds and the disallowance was ordered to be deleted.

30. When we examine the proposition at hand as to making disallowance of Rs.123.09 crores by the AO and reduced the same to Rs.82.67 crores by the Id. CIT (A) in the light of the facts inter alia that AO has not recorded any dissatisfaction as to the working out made by the AO; that the AO has failed to establish any nexus between the tax free income and expenditure incurred; that the assessee was having huge sufficient own funds of Rs.41776 crores as against the investment of Rs.16469 crores and the fact that the entire investment was made long back under one time settlement, disallowance made by the AO as well as Id. CIT (A) is not sustainable. There is not an iota of material on file to prove the fact that the assessee has incurred any expenditure by way of administrative expenses for earning the exempt income, which makes the estimated disallowance made by the AO as well as Id. CIT (A) not sustainable.

31. Hon'ble Supreme Court in case cited as ***Commissioner of Income Tax vs. Walfort Share & Stock Brokers (P)Ltd-326 ITR 1*** held that, "*there has to be proximate cost for disallowance having relationship with the tax exempt income.*"

32. Ld. DR for the Revenue drew our attention towards para 16 of the assessment order wherein assessee itself admitted that it has established an investment group headed by Deputy General Manager (Finance) assisted by two Executives and one steno to look after the matter relating to managing surplus funds of the company which include investment with banks and various securities issued by this Government and they are managing a total investment of more than Rs.20000 crores as shown in Schedule 9 & 14 of the annual accounts and as such, administrative expenses in earning the exempt income must be disallowed.

33. However, we are of the considered view that reply of the assessee in this regard is to be read as a whole wherein it is said that the said staff is appointed to manage the surplus funds as well as investment made by the assessee and at the same time, they have also brought on record by way of financials that no expenditure has been incurred in relation to earning such income. Accounts of the assessee are audited by auditor as well as Controller & Auditor General (CAG) and when the AO has failed to prove on record material to show that such and such expenditure has been incurred by the assessee to earn exempt income, in the face of the fact that all the investments are old investments that too in tax free bonds and loan to the Government out of its own huge surplus funds, no

disallowance can be made. Hon'ble High Court of Punjab & Haryana in case of *CIT vs. Hero Cycles Ltd. - 323 ITR 518* held that disallowance u/s 14A is not permissible where there is no nexus between expenditure incurred and income generated by returning following findings :-

*“Held, dismissing the appeal, that the expenditure on interest was set off against the income from interest and the investment in the shares and funds were out of the dividend proceeds. In view of this finding of fact, disallowance under section 14A was not sustainable. Whether, in a given situation, any expenditure was incurred which was to be disallowed, was a question of fact. The contention of the Revenue that directly or indirectly some expenditure was always incurred which must be disallowed under section 14A and the impact of expenditure so incurred could not be allowed to be set off against the business income which may nullify the mandate of section 14A, could not be accepted. Disallowance under section 14A required finding of incurring of expenditure and where it was found that for earning exempted income no expenditure had been incurred, disallowance under section 14A could not stand. Consequently, the disallowance was not permissible.”*

34. So, in view of what has been discussed above and following the decision rendered by the Tribunal in assessee's own case in AY 2004-05, we are of the considered view that AO as well as Id. CIT (A) have erred in making disallowance of Rs.123.09 crores, which was further reduced to Rs.82.67 crores by the Id. CIT (A), which is ordered to be deleted being not sustainable in the eyes of law. Consequently, ground no.4 of the Revenue's appeal is determined against the Revenue and the Ground No.2(i) & (ii) of the assessee's appeal is allowed.

**GROUND NO.5 IN**  
**ITA NO.4183/DEL/2015 (REVENUE'S APPEAL)**  
**AND**  
**GROUND NO.1 IN**  
**ITA NO.4754/DEL/2015 (ASSEESSEE'S APPEAL)**

33. Ground No.5 of Revenue's appeal and Ground No.1 of assessee's appeal are general in nature, hence need no adjudication.

34. Resultantly, the appeal filed by the Revenue is dismissed and appeal filed by the assessee is allowed.

**Order pronounced in open court on this 25<sup>th</sup> day of April, 2019.**

**Sd/-**  
**(R.K. PANDA)**  
**ACCOUNTANT MEMBER**

**sd/-**  
**(KULDIP SINGH)**  
**JUDICIAL MEMBER**

**Dated the 25<sup>th</sup> day of April, 2019**  
**TS**

Copy forwarded to:

- 1.Appellant
- 2.Respondent
- 3.CIT
- 4.CIT(A)- VI, New Delhi.
- 5.CIT(ITAT), New Delhi.

**AR, ITAT**  
**NEW DELHI.**