IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH 'B', KOLKATA
(Before Shri A.T. Varkey, J.M. & Dr.A.L.Saini, A.M.)

ITA No. 937/Kol/2018 : Asstt. Year : 2010-11
ITA No. 938/Kol/2018 : Asstt. Year : 2010-11

The Peerless General Finance & Investment Co. Ltd. PAN: AABCT 3043L	Vs	D.C.I.T, Cir-3(1), Kolkata
(Assessee/Assessee)		(Respondent/Department)

ITA No. 1439/Kol/2018 : Asstt. Year : 2010-11

D.C.I.T, Cir-3(1), Kolkata	Vs	The Peerless General Finance & Investment Co. Ltd. PAN: AABCT 3043L
(Assessee/Department)		(Respondent)

Assessee/Assessee by : Shri S.K. Tulsiyan, Advocate, ld.AR
Respondent/Department by : Shri A.K. Singh, CIT, ld. DR

Date of Hearing : 07-03-2019		Date of Pronouncement:24 -04-2019

ORDER

Per Dr. A.L.Saini, A.M.:

The captioned three appeals filed by the Assessee and Revenue, pertaining to assessment year 2010-11, are directed against the separate orders passed by the Commissioner of Income-tax (Appeals)-,19 Kolkata, in Appeal Nos. 185/CIT(A)-19/Kol/2015-16, 1895/CIT(A)-1/Circle-3(1)/2015-16, dated 14-03-2018 and 28-03-2018 which in turn arise out of separate assessment orders passed by the Assessing Officer u/s. 143(3)/263 of the Income-Tax Act, 1961 (in short, the 'Act').

2. Since these three appeals pertain to same assessee, same assessment years, common and identical issues are involved, therefore, these have been clubbed and heard together and a consolidated order is being passed for the sake of convenience and brevity.

3. Although, these appeals filed by the Revenue and Assessee contain multiple grounds of appeal. However, at the time of hearing, we have carefully perused all the grounds raised by the Assessee as well as Revenue. We find that most of the grounds raised by the Assessee as well as Revenue are either academic in nature or contentions in nature. However, to meet the ends of justice, we confine ourselves to the core of the controversy and main grievance of Assessee and the Revenue as well. With this back ground, we summarize and concise the grounds raised by the Revenue as well as Assessee as follows.

(1). Ground No. 1 raised by the assessee in ITA No. 937/Kol/2018, for A.Y 2010-11 and Ground nos. 1 and 2 raised by the Revenue in ITA No. 1439/Kol/2018 for A.Y 2010-11 are common and identical and relate to disallowance u/s. 14A r.w.r 8D(2)(ii) and 8D(2)(iii) of the Income Tax Rules, 1962.

(2). Ground No. 3 raised by the Assessee in ITA No. 937/Kol/2018, for A.Y 2010-11, relates to disallowance of Rs. 4,06,847/- holding that the same to be in the nature of prior period expenses.

Note: Ground No. 2 raised by the assesse in ITA No. 937/Kol/2018, for A.Y 2010-11, has not been pressed by the Assessee, therefore, it does not require adjudication.

(3). Ground No. 3 raised by the Revenue in ITA No. 1439/Kol/2018, for A.Y 2010-11, relates to deletion of addition of notional interest of Rs. 82,78,301/-.

(4). Ground No. 4 raised by the Revenue in ITA No. 1439/Kol/2018, relates to disallowance of compensation of Rs. 11,00,000/- paid to M/s. Conforms Pvt. Ltd, a related company u/s. 40A(2)(b) of the Act without calling for Remand Report.

(5). Grounds raised by the assesse in ITA No. 938/Kol/2018, for A.Y 2010-11, relates to action of the Assessing Officer in treating Government securities within the meaning of "Bonds" for the purpose of third proviso to section 48 of the Act, and erred in dismissing the assessee's claim for indexed loss of Rs. 31,49,09,561/-.

(6). Additional ground raised by the assessee in ITA No.937/Kol/2018 for A.Y.2010-11 reads as under:
"That on the facts and in the circumstances of the case, the authorities below erred in not allowing deduction U/s 37(1) of the Income Tax Act, 1961, on account of Education Cesses paid by the assessee while arriving at the assessed income for the year under appeal."

4. First, we shall take up the Revenue's appeal in ITA No. 1439/Kol/2018, for the A.Y 2010-11.

5. The appeal filed by the Revenue in ITA No. 1439/Kol/2018, for the A.Y 2010-11, is barred by limitation by 24 days. The Revenue filed a petition for condonation of delay. Having regard to the reasons given in the petition for condonation of delay, we condone the delay and admit the appeal of Revenue for hearing.

6. We shall take summarized and concise ground No.1, which reads as follows:

(1). Ground No. 1 raised by the assessee in ITA No. 937/Kol/2018, for A.Y 2010-11 and Ground nos. 1 and 2 raised by the Revenue in ITA No. 1439/Kol/2018, for A.Y 2010-11 are common and identical and relate to disallowance u/s. 14A r.w.r 8D(2)(ii) and 8D(2)(iii) of the Income Tax Rules, 1962.

Note: To adjudicate this summarized and concise ground No.1, we take lead case of revenue`s appeal in ITA No.1439/Kol/2018, for A.Y.2010-11.

7. The brief facts qua the issue are that on verification of the accounts of the assessee, it was noted by AO that the assessee company earned interest from Tax free bonds (exempt income) of Rs. 1,32,09,652/-, and dividend income of Rs. 5,13,16,782/-. In its computation of income, the assessee company has suo-motto offered an amount of Rs.91,07,352/-, as disallowance under said section. The computation of disallowance U/s. 14A r.w.r. 8D, as offered by the assessee company is reproduced hereunder for the sake of clarity and convenience.

01.	Average investment in shares on which dividend was received	46,43,51,330
02.	Average investment in Mutual funds on which dividend was received.	1,22,79,81,089
03.	Average investment in Bonds on which tax free interest was received	12,91,38,000
		182,14,70,419
	0.50% of average investment	91,07,352

The AO noticed that the assessee company has not worked out the disallowance U/s. 14A r.w.r 8D strictly according to the method laid down in said provisions of Act/Rules.

Therefore, during the course of hearing, the assessee was asked to furnish full calculation of disallowance in terms of Rule 8D of the I.T. Rules.

In response, the assessee company submitted the revised computation of disallowance under Rule 8D. However, the assessing officer rejected the computation of the assessee and held that disallowance is liable to be worked out strictly in accordance with the method laid down as per section 14A r.w.r 8D of the I.T. Rules. So the amount of disallowance was calculated by AO, on the basis of Rule 8D of the Income-tax Rules as under:

> i) Direct Expenses : The amount of expenditure directly relating to income which does not form part of total income in the P&L account.
>
> The assessee has debited an amount of Rs.56,181/- being security transaction expense depositor. The same is liable to be disallowed.
>
> ii) Disallowance of Interest: = A x B/C
>
> Where A = Amount of expenditure by way of interest other than the amount of interest included in point no.(i) incurred during the previous year. Here as per the details filed by the assessee, the interest debited in the profit and loss A/c is Rs. 119,15,05,151/- Hence, the same figure is considered for this purpose.
>
> B = The average of value of Investment. income from which does not or shall not form part of the total income, as appearing in the Balance sheet of the assessee, on the first day and the last day of the previous year;
>
> C = The average of total Assets as appearing in the Balance sheet of the assessee, on the first day and the last day of the previous year;
>
> Here A = Rs.119,15,05,151/-

B= Average value of investments yielding in the exempt income as submitted by the assessee Rs.251,83,22,935/-

C =Rs.4884,64,29,279/ -

So the resultant figure of AX B/C = Rs.6,14,29, 152/-

Disallowance of ½ % of average value of Investment : The average value of investment, the income from which does not or shall not form part of total income; in assessee's case this amount is Rs.251,83,22,935/-/-. Therefore, this component of disallowance would be Rs. l,25,91,615/-

Therefore, total disallowance U /R 8D of the I.T. Rules read with sec.14A of the I.T. Act, was worked out to Rs.7,40,76,948/- [(i) + (ii)+ (iii) = Rs.56,181 + Rs.6,14,29,152 + Rs. l,25,91,615 =Rs.7,40,76,948/-]

The assessee company, as discussed above, has offered suo motto an amount of disallowance to the tune of Rs. 91,07,352/- in its computation of income. Therefore, the disallowance here is restricted to the tune of Rs.6,49,69,596/- (Rs. 7,40,76,948 - Rs. 91,07,352 = Rs. 6,49,69,596/-

8. Aggrieved by the order of the assessing officer, the assessee carried the matter in appeal before the ld CIT(A), who has partly allowed the appeal of the assessee. Aggrieved, the Revenue is in appeal before us.

9. Before us, the Ld. DR for the Revenue has primarily reiterated the stand taken by the Assessing Officer, which we have already noted in our earlier para and is not being repeated for the sake of brevity. On the other hand, ld Counsel for the assessee has defended the order passed by the ld CIT(A).

10. After giving our thoughtful consideration to the submission of the parties and perusing the judicial decisions relied upon by the Ld. AR, we find that the issue involved in the present issue is no longer res integra. We note that Coordinate Bench of ITAT Kolkata in the case of REI Agro Ltd. Vs. DCIT 144 ITD 141 (Kol-Trib) has held that it is only the investments which yields dividend during the previous year that has to be considered while adopting the average value of investments for the purpose of Rule 8D(2)(ii) & (iii) of the Rules. The aforesaid view of the Tribunal has since been affirmed as correct by the Hon'ble Calcutta High Court in G.A.No.3581 of 2013 in the appeal against the order of the Tribunal in the case of REI Agro Ltd. (supra).

11. We note that assessee had sufficient fund at its disposal and the ld Counsel has contended that investment have been made out of its own fund. The following table shows the amount of shareholder's funds of the assessee company, as compared to the investments in shares:

Particulars	Current Year 2009-10	Previous Year 2008-09
Share Capital (a)	331.56	331.56
Reserves and Surplus (b)	11920.39	9786.59
Total Own Funds (a + b)	12,251.95	10,118.15
Average Investments in exempt income yielding shares/bonds	1821.4	-

As seen from the above table, it is evident that the assessee had sufficient own funds to invest in the exempt income yielding investments. Borrowed Funds were not used for making investments in shares. Therefore, it may be safely concluded that all the investments have been made out of own funds of the Assessee and therefore, no part of interest paid on loan funds can be directly or indirectly attributed to the investments from which exempt income has been earned.

We note that where the assessee was having a common fund consisting of both own funds and borrowed funds and in case the own funds are sufficient to invest in non-business

activities, a presumption is drawn that the said investment is made out of own funds. To buttress this plea, we rely on the judgment of Bombay High Court in the case of CIT v. Reliance Utilities and Power Ltd. (313 ITR 340), wherein it was held as follows:

"The assessee claimed deduction of interest on borrowed capital. The Assessing Officer recorded a finding that the sum of Rs.213 crores was invested out of its own funds and Rs. 147 crores was invested out of borrowed funds. Accordingly, he disallowed interest amounting to Rs.4.40 crores calculated at 12 per cent per annum for three months from January, 2000 to March, 2000. The Commissioner (Appeals) found that the assessee had enough interest-free funds at its disposal for investment and accordingly deleted the addition of Rs.4.40 cores made by the Assessing Officer and directed him to allow the deduction under section 36(1)(iii). The order of the Commissioner (Appeals) was upheld by the Tribunal. On appeal to the High Court :

> *" Held, dismissing the appeal, that if there were funds available both interest-free and overdraft and/or loans taken, then a presumption would arise that investments would be out of the interest- free funds generated or available with the company, if the interest-free funds were sufficient to meet the investments. In this case this presumption was established considering the finding of fact both by the Commissioner (Appeals) and the Tribunal. The interest was deductible. "*

Therefore, considering the factual position and position in law explained above, we delete the disallowance under Rule 8D (2) (ii) of the I.T. Rules.

12. We note that in computation of disallowance under Rule 8D(2)(iii), the Jurisdictional High Court in the case of REI Agro Ltd. (supra) has taken a view that only the investment out of which dividend has been earned will be considered and hence the same has to be considered in the case of the assessee. We note that in its computation of income, the assessee suo moto disallowed a sum of Rs.91,07,352/- u/s 14A of the Act read with Rule 8D(2)(iii), being 0.5% of the average investments yielding exempt income. The said computation is reproduced in the assessment order, page 3, point 5. We direct the AO to restrict the disallowance to the tune of Rs.91,07,352/- u/s 14A of the Act read with Rule 8D(2)(iii), being 0.5% of the average investments yielding exempt income.

In nut shall we confirm the disallowance under Rule 8D (2) (i) at Rs.56,181/- and under rule 8D (2) (iii) at Rs.91,07,352/-. The same principles for computation of disallowance under

section 14A read with rule 8D will be applicable to assessee`s appeal in ITA No.937/Kol/2018, therefore, AO is directed to compute the disallowance as per the precedents cited above and discussion made (supra).

13. We shall take summarized and concise ground No.2, which reads as follows:

"(2). Ground No. 3 raised by the Assessee in ITA No. 937/Kol/2018, for A.Y 2010-11, relates to disallowance of Rs. 4,06,847/- holding that the same to be in the nature of prior period expenses.
Note: Ground No. 2 raised by the assesse in ITA No. 937/Kol/2018, for A.Y 2010-11, has not been pressed by the Assessee, therefore, it does not require adjudication.

14. Brief facts qua the issue are that on perusal of the account of assesse company it was noticed by AO that an amount of Rs.4,06,487/- was debited under the head 'other expenditure'. During the course of hearing, the assesse company was asked to explain and show cause as to why the said amount should not be disallowed being the expenses of the prior period not related to the year under consideration.
In response, the assessee explained the AO that the said expenses were crystallized during the year under consideration and therefore, the same should be allowed. However, the AO rejected the contention of the assessee and made addition to the tune of Rs. 4,06,487/-.

15. On appeal, ld CIT(A) confirmed the addition made by assessing officer. Aggrieved, the assessee is in appeal before us.

16. Before us, the Ld. DR for the Revenue has primarily reiterated the stand taken by the Assessing Officer, which we have already noted in our earlier para and the same is not being repeated for the sake of brevity. On the other hand, ld Counsel for the assessee has relied on the submissions made before the authorities below.

17. We have heard both the parties and perused the material available on record, we note that the aforesaid expenditure pertains to telephone and electricity bill which the assessee has claimed to have received in the F.Y 2009-10 and as such booked in this year. We note that ld CIT(A) rejected the claim of the assessee holding that since the assessee followed mercantile system of accounting and as such the impugned expenditure can only be allowed in the year to which it pertains. The Ld CIT(A) also held that the assessee should have claimed in F.Y 2008-09 relevant to A.Y. 2009-10 instead of claim in A.Y 2010-11.

We note that during the course of assessment proceedings, the assessee was asked to explain the prior period expenses claimed by it. In response to his query, the assessee explained that as per note 22(b) of Tax Audit Report, an amount of Rs.4,06,487/- has been shown as Prior Period Expenses. The summary of Prior Period expenses relate to the bills for office expenses for the preceding year, being AY 2009-10, which could not be paid before the close of that relevant year, being 31-03-2009, for various reasons. These bills were actually submitted in the office of the assessee after the close of the said FY 2008-09, relevant to AY 2009-10. It mainly includes the electricity and telephone bills relating to the period of February and March 2009 but actually received in the office in the month of May-June 2009. Such expenses were mostly incurred in various Branch Offices of the company. The bills were received by the corporate office for accounting and payment after the close of that particular year and accordingly were accounted for in the current year under assessment.

We note that the bills though relating to the previous years were cleared/paid by the assessee in the current year and as such, they were claimed as deduction in this assessment year, 2010-11. These expenses were not claimed in the previous years and as such, there was no loss to the Revenue, as deduction of these expenses was claimed only once. The liability to pay for the expense crystallized in the current year only and under mercantile system of accounting, such liability is allowable in the year it crystallizes. To buttress this, reliance is placed on the decision of the Hon'ble Gujarat High Court in the case of Saurashtra Cement &

Chemical Industries ltd. vs. CIT reported in (1995) 213 ITR 0523 wherein it was held as follows:

> *"Merely because an expense relates to a transaction of an earlier year it does not become a liability payable in the earlier year unless it can be said that the liability was determined and crystallized in the year in question on the basis of maintaining accounts on the mercantile basis. In each case where the accounts are maintained on mercantile basis it has to be found in respect of any claim, whether such liability was crystallized and quantified during the previous year so as to be required to be adjusted in the books of accounts of that previous year. If any liability, though relating to the earlier year, depends upon making a demand and its acceptance by the assessee and such liability has been actually claimed and paid in the later previous years cannot be disallowed as deduction merely on the basis the accounts are maintained on mercantile basis and that it related to a transaction of the previous year"*

Since the Bills were not received, it was not possible to make provisions for such expenses in the accounts of the preceding year ending on 31-03-2009. On receipt of these bills relating to earlier year, these payments were made in the current year. These prior period expenses, which were claimed in the current year, were not debited in the books of the preceding year and accordingly were not claimed by the assessee in AY 2009-10. The said expenses of Rs. 4,06,487/- was claimed by assessee in the assessment year 2010-11, hence we allow the claim of the assessee. Therefore, we delete the addition of Rs.4,06,487/-.

18. We take summarized and concise ground No. 3, which reads as follows:
"(3). Ground No. 3 raised by the Revenue in ITA No. 1439/Kol/2018, for A.Y 2010-11, relates to deletion of addition of notional interest of Rs. 82,78,301/-."

19. Brief facts qua the issue are that during the assessment proceedings AO noticed that as per note-3 (iii) of Auditor's Report on accounts (Page-68) of printed accounts, interest was not being charged on loans of Rs.16.55 Crores granted to subsidiary company M/s. Peerless

Developers (P) Ltd. The assessee company was asked to furnish detailed justification and explained as to why the interest paid to certificate holders should not be disallowed proportionately for diversion of interest free loan. The assessee filed written submission before AO dated 17.01.2013 and explained following:

"*That only loan of Rs.16.55 Crore was given to M/s. Peerless Developers Limited and you have also disallowed interest during assessment year 2009-10 and against which we have filed an appeal and we rely on our last year's submission filed before you. The last year submission is reproduced hereunder:*

"that the loan of Rs. 16.55 Crore was given to M/s. Peerless Developers Limited which is a subsidiary of the assessee company and the said loan was given out of the assessee's own fund and hence even if no interest is charged, there is no scope of disallowing proportionate interest payable to the certificate holders. It is also submitted that the assessee is a residuary non-banking finance company and its activities are directly controlled by RBI, it cannot undertake any other business. Hence it floated a few subsidiary companies for the purpose of other businesses and therefore, the loan should be treated as given for business purposes and in view of the Hon 'ble Supreme Court's decision in the case of S.A Builders Ltd. 288 ITR 1, no disallowance of interest is called for on account of alleged diversion of fund collected from the certificate holders."

However, the assessing officer rejected the contention of the assessee and the proportionate disallowance of interest on said loan calculated at the rate of 5%· (which is given by the assessee to its certificate holders) worked out to be Rs. 82,78,301/ - was disallowed by assessing officer.

20. On appeal, ld CIT(A) deleted the addition made by assessing officer. Aggrieved, the Revenue is in appeal before us.

21. Before us, the Ld. DR for the Revenue has primarily reiterated the stand taken by the Assessing Officer, which we have already noted in our earlier para and the same is not being repeated for the sake of brevity. On the other hand, ld Counsel for the assessee has relied on the submissions made before the authorities below.

22. We have heard both the parties and perused the material available on record, we note that in respect of disallowance of notional interest of Rs.82,78,301/- in respect of interest free loan of Rs.16.55 crore advanced by it for business purpose of M/s. Peerless Developers Ltd, which is its subsidiary company, and since the said money was given to the subsidiary in course of business of the assessee. We are of the view that the principles decided by the Hon'ble Supreme Court in S.A Builders Ltd 281 ITR 1 (SC) squarely applies to the assessee`s case under consideration.

We note that the assessee has advanced an interest free loan of Rs. l6.55 crs. to M/s. Peerless Developers Ltd, subsidiary company of the assessee, for business purposes. During the course of assessment proceedings, it was submitted that the said Loan of Rs.16.55 Crs. was given to M/s. Peerless Developers Ltd. in the earlier years out of own funds of the assessee. However, the learned AO did not appreciate the submissions of the assessee and computed notional interest at the rate of 5% which comes to Rs.82,78,301/- and disallowed the same.

We note that a similar disallowance was made by the learned AO in the immediately preceding year, AY 2009-10. Aggrieved, the assessee went in appeal before the learned CIT(A). The learned CIT(A) perused the facts of the case in detail and allowing the appeal of the assessee held that:

> *"Next ground no.4 relates to addition due to charging of interest of Rs.82, 78,301/- in respect of interest free loan given to 100% subsidiary company M/s Peerless Developers Pvt ltd for Rs.16.55 crores @ 5%. It was contended that the loan was given out of assessee own funds which exceeded the amount of Rs.16.55 crores. The A/R further relied upon the judgment of Supreme Court in the case of M/s S.A Builders Ltd 288 ITR 1 as the above loan was given to subsidiary for the purpose of business by way of commercial expediency. Keeping in view these facts and circumstances addition of Rs.82, 78,301/- and ground no.4 is deleted.*

Aggrieved, the Revenue went in appeal before the Hon'ble ITAT, Kolkata. The appeal of the Revenue was dismissed and it was held by the Coordinate Bench as follows:

"Keeping in view all these facts of the case and applying the rule of consistency, we uphold the impugned order of the ld. CIT(Appeals) deleting the disallowance made by the Assessing Officer on account of interest allegedly attributable to the interest free loans given by the assesse company to its subsidiary companies and dismiss Ground No. 3 of the Revenue's Appeal."

Since this ground of the Revenue has already been adjudicated by the coordinate bench in the assessee's own case for AY 2009-10, and there being no change in the facts of the case and law in the present assessment year, therefore, we dismiss the appeal of the Revenue.

23. We take summarized and concise ground No. 4, which reads as follows:

"(4). Ground No. 4 raised by the Revenue in ITA No. 1439/Kol/2018, relates to disallowance of compensation of Rs.11,00,000/- paid to M/s. Conforms Pvt. Ltd, a related company u/s. 40A(2)(b) of the Act without calling for Remand Report."

24. The brief facts qua the issue are that during the assessment proceedings, the assessing officer noted that the assessee, in its profit and loss account had debited an amount of Rs.2,56,87,475/- under sub head 'other expenditure'. The party- wise details were sought. On perusals of which it was noted by the AO that the assessee had paid Rs.11,00,000/ - on account of Compensation paid to tenant. The assessee was further asked to produce the details of the tenants. The same was filed by the assessee and on perusal of which, the AO noticed that it was paid to M/s. Conforms (P) Ltd, to whom the assessee company let out a portion of its office premises at 13A. Dacres Kolkata- 69 and the compensation was paid to vacate the premise. On examination of the annual report and accounts of the assessee company it was noted by AO that M/s Conform (P) Ltd is a related party in terms of section 40A(2b) of the Act. The assessee company accordingly was to produce the copy of agreement which may support the claim of assessee. In spite of allowing adequate opportunity and time the assessee could not produce the copy of agreement or any evidence which shows that failing to vacate the said premise, assessee company had to pay compensation to M/s. Conforms (P) Ltd. The assessee company could only produce some

correspondence in this respect but failed to adduce a single evidence that the compensation was the part of the terms and conditions of any agreement. Therefore, the said amount of compensation of Rs. 11,00,000/- was disallowed under the provision of section 40A(2b) of the Act.

25. On appeal by the assessee, the ld CIT(A) deleted the addition. Aggrieved, the Revenue is in appeal before us.

26. Before us, the Ld. DR for the Revenue has primarily reiterated the stand taken by the Assessing Officer, which we have already noted in our earlier para and the same is not being repeated for the sake of brevity. On the other hand, ld Counsel for the assessee has relied on the submissions made before the authorities below.

27. We have heard both the parties and perused the material available on record, we note that in respect of disallowance of Rs.l1,00,000/- being compensation paid by it to M/s. Conforms (P) Ltd, a related company u/s 40A(2)(a) & (b) and in such respect the ld counsel for the assessee has contended that the AO has nowhere brought on record the fair market value (F.M.V.) of the compensation so paid in terms of section 40A(2)(a) & (b), to prove the excess so paid by the assessee to such company. The payment was made in respect of vacation of the property so occupied by such company. We find substance in the ld Counsel`s argument that the payment was made by the assessee after much negotiation and it was a separate entity and correspondences had occurred between the assessee and the said company to settle the amount. Even if the agreement was not there but relevant correspondences duly prove that the payment was for the vacation of the impugned premises which was vacated by the said company. Hence, it is in accordance with the business of the assessee and the same is allowable. That being so, we decline to interfere with the order of Id. C.I T.(A) in deleting the aforesaid addition. His order on this issue is, therefore, upheld and the grounds of appeal of the Revenue is dismissed.

28. Now, we shall take summarized and concise ground No. 5, which reads as under:

"(5). Grounds raised by the assesse in ITA No. 938/Kol/2018, for A.Y 2010-11, relates to action of the Assessing Officer in treating Government securities within the meaning of "Bonds" for the purpose of third proviso to section 48 of the Act, and erred in dismissing the assessee's claim for indexed loss of Rs. 31,49,09,561/-."

29. The brief facts qua the issue are that the assessee company filed its return of income for the A.Y. 2010-11, electronically on 27.09.2010 and declaring total income at Rs. 354,35,08,182/-. The assessee`s return of income was processed u/s143(1) on 29.04.2011, at total income of Rs.354,36,08.185/-. Later on, the case was selected for scrutiny and order u/s.143(3) was passed on 22.03.2013 on a total income of Rs. 362,77,16,170/- In the computation of income the assessee claimed long term capital loss of Rs.31,50,15,297/- to be carried forward. In the assessment order the A.O. remain silent on this loss that means the assessee's allowed to carried forward this loss. The ld Pr.CIT, on examination of assessment records in the instant case for A.Y. 2010-11 noted the following:

"Computation of income, as submitted by the, assessee company was accepted in assessment (except a few addition/disallowance of expenditure). In computation Long Term Capital Loss (LTCL) Rs. 31,50,15,297/- was carried forward. LTCL computation sheet related that the loss arose due to disinvestment in Govt. Securities. Book loss on transaction of Govt. Securities (ignoring amortization) was Rs.3,05,76,1501- and indexed loss was Rs.31,49,09,561/-. As per 3rd proviso, below section 48, the concept of Indexed cost of acquisition (as mentioned in 2nd proviso) will not be applicable in computation LTCG arising from transfer of LTC assets being bond or debenture other than capital indexed bond issued by the Govt. Hence, as per above provisions of I.T. Act LTCL of Rs.3,05,76,150/- only is to be carried forward instead of Rs.31,49,09,561/-. Irregular indexing resulted in excess carry forward of L.T.C by Rs. 28,43,33,411/-. Since, the assessment order is erroneous and the prejudicial of the revenue. The Pr. CIT, Kol-I, Kolkata passed an order uls.263 dated 19.03.2015 restoring back to the file of the A.O. set-asiding the issue."

A show cause letter dated 22.07.2015 was issued to the assessee requesting to explain the issue, in response the assessee submitted a letter on 29.07.2015 stating that the assessee preferred an appeal before ITAT against the order of Ld. Pr. CIT.

Since, the explanation of the assessee was not adequate therefore the assessee was asked to submit the proper explanation. In response, the assessee submitted explanation on 30.11.2015 stating that even if the effect of order u/s.263 was given there is no impact on the total income and till date that capital loss not utilized in subsequent years.

It appeared to the AO that the assessee did not have proper explanation to submit in response of the wrong claim of LTCG as mentioned above. Under this, circumstances, the LTCG was being reduce by Rs.28,43,33,411/- and only LTCG (loss) of Rs.3,05,76,150/- was allowed to be carried forward.

30. On appeal by the assessee, the ld CIT(A) confirmed the addition made by assessing officer. The ld CIT(A) noted that the Govt. Securities held by the assessee are bonds and therefore the assessee is not eligible for indexation in view of 3rd proviso to Section 48 of the Income Tax Act, 1961. Therefore, the assessee's claim for indexed loss of Rs.31,49,09,561/- was found to be without merit and dismissed.

31. Aggrieved, the assessee is in appeal before us.

32. Before us, ld Counsel for the assessee has reiterated on the submissions made before the authorities below, whereas the Ld. DR for the Revenue has primarily reiterated the stand taken by the Assessing Officer, which we have already noted in our earlier para and the same is not being repeated for the sake of brevity.

33. We have heard both the parties and perused the material available on record, we note that in the present case, the assessee was denied the benefit of indexation in respect of Government Securities on the belief that Cost Inflation Index was not applicable on

Government securities in terms of the third proviso to section 48 of the Act as these were bonds and debentures. Third proviso to section 48 read as under:

> *"Provided also that nothing contained in the second proviso shall apply to the long-term capital gain arising from the transfer of a long-term capital asset, being a bond or debenture other than-*
>
> *(a) capital indexed bonds issued by the Government; or*
>
> *(b) Sovereign Gold Bond issued by the Reserve Bank of India under the Sovereign Gold Bond Scheme, 2015"*

Here, it is of utmost relevance to discuss the meaning of 'Government Security'. We note that the term "Government security" has been defined under Explanation (b) to section 194LD(2) of the Income Tax Act, 1961 as follows:

> "Government security" shall have the meaning assigned to it in clause (b) of section 2 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956)"

As per Section 2(b) of the Securities Contracts (Regulation) Act, 1956 "Government security" means a security created and issued, whether before or after the commencement of this Act, by the Central Government or a State Government for the purpose of raising a public loan and having one of the forms specified in clause (2) of section 2 of the Public Debt Act, 1944 (18 of 1944).

Further, section 2(2) of the Public Debt Act, 1944 defines "Government security" as follows:

> *" Government security" means-*
>
> *(a) a security, created and issued, by the Government) for the purpose of raising a public loan, and having one of the following forms, namely:-*
>
> *(i) stock transferable by registration in the books of the Bank; or*
>
> *(ii) a promissory note payable to order; or*
>
> *(iii) a bearer bond payable to bearer; or*
>
> *(iv) a form prescribed in this behalf;*

(b) any other security created and issued by the Government in such form and for such of the purposes of this Act as may be prescribed"

The Government securities which were sold during the year were stocks being of the nature described in clause (i) to section 2(a) of the Public Debt Act,1944.

The third proviso to section 48 of the Act restricts the indexation in the case of long term capital assets, being bonds or debentures other than Capital Indexed Bonds issued by the Government.

The term debenture has been defined in section 2(30) of the Companies Act, 2013 which reads as "debenture" includes debenture stock, bonds or any other instrument of a company evidencing a debt, whether constituting a charge on the assets of the company or not"

From the above definitions, it is clear that Debenture includes Bond but it does not include Government Securities. One of the fundamental differences between "Debenture" on one hand and "Government Securities" on the other hand is that "Debentures" are issued by a Company whereas "Government Securities" are issued by the Central or State Governments and not by any other Authority or legal entity.

The definition of 'Bonds' and 'Government Securities' as per the Reserve Bank of India, the following definitions are quoted from the official website of RBI i.e https:m.rbi.org.in/Scripts/FAQView.

What is a Bond?

l.1 A bond is a debt instrument in which an investor loans money to an entity (typically corporate or government) which borrows the funds for a defined period of time at a variable or fixed interest rate. Bonds are used by companies, municipalities, states and sovereign governments to raise money to finance a variety of projects and activities. Owners of bonds are debt holders, or creditors, of the issuer.

What is a Government Security (G-Sec)?

l.2 A Government Security (G-See) is a tradeable instrument issued by the Central Government or the State Governments. It acknowledges the Government's debt obligation. Such securities are short term (usually called treasury bills, with original maturities of less than one year) or long term (usually called Government bonds or dated securities with original maturity of one year or more). In India, the Central Government issues both, treasury bills and bond or dated securities while the State Governments issue only bonds or dated securities, which are called the State Development Loans (SDLs). G-Secs carry practically no risk of default and, hence, are called risk-free gilt-edged instruments.

The RBI/Government had itself adopted a different nomenclature and definition for 'Bonds' and 'Government Securities' as evident from the above definitions. Had Bonds and Government Securities the same, there would have been no need to define both these terms differently. The learned AO and the learned CIT(A) had not disputed the fact that the assessee has transacted in Government Securities but have only alleged that these Government Securities are in the nature of Bonds and Debentures on which indexation benefit u/s 48 of the Act is not applicable. During the course of appellate proceedings, the above definitions were explained before the learned CIT(A).

34. We note that it was also submitted during appellate proceedings that the Learned PCIT in his order u/s 263 dated 19-03-2015 had not discussed any of the contentions of the assessee claiming that Government Securities are not Bonds and Debentures. In the said order, he has not given any finding either accepting or denying the contentions of the assessee. On the other hand, in the said order passed u/s 263, he had concentrated only on the technical aspect that the assessment order for AY 2010-11 was erroneous and prejudicial to the interest of the Revenue since the Learned AO had not examined this question of indexation on transfer of Government Securities at the assessment stage and hence Sec.263 of the Act was applicable in the present case. He therefore set aside the assessment order for the limited purpose of

examining whether on the divestment of the Government Securities the assessee was entitled to the benefit of indexation. The assessee thereafter filed an appeal against the Learned Pr. CIT's order U/s 263 before the Hon'ble Tribunal. The assessee raised several grounds pointing out the difference between Bonds and Debentures on one hand and Government Securities on the other. The Hon'ble Tribunal did not examine these contentions and held that the learned AO did not examine this question at the assessment stage and as such uphold the orders u/s 263 passed by the Learned PCIT. However, the submissions made by the assessee were totally ignored by the learned PCIT.

We note that Learned CIT(A), has nowhere in the appellate order disputed or challenged the difference and distinction between Bonds and Debentures on one hand and Government Securities on the other as submitted by the assessee. As evident from Page 7,8,9 & 10 of the appellate order, he has made discussion under the heading "What is Bond?", "What is a Government Security?", "How do the G-Sec. transactions settled in primary and secondary market?" and "How does the trading in G-Sec. takes place in secondary market and stock exchanges?". But in all the discussions he has not tried to show how the Government Securities are Bonds and Debentures. The ld CIT(A) has referred to the definition of "Bonds" as appearing in Mitra's "Legal and commercial dictionary". In all his discussions, the ld CIT(A) has not explained how Government Securities are Bonds and Debentures. He has finally drawn the following conclusion at Pg- 12 of his order, which is reproduced below:

> *"These cash flows are traded separately as independent securities in the secondary market. From perusal of the RBI clarification also, the assessee is found to have purchased and sold the said G-Secs through the secondary Market, i.e. LKP Securities Ltd and Bankers i.e. United Bank of India as per copy of confirmations placed on record by the assessee. Hence, in my considered opinion, the Govt. Securities in question, viz. GS-20l0 & ,GS-20l2 are also bonds, as per this definition of bond as enunciated by various authorities, including the guidelines of RBI. "*

The ld CIT(A), has finally relied on a decision of the Hon'ble Tribunal Ahmedabad Bench in the case of Areez P. Khambatta in ITA NO.795/Ahd/2009 for A.Y. 2005-06 dated 09-12-

2011, wherein the Tribunal examined the question whether UTI MIP-59 carrying fixed amount of interest was a Bond and Debenture. It was held that aforesaid financial instrument was Bond and therefore no benefit of indexation would be available to the assessee because the case was hit by 3rd proviso of Sec.48 of the Act. But the said order of the Tribunal did not throw any light on the dispute in the present case i.e. whether the Government Securities are Bonds & Debentures. The facts of the said case and conclusion is given below:

"Facts of this case:

Capital gains-Indexation benefit on debt instruments-Assessee reported loss on conversion of units of UTI MIP 99 which were converted by UTI into tax free bonds prior to the actual date of redemption, after claiming benefit of indexation-Terms "bonds" and "debentures" are not defined in IT Act-In case of premature withdrawal, interest already paid is deducted from capital-In that sense, UTI, MIP-99 is also a bond as per definition of bond-Third proviso to s.48 excludes bonds and debentures other than capital indexed bonds issued by the Government from the list of capital assets eligible for the benefit of indexation-CIT(A) has erred in allowing indexation on such bonds"

"UTI bonds himself to pay to the holder of MIP-99, a fixed sum @ 11.3 per cent per annum in each month and to pay back the investment/capital amount after the lapse of full term of 5 years. However, in case of premature withdrawal by the assessee, there is no guarantee of protection of capital and the same will be repaid as per NAV. This is similar to FD and NSC because in case of FD and NSC, if there is premature withdrawal, penalty is levied and rate of interest is also varied being applicable to the actual period of holding and in case interest is already paid, such deduction in interest and penalty for premature withdrawal is deducted from capital. Merely for this reason, it cannot be said that repayment is not of a specified sum. Hence, UTI, MIP-99 is also a bond as per this definition of bond.

Once, it is held so, the Tribunal order cited by Authorised Representative of the assessee is not applicable in the present case because in that case, the Tribunal has proceeded on this basis that UTI- MIP is not a bond or debenture without deciding or examining that aspect.

As per above discussion, it is held that UTl-M1P-99 is a bond and hence, the assessee is not eligible for indexation in view of 3rd proviso to s. 48. This ground of Revenue is allowed. "

35. We note that the facts of this case which is mentioned in para 34 of our order are not applicable to the present case of the assessee. In this case, UTI MIP - 99 was transferred by the assessee. UTI MIP-99 is a bond floated by Unit Trust of India which is not a Government entity. UTI Mutual Fund is promoted by the four of the largest Public Sector Financial Institutions as sponsors, viz., State Bank of India, Life Insurance Corporation of India, Bank of Baroda and Punjab National Bank with each of them holding an 18.24% stake in the paid up capital of UTI AMC. However, in the present case, the assessee has transferred Government Securities floated by the Central Government. In this case cited by the CIT(A), there is no reference of Government Securities, as such the facts of this are clearly distinguishable from the present case.

Most importantly, to buttress the contention that 'indexation benefits arc available on sale of Government Securities' we rely on the judgment of the Coordinate bench of Chennai Tribunal in the case of Sundaram Finance Limited vs ACIT (2017) 165 ITD 0563 (Chennai) wherein on identical facts it was held that Government Securities are entitled to indexation. The detailed facts and findings are given below:

"Facts of the case:

Capital gains-Short term and long term capital assets and short term and long term capital gains- Deletion of addition-AO disallowed indexation benefit claimed by assessee as per 3rd proviso of Sec.48 held that on sale of government securities, indexation benefit was not allowed-CIT(A) deleted addition placing reliance on Explanation-2 to Section 2(42A) r/w Securities Contracts Regulation Act, 1956 and allowed appeal of assessee-Revenue in appeal was related to indexation benefit on capital gains u/s 48-Held, from definition of capital asset, government securities were not excluded from definition of capital asset-As per Section 2(42A) expression 'security' should had meaning assigned to Clause-11 of Securities Contracts Regulation Act, 1956 which includes government securities-Bonds could not be equated with securities-Assessee had made investments in government securities and sold securities after hold period of more than 12 months to treat securities as long term capital assets-Capital gains arose on transfer of long term company assets were entitled for benefit of indexation as per Section 48-From plain reading of 3rd proviso section 48 government securities were not excluded for indexation benefit only bond

or debenture included in third proviso to Sec.48-Therefore, tribunal did not find any infirmity in order of CIT(A) and same upheld-Revenue's appeal dismissed.

Held:

"From the definition of the capital asset, the government securities are not excluded from the definition of capital asset. Therefore, the government securities are capital assets. As per Sec.2(42A) the expression 'security' shall have the meaning assigned to Clause-I1 of Securities Contracts Regulation Act, 1956 which includes government securities as discussed in the Ld.CIT(A) orders which was extracted above.

Bonds cannot be equated with the securities. The assessee has made investments in government securities and sold the securities after holding the period of more than 12 months to treat the securities as long term capital assets. The capital gains arising on transfer of long term company assets are entitled for the benefit of indexation as per Sec. 48 of Income Tax Act.

From the plain reading of 3rd proviso section 48 of I. T. Act, government securities are not excluded for indexation benefit only bond or debenture included in the third proviso to Sec.48. Therefore, we do not find any infirmity in the order of the Ld. CIT(A) and the same is upheld. "

Based on the factual position discussed above, we note that as per Section 2(42A) expression 'security' shall have meaning assigned to Clause-II of Securities Contracts Regulation Act, 1956 which includes government securities. The facts of this case are squarely applicable to the present case of the assessee. Therefore, respectfully following the judgment of the Coordinate Bench in the case of Sundaram Finance Limited (supra) we note that it is abundantly clear that Government Securities are entitled to Indexation Benefits. Therefore, we note that Government Securities are different from Bond and Debenture for the purpose of the 3rd proviso to Sec. 48 of the Act (4th proviso after amendment) and therefore the benefit of indexation should be granted to the assessee on the redemption of these Government Securities.

36. In the result, appeal of the assessee in ITA No.938/Kol/2018, is allowed.

37. Additional ground raised by the assessee in ITA No.937/Kol/2018 for A.Y.2010-11 reads as under:

> "That on the facts and in the circumstances of the case, the authorities below erred in not allowing deduction U/s 37(1) of the Income Tax Act, 1961, on account of Education Cesses paid by the assessee while arriving at the assessed income for the year under appeal."

38. After giving our thoughtful consideration to the submission of the parties and perusing the judicial decisions relied upon by the Ld. AR, we find that the issue involved in the present ground of appeal is no longer res integra. The education cess being not 'income tax' is allowable as deduction under section 37 (1) of the Act. For this, we rely on the judgment of the coordinate Bench of ITAT Kolkata in the case of ITC Limited, ITA No.685/Kol/2014, order dated 27.11.2018, wherein it was held that education cess is an allowable expenditure under section 37(1) of the Act. Therefore, we direct the assessing officer to verify all the relevant facts and allow education cess as deduction under section 37(1) of the Act.

39. In the result, the appeal of the revenue and assessee are allowed as per the discussion made (supra).

Order Pronounced in the Open Court on 24-04-2019

Sd/-	Sd/-
(A.T Varkey)	(Dr. A.L.Saini)
Judicial Member	Accountant Member

Dated: 24 -04-2019

*PRADIP (Sr.PS)

Copy of the order forwarded to:

1. The Assessee/Assessee: M/s. The Peerless General Finance & Investment Co. Ltd 3 Esplanade East, Kolkata-69.
2 The Respondent/Department : Deputy Commissioner of Income Tax Officer, Cir-3(1), Aaykar Bhawan, P-7 Chowringhee Sq., Kolkata-69.
3. The CIT-, 4. The CIT(A)-,
5. DR, Kolkata Benches, Kolkata

True Copy, By order,

Asst. Registrar

ITAT, Kolkata Benches