आयकर अपीलीय अधिकरण “E” न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL “E” BENCH, MUMBAI
BEFORE SHRI SANDEEP GOSAIN, JUDICIAL MEMBER
AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER

आयकर अपील सं./I.T.A. No.852/Mum/2016
(**निर्धारण वर्ष /** Assessment Year: 2010-11)

Entertainment Network (India) Ltd., 4th Floor, A Wing, Matulya Centre, Senapati Bapat Marg, Lower Parel (West), Mumbai-400013	**बनाम**/ v.	ACIT 16(1), Room No. 439, 4th floor, Aayakar Bhavan, M.K Road, Mumbai- 400020
स्थायी लेखा सं./PAN :AAACE7796G		

आयकर अपील सं./I.T.A. No.812/Mum/2016
(**निर्धारण वर्ष /** Assessment Year: 2010-11)

ACIT 16(1), Room No. 439, 4th floor, Aayakar Bhavan, M.K Road, Mumbai 400020	**बनाम**/ v.	Entertainment Network (India) Ltd., 4th Floor, A Wing, Matulya Centre, Senapati Bapat Marg, Lower Parel(West), Mumbai-400013
		स्थायी लेखा सं./PAN : AAACE7796G
(अपीलार्थी /**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

Assesee by:	Shri V. Mohan
Revenue by :	Shri. R. Manjunatha Swamy & Shri. D.G Pansari (DR)

सुनवाई की तारीख /**Date of Hearing : 28.03.2019**
घोषणा की तारीख /**Date of Pronouncement : 26 -06-2019**

आदेश / O R D E R

PER RAMIT KOCHAR, Accountant Member

These are cross appeals filed by both Assessee and Revenue both for assessment year(AY 2010-11), being ITA No. 852/Mum/2016 & ITA no. 812/Mum/2016 respectively and these appeals are directed against

the appellate order dated 16.11.2015 passed in appeal no. CIT(A)-4/Tr.50/A-(3)/AC-11(1)/14-15 by learned Commissioner of Income-tax (Appeals)-4, Mumbai (hereinafter called "the CIT(A)"), the appellate proceedings had arisen before learned CIT(A) from assessment order dated 28.03.2013 passed by learned Assessing Officer (hereinafter called "the AO") u/s 143(3) of the Income-tax Act, 1961 (hereinafter called "the Act"). Both these appeals were heard together and adjudicated by this common order.

2. The grounds of appeal raised by assessee in the memo of appeal filed with the Income-Tax Appellate Tribunal, Mumbai (hereinafter called "the tribunal") in ITA no. 852/Mum/2016 for AY 2010-11, read as under:-

" ***1. Business promotion expenses : Rs. 3,35,198/-***

1.1. On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in upholding the action of the learned AO who disallowed 20% of the expenditure incurred on business promotion for want of supporting evidence on an adhoc basis without any cogent reason.

1.2. Without prejudice to the above, it is submitted that the disallowance made by the learned CIT(A) upholding the action of the learned AO is excessive and without basis.

2. ***Disallowance under section 14A : Rs. 62,16,426/-***

2.1. On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in upholding the learned AO's action of applying the provisions of Rule 8D of the Income Tax Rules, 1962 ("the Rules") while making a disallowance under section 14A of the Act to arrive at the assessed income for the relevant financial year.

2.2. It is submitted that the interest expenses incurred by the Appellants is purely attributable to the business of the Appellants and do not in any way relate to the investment activities of the Appellants.

2.3. It is also submitted that the investments made by the Appellant consists of the following :

a) Investments in equity shares of subsidiary companies where more than 50% of the shares of are held by the Appellant as under :

Name of the subsidiary Company	No of shares held	% of shareholding
Times Innovative Media Limited	320,00,000	83.44%
Alternate Brand Solutions (India) Limited	16,00,000	100.00%

b) Investments in units of mutual funds (growth option)

It is further submitted that the Appellant did not receive any dividend from the equity shares invested in subsidiary companies. It is submitted that the investments made hi subsidiary companies are for strategic purposes and with the objective to get strong foothold in the Radio Broadcasting Industry and achieve business synergy which

would be mutually beneficial. It is respectfully submitted that disallowance could only be computed until and unless the assessee earns exempt income.

It is also submitted that that the Appellant's own funds and other non-interest bearing funds are more than the investment in the tax-free securities. In the Appellant's factual matrix, Capital, Profit, Reserves and Surplus are higher than the investment in the tax-free securities. In view of this factual position, it is respectfully submitted that it would have to be presumed that the investment made by the Appellant would be out of the interest-free funds available with the Appellant and therefore the provisions of Section 14A of the Act are not applicable.

Without prejudice, the disallowance upheld by the learned CTT(A) is excessive and without basis. The learned CIT(A) failed to appreciate that no expenses are relatable to exempt income and accordingly no disallowance is warranted in the instant case under section 14A of the Act.

3. Addition to Book Profits u/s. 115JB being disallowance u/s, 14A
3.1. On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in upholding the stand of the learned AO in adding disallowance u/s. 14A amounting to Rs. 62,16,426/- to the book profit u/s. 115JB amounting to Rs. 33,73,01,797/- computed by the Appellant for MAT Liability.

It is respectfully submitted that Section 14A cannot be imported into while computing the book profit u/s. 115JB because clause (f) of Explanation to Section 115JB of the Act refers to the amount debited to the Profit and Loss Account which can be added back to the book profit while computing book profit u/s. 115JB of the Act.

4. Depreciation on software expenses disallowed in Assessment Year 2007-08
4.1 On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in not directing the learned AO to grant depreciation on software expenses amounting to Rs. 15,720/- being expenses capitalized in A.Y. 2007-08.

5. ***Credit for Tax deducted at source***
5.1. On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in not directing the learned AO to grant credit for taxes deducted at source of Rs. 1,75,228/-.

6. ***Grant of interest u/s, 244A***
6.1. On the facts and circumstances of the case and in law, the learned CIT(A) erred in not directing the learned AO to grant interest u/s. 244A of the Act as per Law till the date of receipt of refund order.

7. ***Charge of Interest u/s. 234C***
M 7.1 On the facts and circumstances of the case and in law, the learned CTT(A) erred in not directing the learned AO to levy interest u/s. 234C of the Act as per Law on the basis of the Return of Income submitted and not as per the Assessed Income.

8. ***Charge of Interest u/s. 234D***
8.1 On the facts and circumstances of the case and in law, the learned CIT(A) erred in not directing the learned AO to levy interest u/s. 234D of the Act as per Law only on the refund withdrawn.

The above grounds of appeal are mutually exclusive & without prejudice to each other. The Appellant prays for appropriate relief based on the said ground of appeal and the facts and circumstances of the case. "

3. The grounds of appeal raised by Revenue in memo of appeal filed with the tribunal in ITA no. 812/Mum/2016 for AY 2010-11, read as under:-

> *"1) On the facts and circumstances of the case and in law, whether the CIT(A) was justified in deleting the addition made u/s. 40(a)(ia) of Rs.27,43,52,361/- claimed as 'Agency Discount' and treated as 'Commission' under the provisions of section 194H?*
>
> *2} On the facts and circumstances of the case and in law, whether the CIT(A) was justified in deleting the addition made u/s. 40(a)(ia) of Rs.27,43,52,361/-claimed as 'Agency Discount' and treated as 'Commission' under the provisions of section 194H, by holding that there is no evidence on record that the Agency has received any remuneration from the assessee for sale of its airtime, whereas the assessee has failed to prove that such income has 'not' been accounted by the Agency in assessment as well as appellate proceedings?*
>
> *3) On the facts and circumstances of the case and in law, whether the CIT(A) was justified in deleting the addition made u/s. 40(a)(ia) of Rs.27,43,52,361/-claimed as 'Agency Discount' by placing reliance on the decision of Living Media India Ltd. (ITA No, 3807(Del)/2005 for AY 2003-04 passed in May, 2007),the facts of which are not pari materia with that of the instant case.*
>
> *4) On the facts and in circumstances of the case and in law, whether the Ld.CIT(A) was justified in deleting the disallowance of website development expenses, despite the fact that the creation of website, results in bringing in an asset of enduring nature.*
>
> *5) On the facts and in circumstances of the case and in law, whether the Ld. CIT(A) was justified in deleting the disallowance made on account of excess commission paid to M/s. Bennet Coleman and Company Ltd. (BCCL), ignoring the fact that the said concern is a parent company of the assessee and the transaction is not at arm's length.*
>
> *6) On the facts and circumstances of the case and in law, where the disallowance u/s. 36(1)(iii) was made on the basis of ratio laid down by the CIT(A) in assessee's own case for AY 2009-10, whether the CIT(A) was justified in deleting the same by relying on the ITAT's decision in assessee's own case for earlier AY 2006-07 & AY 2007-08 without appreciating that the Hon'ble Supreme Court in the case of S.A. Builders Ltd, vs. CIT(Appeals) (2007) 288 ITR 1 (SC), had specifically held that there can be no continuing presumption as to utilization for a non-business purpose, and the facts of each year have to be considered separately.*
>
> *7) On the facts and circumstances of the case and in law, where the disallowance u/s. 36(1)(iii) was made on the basis of ratio laid down by the CIT(A) in assessee's own case for AY 2009-10, whether the CIT(A) was justified in deleting the same without appreciating the proportion of nexus between the interest expenditure and its extent of use for the purpose of business.*

8) The appellant prays that the order of CIT(A) on the above grounds be set aside and that of the Assessing officer be restored.

9) The appellant craves leave to amend or alter any ground or add a new ground which may be necessary."

4. The assessee is operating FM Radio Broadcasting Service.

4.2 The assessee has received net revenue of Rs. 230.04 crores from the advertising agency towards advertisements. The assessee has booked revenue in its books of accounts after netting off the agency commission. The assessee has used the term 'Agency Discount' instead of 'Agency Commission' . The AO observed that it is normal practice in the industry for advertising agencies to charge commission to the Media Company. The AO observed that gross revenue earned by the assessee was Rs. 257.95 crores while agency commission expenses were to the tune of Rs. 27.43 crores which was not separately reflected in the books of accounts and net revenue viz. gross advertising revenue less advertising commission paid to advertising agency, is reflected in its books of accounts and in P&L Account. The AO observed that the assessee has also not deducted income-tax at source u/s 194H of the 1961 Act on such agency commission paid by assessee to advertising agency . It was observed by AO that there are three entities to the transactions involving 'Agency Commission' , as under:-

Broadcast (assessee)
Advertising Agent
Advertiser

- *Broadcaster is an entity which broadcasts the advertisements.*
- *Advertising Agency is an entity which sources advertisements for advertiser.*
- *Advertiser is an entity which advertised its product/ service.*

4.3 The AO elaborately discussed this issue in its assessment order and came to conclusion that there is a principal agency relationship between the

assessee and advertising agency to whom commission is paid and the assessee ought to have deducted income-tax at source u/s. 194H of the 1961 Act on such advertising agency commission . The AO observed that the gross of advertising revenue is payable by the Advertising Agency to the assessee. The commission is payable by assessee to the Advertising Agency. The AO observed that the commission payable to the Advertising Agency is appropriated from the Gross Advertising Revenue. The AO observed that after deducting commission due to them the advertisement agency remits net advertising revenue to the assessee. The AO observed that provisions of Section 194H of the 1961 Act is clearly applicable on the said payments even if commission is retained by agent/consignee without actual payment from the consignor/principal , and it would be deemed to be 'constructive payment' which is subject to deduction of income-tax at source u/s 194H of the 1961 Act. The AO referred to Circular no. 619 issued by CBDT on 04.12.1991. The assessee was asked by AO during assessment proceedings to explain why the said amount of advertisement commission be not disallowed by invoking provisions of Section 40(a)(ia) read with Section 194H of the 1961 Act, for not deducting of income-tax at source on these advertising commission paid by assessee to advertising agencies.

4.4 The assessee on its part submitted that the deduction of 15% in invoice by advertisement agency is not commission paid to the advertising agencies and the billing done to the advertising agency by assessee is in the form of principal to principal relationship. The assessee explained that amount deducted in the invoice is a trade discount on the rate chargeable to advertising agency and not a commission .

4.5 The AO after considering the submissions of the assessee was of the view that section 194H of the 1961 Act is applicable and such payment made by the assessee is not discount but commission which is subject to provisions of Section 194H of the 1961 Act, wherein the AO held as under:-

> " *1. The nature and characteristic of payment is in the nature of Commission and not Discount.*
>
> *2. The relation between media and agency is Principal to Agent and not Principal to Principal.*
>
> *3. The Advertising Agencies Association of India (AAAI) has written a letter to the CBDT for seeking clarifications regarding*

TDS on commission wherein AAAI has admitted that they receive commission from media companies.

4. It is the Industry practice that Media gives Agency Commission to the Advertising Agencies and not trade discount in lieu of their services.

5. The Assessee has conveniently used the terminology "AGENCY DISCOUNT" in place of "AGENCY COMMISSION". This is a deliberate attempt of / by the Assessee to circumvent the otherwise normally applicable TDS Provision. Merely because the Assessee has chosen a nomenclature that suits it the best, the true character and nature of payment cannot be defeated by a coloring act. The substance of the transaction is as such that the Advertising Agency charges the commission for the services rendered by it and this is a time tested trade practice.

4.6. The AO was of the view that the advertising agency are performing services for the assessee as middleman and these advertising agencies are entitled for commission for services provided by them to the assessee. Further, the AO was of the view that discounts are allowances of concession in price which is given to induce buyer to place order and make payment in time. The AO also looked into relation between the assessee and the advertising agency and came to conclusion that relationship is that of principal to agent and not principal to principal, on following reasoning:-

" 1. The broadcasting of the advertisement is under the complete operation, control, management and execution of the assessee. The agency cannot independently perform release of advertisement without the full fledged involvement and intervention of the broadcaster. This necessarily means that it is a Principal to Agent relationship. The pricing factor of broadcasting the advertisements is predominantly dictated by the broadcaster. It is in this sense of the matter that the advertising agency cannot independently negotiate the price with the intending advertisers. All the decisions relating to broadcasting of advertisements are taken by the broadcaster including refusal to broadcast. The advertising agency has no control in regard hereto.

2. The advertisement has to comply with guidelines, norms and procedures set by MIB, TRAI, and PCI which are dictated only on the broadcaster. It is the duty of the broadcaster to advertise adult ads in the late night slot and not in the prime time slot. Therefore, the broadcaster is not mechanically telecasting the advertisement but only after vetting by it.

3. The agency cannot sell the Free Commercial Time (FCT) to any person whatsoever, which is also dictated by the

> *broadcaster. This is evident from the invoice which names the agency as well as the name of the advertiser.*
>
> *4. There is no principal to principal relationship also on the fact that it is prerogative of the broadcaster whether to air the advertisements or not.*
>
> *5. It is not sale of goods as there is no application of VAT but Service Tax has been applied in view of services. The advertising agency is merely a middleman between the advertiser and the broadcaster.*
>
> *6. The services are provided by the media only. There is no value addition in the services by the advertising agency. The end user of the services is the advertiser and the service provider is the broadcaster. The advertising agency is the middleman and facilitator rendering services to both the parties for which they earn commission."*

4.7. The AO relied upon the decision of Hon'ble Delhi High Court in the case of CIT v. Idea Cellular Limited (2010) 189 Taxman 118(Delhi). The AO also referred to CBDT circular number 715 dated 08.08.1995 wherein vide answer to question number 27 the CBDT specified that Section 194J of the 1961 Act is applicable on commission received by advertising agency from the media for deduction of income-tax at source, by answering question number 27 as under:

> *"Question 27* : Whether commission received by the advertising agency from the media would require deduction of tax at source under section 194J of the Act ?
>
> *Answer* : Yes."

4.8. The AO referred to decision of Hon'ble Kerala High Court in the case of CIT v. Director, Prasar Bharati, Doordarshan Kendra (2010) 189 Taxman 315 (Ker.) which had held this issue in favour of Revenue and additions were made to the income of the assessee by the AO to the tune of Rs.27,43,52,361/- u/s. 40(a)(ia) of the Act for non deduction of income-tax at source under Chapter XVIIB of the 1961 Act , vide assessment order dated 28.03.2013 passed by the AO u/s 143(3) of the 1961 Act.

5. The second issue concerns itself with disallowance of Business Promotion Expenses to the tune of 20% of the expense amounting to Rs. 16,75,990/- which led to disallowance of Rs. 3,35,198/- on the grounds that these

expenses were incurred by Managing Director and other employees for entertaining clients which include food expenses, bouquets, sweet boxes purchased for celebrities, clients, entry fees for ad club awards, movie tickets, tickets for cricket matches etc. and the business nexus of these expenses could not be proved by the assessee, which led the AO to make additions to the income of the assessee to the tune of Rs. 3,35,198/-, vide assessment order dated 28.03.2013 passed by the AO u/s 143(3) of the 1961 Act.

6. The next addition to the income as was made by the AO in an assessment order pertained to website creation expenses incurred by the assessee to the tune of Rs. 3,87,047/- which was held by the AO to be capital expenditure which the assessee ought to have capitalised in its Books of Accounts. The AO after holding that these website creation expenses are capital in nature however allowed depreciation on these website expenditure @ 60% while the balance amount of Rs. 1,54,819/- was disallowed and added to the income of the assessee by the AO, vide assessment order dated 28.03.2013 passed by the AO u/s 143(3) of the 1961 Act.

7. The next addition as was made by the AO to the income of the assessee in its assessment order pertains to commission @ 5% of the business generated by and through Bennett Coleman & Company Limited(hereinafter called " the BCCL") in favour of the assessee. it was observed by the AO that the said BCCL has financial stake in assessee and business was also procured by said BCCL in favour of the assessee on which commission was paid @ 5% which is on higher side as compared to industry standards. The assessee was asked by the AO to explain the same.

7.2 The assessee submitted that the commission is paid to BCCL @ 5% of the business procured through them. It was explained that the assessee has to pay in advance heavy fixed license fee for the station commissioned whether the same is fully operational or not. The assessee submitted that due to these fixed overhead , the breakeven point of the assessee is substantially high for which higher turnover is required to achieve profitability. The assessee submitted that BCCL tie up clients for 1-3 years with spend commitment given by the clients. The said BCCL has taken a financial stake in the assessee company. The assessee explained that

through this arrangement, the assessee gets a committed business without much marketing efforts. The assessee explained that management of deal and realisation of underlying outstanding dues is responsibility of BCCL and the assessee's costs are negligible. It was explained by assessee before the AO that the advertisers procured by BCCL are first time advertisers , who may not otherwise advertise on radio. The assessee submitted that it leads to higher inventory for the assessee and the turnover is in addition to the existing turnover marked by operation staff of the assessee and hence gives a better leverage to the contribution. The assessee explained before the AO that the assessee is paying commission to BCCL@5% on business procured by and through them as against normal commission in the media industry which is between 15-20%. The assessee submitted that it paid commission of Rs. 7,59,558/- to BCCL, which is disclosed in P & L account under the head 'Miscellaneous Expenditure'. The assessee submitted that similar issue arose in AY 2009-10, wherein the AO while framing assessment for AY 2009-10 has disallowed 50% of commission paid by the assessee to BCCL by holding as under:

> *"At the outset , it appears to be an unhealthy business practice wherein, the equity holder would demand business as a quid-pro-quo. It is a restrictive trade practice in as much as the client company cannot approach the competitors as they receive equity or funding from BCCL."*

The assessee explained that with the above remarks , the AO restricted commission to 50% in AY 2009-10 which is unjustified.

7.3 The AO after considering the submissions of the assessee was of the view that there is an intense competition in the advertisement industry wherein competitors are charging margin of 1.5% to 2% and hence margin of 5% paid by the assessee to BCCL is excessive . The AO was of the view that given the fact that BCCL is investing in the clients for obtaining business, a commission of 2.5% of the business procured through BCCL would be sufficient compensation to BCCL for its services. The AO also noted that BCCL is a parent company and provisions of Section 40A(2)(b) of the 1961 Act are also attractive and hence disallowance of Rs. 3,79,779/- being 50% of the commission paid to BCCL was affirmed by the AO , vide assessment order dated 28.03.2013 passed by the AO u/s 143(3) of the 1961 Act.

8. The next additions as was made by the AO to the income of the assessee related to disallowance of expenses incurred in relation to earning of an exempt income , to the tune of Rs. 62,16,426/- by invocation of provisions of Section 14A of the 1961 Act read with Rule 8D of the Income-tax Rules, 1962 , wherein additions were made by invoking Rule 8D2(ii) and 8D2(iii) of the 1962 Rules by the AO, by holding as under:-

"

i)	*The amount of expenditure directly relating to income which does not form part of total income*	*Nil*
ii)	*In a case where the assessee has incurred expenditure by way of interest during the previous year which is not directly attributable to any particular income or receipt, an amount computed in accordance with the following formula, namely:* $A \times \frac{B}{C}$ *Where* *A = amount of expenditure by way of interest other than the amount of interest included in clause (i) incurred during the previous year;* *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;* *3. For the purpose of this rule, the 'total assets' shall mean, total assets as appearing in the balance sheet excluding the increase on account of revaluation of assets but including the decrease on account of revaluation of assets.* *39,02,50,000/ 4,28,15,14,251 x 4, 67,94,141*	*42,65,176/-*
iii)	*An amount equal to one-half per cent of the average of the 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.* *39,02,50,000 X 0.5% (420,250,000 - 30,000,000) 30,000,000 consists of*	*19,51,250/-*

	growth funds	
	Total	*62,16,426/-*

Therefore disallowance u/s 14A r.w. Rule 8D works out to Rs.62,16,426/-."

8.2 While making aforesaid additions to the income of the assessee by disallowing expenses incurred in relation to earning of an income which is not chargeable to tax u/s 14A read with Rule 8D(2)(ii) and 8D(2)(iii) of the 1962 Rules, the AO noted the submissions of the assessee that no interest bearing funds were utilised for earning exempt income. The AO also noted that it was mixed use funds which were utilised by assessee for making investments in shares/mutual funds, wherein both interest bearing borrowed funds as well owned funds were utilised by the assessee. The AO noted that the investment profile of the assessee has undergone change during the year and administrative expenses and management time cost was incurred by the assessee for earning exempt income. The AO passed an assessment order dated 28.03.2013 u/s 143(3) of the 1961 Act to make additions to the income of the assessee by disallowing expenses of Rs. 62,16,426/- u/s 14A read with Rule 8D(2)(ii) and (iii) of the 1962 Rules purported to be incurred for earning of an exempt income.

9. The next ground on which additions to the income of the assessee was made by the AO vide assessment order dated 28.03.2013 passed by the AO u/s 143(3) of the 1961 Act, pertained to interest expense of Rs. 4,67,94,141/- , which was debited by the assessee in its P&L account. The assessee was asked by the AO to explain utilisation of the fund for which interest expenses were incurred. The assessee submitted that it is operating FM Radio Broadcasting Station through the Brand "Radio Mirchi" in 32 Indian cities and has setup FM Radio Broadcasting Station in 25 Indian cities. The assessee explained before the AO during assessment proceedings that in order to make its requirements toward expansion and working capital, the assessee came out with an IPO and also obtained loan from Bennett Coleman & Co. Ltd.. It was submitted by assessee that working

capital funds were used exclusively by the assessee for the purpose of its working capital requirements for its business. The assessee claimed that it had made investments in equity shares of its subsidiaries and mutual fund. It was submitted by assessee that no income was earned on sale of shares but income was earned on redemption of mutual fund which is offered by the assessee to tax as Short Term Capital Gain(STCG). The assessee relied upon the decision of Hon'ble Bombay High Court in the case of CIT v. Reliance Utilities & Power Ltd., (2009) 313 ITR 340 (Bom) and also relied upon decision of Hon'ble Supreme Court in the case of S.A. Builders Limited v. CIT (2007) 288 ITR 1(SC) for its claim of deduction of interest expenses .

9.2 The AO after considering submissions of the assessee was of the view that for AY 2006-07, 2008-09 and 2009-10 , this issue was decided by AO against the assessee . The AO was of the view that even in this year under consideration, the assessee has used loans for non business purposes and the assessee has failed to prove business expediency of the interest paid. The AO observed that for preceding years, the learned CIT(A) vide its appellate order no. CIT(A)-3/Addl.CIT/11(1)/IT-274/11-12 dated 31.12.2012 had apportioned the disallowable interest expenses and the appellate order of learned CIT(A) is acceptable to Revenue. Based upon the same, the AO disallowed an amount of Rs. 80 lacs @ 8% of the investment in its subsidiary to the tune of Rs. 10 crores, vide assessment order dated 28.03.2013 passed by the AO u/s 143(3) of the 1961 Act.

10. Aggrieved by an assessment framed by the AO u/s 143(3) of the 1961 Act wherein aforesaid addition(s) were made by the AO to the income of the assessee, the assessee filed first appeal before learned CIT(A).

10.2 With respect to the first issue wherein additions were made by the AO to the income of the assessee concerning disallowance of expenses towards advertising agency commission by invocation of Section 40(a)(ia) read with Chapter XVII-B of the 1961 Act for non deduction of income-tax at source u/s 194H of the 1961 Act, the assessee made elaborate submissions before learned CIT(A). The Ld. CIT(A) after considering submissions of the assessee was pleased to delete the additions as were made by the AO , vide appellate order dated 16.11.2015 passed by learned CIT(A), by holding as under:-

" 2.3 I have considered the findings of the AO as well as rival submission of the AR. I have also considered the facts and material on record. The dispute before me is whether the amount shown as 15% trade discount is discount or commission and whether tax is required to be deducted u/s 194H of the I.T. Act. The distinction between commission and discount is subtle and sometimes the words are interchanged. Therefore, before deciding the issue it is very important to understand the meaning of two words :-

Commission *has been defined in dictionary as under:-*

i. Commission" is percentage or allowance to factor or agent for transacting business for another

ii. "Commission" is compensation paid to another for service rendered in the handling of another's business or property and based proportionately upon the amount or value thereof"

iii. "Compensation is paid for work measured by results achieved.

iv. "Commission" generally denotes the compensation which a person can receive on sales"

A producer or manufacturer of goods, generally does not sell his goods directly to the ultimate consumer. There are agents who purchase the goods from the manufacturer and sell them to the consumer. In a sense, such agents bring the manufacturers and the consumers together for transaction. The remuneration which an agent gets for his services in the transaction is called commission. Most of the business transactions are made through intermediate persons.

Trade discount is an allowance or rebate from the listed price granted by the seller to buyer. In other words, Trade discount is an allowance made from the full invoice price to a customer who buys goods in the ordinary course of trade. For example, a whole seller may invoice goods to a retailer at the retail selling price less a discount of 25%; which represents the retailer's gross profit.

From above it is observed that the discount is for the customer or the buyer and commission is to the agent/middleman. Whether the appellant has appointed the advertising agency as its agent is 'a question of fact' and has to be determined based on the prevailing evidence.

The nature of work of the appellant and advertiser is completely different. Appellant is in the business of operating radio channel and sells its airtime to generate revenue whereas the advertising agency is in the business of creating advertisement and books airtime on radio/TV and space in print media on behalf of the advertisers. With regard to airtime sold to advertisers through advertising agency the appellant has given 15% discount on the tariff amount as per industry practice. The appellant has nowhere in its account shown as receivable this 15% discount. The terms and conditions between the advertisement agency and the appellant was perused. None of the clause of terms and conditions connotes that the appellant has appointed the advertising agency as their agent to bring the advertisement for sale of their air-time. There is nothing on record to prove that the advertising agency acted as an agent of the appellant. The sample invoice raised by the appellant as filed was perused and is summarised as under:

Invoice raised by ENIL on Lintas India Pvt. Ltd.
Invoice No.183010 dated *15.03.2010* ***Advertiser*** *Bajaj* ***Electricals Ltd.***

	Gross. Amount	*466,956*
	Agency Discount Credit	*70,043*
Subtotal	*3,96,913*	
Service tax	*40.882*	
Net due	*437,795*	

Invoice raised by Lintas India Pvt. Ltd. to Bajaj *Electricals* ***Ltd.***
Invoice No.1016004942 dated *12.05.2010*

Reimbursement of Broadcasting Charges	*396.913*
Service Tax	*40,882*
Total Broadcasting Charges - Reimbursement	*4,37,795*
Media Agency Commission @ 3% 14,009	
Service Tax	*1,443*
Grand Total	***453,247***

Thus from above it is clear that the advertising agency is raising the bill to the advertiser on net amount charged by the appellant i.e. Rs.3,96,913/- and charging separate commission from the advertiser. No commission is charged from the appellant by the advertising agency nor the appellant has given the advertising agency, any commission on purchase/sale of airtime. Therefore, no amount is transacted between the appellant and advertising agency which partakes the character of commission. Hence the stipulation of section 194H is not satisfied.

Section 194H talks about the payment to a recipient which is the income by way of commission or brokerage. The commission under the. Explanation (i) to section 194H is defined in an inclusive manner. 'Commission' under the definition includes payment received or receivable, directly or indirectly, by a person acting on behalf of another person for services rendered (not being professional services) or for any service in the course of buying or selling of goods or in relation to any transaction relating to any asset, valuable article; or thing (not being securities). It takes into account a situation where a person render's service to another person for which the person rendering service either receives or is entitled to receive, directly or indirectly payment from that another person to whom the service is rendered.

2.4 The Hon'ble Gujarat High Court in the case of Ahmadabad Stump Vendors Association vs Union of India has made a reference to the distinction between the 'commission' and 'discount' as explained in law dictionaries and in judicial pronouncement. The definition of commission as given in the Black's law dictionary is that;

"The recompense, compensation or reward of an agent, salesman, executor, trustee, receiver, factor; broker or bailee, when the same is calculated as a percentage on the amount of his transactions or on the profit to the principal. This was further elaborated in the decision of the Weiner vs Swales reported in 217 Md 123; as a fee paid to an agent employee for transacting a piece of business or performing a service.

2.5 The discount, in a general sense is, all allowance of deduction made from a gross sum on any account whatever; in a more limited and technical sense, the taking of interest in advance.

Further the Hon'ble Supreme Court in the above referred Gujarat High Court case cited in 348 ITR 378 (SC) dismissed the appeal of the department upholding that discount given to the stamp vendors for purchasing stamps in bulk quantity is in the nature of cash discount.

The Hon'ble Gujarat High Court has also considered the distinction between the commission and discount as explained by the Hon'ble Bombay High Court in the case of M/s.Harihar Cotton Pressing Factory vs. CIT reported in 39 ITR 594 wherein it has been explained the expression;

"Commission" has no technical meaning but both in legal and commercial acceptation of the term it has definite signification and is understood as an allowance for service or labour in discharging certain duties such for instance of an agent, factor, broker or any other person who manages the affairs or undertakes to do some work or renders some service to another. Rebate, on the other hand, is a remission or a payment back and of the nature of a deduction from the gross amount. "

The Hon'ble High Court has also considered the decision of the Hon'ble Apex Court in the case of M/s .Coromandel Fertilizers Ltd vs. Union of India reported in 17 ELT 607 wherein the Hon'ble Apex Court has applied the aforesaid principles and observed that;

'The trader discounts given to the dealers by the manufacturer were held to be liable to be deducted from the price charged to the dealers for the purpose of arriving at the excisable value of the goods; but the commissions given to the agents were held to be not deductible from the price for the purpose of arriving at the excisable value of the goods. "

It is clear from the various decisions as considered, by the Hon'ble Gujarat High Court that a discount is given from the gross price and it occurs at the instance of sale and purchase between the owner and the buyer, Whereas the commission is in the nature of refund or compensation for performing some task or business by one person on behalf of the other.

In the case in hand, the undisputed fact is that the amount of discount has been reduced from the value of price charged by the assessee from the advertising agency on sale of airtime.

2.6 The AO had relied on the the Hon'ble Delhi High Court in the case of Commissioner of Income-tax vs. M/s.Idea Cellular Ltd. reported in 325 ITR 148 which has also discussed the definition of commission as well as discount and also the difference between two terms/expression. There is no dispute that there is no necessity for a formal contract of agency it may be implied which could arise from the act and conduct of the parties or situation in which the parties are put as observed by the Hon'ble Supreme Court in the ease of Lakshminarayan Ram Gopal and Sons Ltd. v. Government of Hyderabad reported in 25 ITR 449.

In the case in hand, it is manifested from the records as well as from the facts and circumstances of the case that the benefit/incentive

given by the assessee is the nature of discount because the discount is always given at the 'time of transaction of sale and purchase between the owner and the advertising agency and the said amount is required to be reduced from the gross price and therefore, the sale price is always ex-discount and therefore the Idea Cellular Judgement relied upon by the AO is not applicable to the facts of the Appellant's case.

On the other hand, the commission is given only after the completion of the task or services or the sale, if it is on sale of products by the distributor or dealer to the retailer or consumers. When the distributor records the purchase price without reducing the amount of so called discount then the said benefit allowed by the assessee to the distributor, would not partake the character of discount.

2.7 The AO has also relied on the Kerala High Court's decision in the case of Commissioner of Income-tax, Thiruvananthapuram v. Director, Prasarbharti, Doordarshan Kendra [2010] 189 TAXMAN 315 (KER.) wherein advertisement charges were collected by agents on behalf of the assessee and the agents are allowed to retain their 15% of the commission. The facts of the Kerala High Court's decision has been clearly distinguished by the Appellants vide their submissions which is summarised below:

SNo	Nature of arrangement	Prasar Bharti & Advertising Agencies	ENIL & Advertisement Agencies
I	Appointment of Advertisement Agencies	Agents are appointed by Prasar Bharti	Agencies are appointed by Advertiser. ENIL has no role in the appointment of Agencies
2	Canvassing of Advertisements	Canvassed through Agents	Canvassed by sale team of ENIL
3	TDS Clause	Specific clause that tax shall be deductible at source on payment of trade discount	No such clause in the Terms and Conditions issued by ENIL to the Agency
4	Rendering of Service	Agents render service to Prasar Bharati	Agency render service to Advertiser
5	Control	Agents are controlled by Prasar Bharti	Agents are controlled by Advertisers.

6	*Entry passed for the transaction*	*Prasar Bharti passes entry for Rs. 100 received from the advertiser and then accounts for Rs. 15 as commission paid to Advertising Agency*	*ENIL accounts for Rs. 85/- as income received from the Agency. Rs. 15 is not accounted as expenditure by ENIL as this is in the nature of Trade discount.*

2.8. Further, the Hon'ble Allahabad High court in the case of Jagran Prakashan has held that "it is clear that no foundational facts exists on the basis of which any inference can be drawn that advertising agencies are agent of the petitioner and further advertising agencies render any. service to 'the newspaper".

2.9 The Hon'ble Delhi Tribunal in the case of ACIT vs. Living Media India Limited (ITA No 1264 of 2007) vindicates the appellant's position in the matter, in the above case too, the issue was the agency discount of 15% was reduced by the Company in its invoice when it had charged the balance 85% from the advertising agency. The Hon'ble Tribunal had then held that the provisions of section 194H of the Act cannot be invoked in the case of the said agency discount of 15%. Though rendered in the context of magazine advertisement, the issue before the Hon'ble Tribunal is similar to the one at hand. The Hon'ble Delhi High Court had approved the decision in the case of ACIT vs. Living Media India Limited (ITA No 1264 of 2007). The Hon'ble Supreme Court had dismissed the SLP filed by the revenue in that case vide its order dated 11 December 2009 (3433 of 2009). The assessee recognizes the revenue from sale of air time as per invoice/bills at which the airtime were sold to the advertising agency and the amount of discount is not separately treated as expenditure on account of sale of airtime and accordingly, not debited to the P&L account. This clearly brings out the case of the assesses to fall within the ambit of discount. The assessee has not appointed the advertising agency as its agent directly or indirectly. No evidence on record is produced by AO to show that the advertising agency was appointed by the appellant for sale of its airtime. The discounts have been offered by the appellant as per prevalent trade practice. The inventory of the airtime is always with the appellant. The advertising agency buys the airtime slots as per their desire and requirements of the advertiser. The appellant has no say in this regard. If a particular time slot remains vacant 'the loss is, of the appellant . Therefore the discount offered by the appellant on sale of airtime does not partake the character of commission. In the instant case also, there is no evidence on record to show that the advertising agencies were agent of the appellant directly or indirectly and they have received any remuneration from the appellant to sell their airtime. The discount given by the appellant was as per prevailing industry practice which the appellant was giving to any person who was buying airtime from them i.e. direct advertisers or the advertising agency It is also a fact that the revenue authorities have accepted the practice of broadcasters for several years and have not disputed the same.

> *2.9 The above issue has also been decided in favour of the appellant by the CIT (Appeals) - 14 while disposing off the Company's Appeal for the Assessment Years 2011-12 & 2012-13 against the Order of the ITO(OSD)(TDS)-1(2), Mumbai. In view of the aforesaid discussion and considering the legal and factual matrix of the case. I am of the considered opinion that the appellant is not required to make TDS thus following the above referred to decisions. The Assessing Officer is directed to delete the disallowance of Rs.27,43,52,361 /-."*

10.3 With respect to second issue of disallowance of 20% of the business promotion expenses which stood added to income of the assessee by the AO in an assessment framed u/s 143(3) of the 1961 Act, the learned CIT(A) was pleased to dismiss the appeal of the assessee , as in the opinion of learned CIT(A) the assessee could not prove business nexus of these expenses , vide appellate order dated 16.11.2015 passed by learned CIT(A) by holding as under:-

> *"3.3 I have considered the issue under appeal, carefully. I find that Ld. AO has rightly disallowed 20% of the total expenses of Rs. 16,25,990/- claimed to be Business Promotion Expenses. The reason is very obvious that most of the expenses are personal in nature, not related to any business need nor is incurred wholly and exclusively for the business purposes.* ***For example:*** *Expenses related to food, cannot be presumed to be for business purposes unless, demonstrated with any verifiable evidences. Similarly, the Expenses of Bouquets, cannot be presumed to be for and business purposes unless established with evidences that such bouquet has been presented for any such business purposes. Similarly, Sweets Boxes purchased for Celebrities is the application of income and not at all related to requirement of any business. The expenditure related to purchase of movie tickets and cricket tickets for IPL Matches or expenditure related to Taj Hotel and other Lunch Bills does not show any business need or business requirement. All the same, it reveals the fact that such expenses are more or less personal in nature or application of profit, hence it cannot be presumed to be incurred exclusively for business purposes Therefore, I find no merit in the counter argument of the Ld. A.R. that such expenses have been incurred for business promotion. As such, the disallowance of Rs.3,35,198/- being 20% of claimed Business Promotion Expenses is found to be correctly made by the AO. Therefore. disallowance of such expenditure is* ***sustained.***

10.4 On the next issue of disallowance of Rs. 1,54,819/- being website creation expenses which were held to be capital in nature by the AO on which depreciation @60% was allowed by the AO , while rest of the expenses to the tune of Rs. 1,54,819/- stood disallowed by the AO in an assessment framed u/s 143(3) of the 1961 Act, the Ld. CIT(A) was pleased to allow the said expenses vide appellate order dated 16.11.2015 , by holding as under:-

> *"4.3 I have considered the facts and perused the material on record. I find that website is needed for running day to day business and requires constant updating. Therefore, the benefit obtained by the appellant cannot be said that it has accrual in the capital field. The AR has rightly relied on the case of lndianvisit.com (P) Limited (176 Taxman 164) in which it was held that expenditure incurred on website has to be regarded as revenue expenditure. Similar views were also held in the case of Polyplex Corporation Ltd [176 Taxman 56] wherein it was held that business expenses incurred for development of website to promote business activities, and display information and product is allowable as revenue expenditure. The AR further relied in the case of Edelweiss Capital Limited, wherein the tribunal held that the expenditure incurred on website could not have been viewed as capital expenditure because the website is put up for purpose of day to day running of the business. Similar view was also in the case of M/s. R.R. Kabel Ltd's. The Addl. CIT wherein the expenditure relating to webhosting charges is regarded of revenue in nature. It is, further seen that this ground has been decided in favour by my predecessor white disposing off the Appellant's Appeal for the Assessment Year 2009-10 vide Order dated 31 December 2012. Respectfully following the above referred to decisions, the AO is directed to delete the disallowance of Rs. 1,54,819/-."*

10.5. With respect to the next disallowance of commission paid to BCCL to the tune of 2.5% of the business procured for the assessee as against commission @5% paid to BCCL for procurement of business for the assessee by or through BCCL, the learned CIT(A) was pleased to allow the ground raised by the assessee and deleted the additions to the income as were made by the AO vide appellate order dated 16.11.2015, by holding as under:-

> *" 5.3 I have considered the facts and find that the appellant could be able to obtain business from BCCL as BCCL is in the field of print media who has well established setup to for marketing and government of business. Therefore it is easy for BCCL to procure orders from their existing clients for advertisement in Radio Mirchi. This helped the appellant in collecting the best for which it secures the orders which also help in reducing the debt of the appellant. The appellant has incurred @ 5% fees to BCCL for procuring the business. Therefore there appears no unreasonable payment or excessive payment as commented by the AO. Therefore, provision of section 40A(2)(b) of the Act are not applicable in the case of appellant as the shareholding is below the threshold limit mentioned in the section. It is also seen from the assessment order that the AO has not demonstrated that the payment is excessive. It is also noticed that the AO has not pointed out an contemporary cases of similar cases or comparable cases to hold that the commission payment at the rate of 5% to BCCL is higher in "comparison to other such media agencies. Further, it is seen that this ground has been decided in favour of assessee by my predecessor while disposing off the Appellant's Appeal for the Assessment Year 2009-10 vide order dated 31 December 2012. Respectfully following the above referred to cases, Assessing Officer is directed to delete the disallowance of Rs. 3,79,779/-."*

10.6. With respect to the next ground of disallowance of expenditure incurred in relation to earning of an exempt income being made by the AO u/s. 14A of the 1961 Act read with Rule 8D(2)(ii) and 8D(2)(iii) of the 1962 Rules to the tune of Rs. 62,16,426/-, the learned CIT(A) was pleased to dismiss the grounds raised by the assessee and confirmed the additions as were made by the AO u/s. 14A of the 1961 Act r.w.r 8D(2)(ii) and (iii) of the 1962 Rules, by holding as under vide appellate order dated 16.11.2015 passed by learned CIT(A):-

> *" 6.3 I have considered the issue. It is seen that this ground has been decided against the appellant by my predecessor while disposing off the Appellant's Appeal for the Assessment Year 2009-10 vide Order No.CIT(A)-3/Addl.CIT11(1)/IT-274/11-12 dated 31 December 2012 is as under :-*
>
> *"I have considered the fact. It is seen that the Appellant has made investment in exempt income being equity shares in the subsidiary companies and investment in the mutual funds. Therefore, the claim of the appellant that no expenditure has been incurred for earning dividend income cannot be accepted as it is impossible to earn substantial exempt income without incurring any expenses. This view is also fortified by decision in the case of Citicorp Finance (India) Ltd. [2007] 108 ITD 471 (Mum) wherein it was held that "it is difficult to accept the hypothesis that one can earn substantial dividend income without incurring any expenses, whatsoever, Including management or administrative expenses and Gujarat Gas Financial Services Ltd. vs. ACIT [2008] 14 DTR (Ahd) (SB) 481] wherein it was held that there is no dispute and there cannot be any doubt, that some expenditure is incurred for making or earning the income from dividend. I find that Hon'ble Bombay High Court in the case of Godrej & Boyce Manufacturing Co. Ltd. vs. DCIT [2010] 328 ITR 81 (Bom). The Hon'ble High Court further lay down that the Assessing Officer can adopt a reasonable basis for effecting the appointment " Therefore, following the above decision, it would be reasonable to make the disallowance as per section 14A of the Act and read with Rule 8D of Income Tax Rule, 1962 It may also be noted that Rule 8D is made applicable for the A. Y. 2008-09 which has also been upheld by the Supreme Court in the case of Godrej & Boyce Manufacturing & Trading Co. Further, in the case of Chemivest Ltd. (121 ITD 318) (SB) (DL) wherein it was held that what one has to see is whether any expenditure were incurred by an assessee in relation to an income that does not form part of total income of the assesses under this Act and if the answer is in affirmative then that expenditure cannot be allowed irrespective of the fact that it was allowable under different provisions of the Act where a different phraseology is used in allowing that expenditure as the focus is to be on the disallowance within*

> *parameters of Section 14A, an overriding provision over allowance provisions. It would result in disallowance even of no income has resulted or made or earned by the assessee in the year under consideration. Therefore, in view of the provision sections 14A of the Act no deduction shall he allowed to the assessee in respect of expenditure in relation to the income which does not form part of the total income under the Act. wherever such expenses are not readily available, the same is to be ascertained. Therefore, the disallowance made u/s. 14A read with Rule 8D are accordingly confirmed.*
>
> *Respectfully following the earlier decision, the disallowance made of Rs.62,16.426/- is sustained."*

As could be seen above, the Ld. CIT(A) while passing the appellate order for impugned assessment year, was pleased to follow the appellate order passed by Ld. CIT(A) for AY 2009-10 in assessee's own case vide order no. CIT(A)-3/Addl.CIT-11(1)/IT-274/11-12 dated 31.12.2012 and adjudicated the issue against the assessee by dismissing appeal of the assessee.

10.7. The next ground raised by assessee before learned CIT(A) was with respect to disallowance of proportionate interest expenses to the tune of Rs. 80 lacs disallowed by the AO and added to the income of the assessee, by following the decision of Ld. CIT(A) for the AY 2009-10. The learned CIT(A) while adjudicating appeal for the impugned AY 2010-11 under consideration observed that this issue also came up in AY 2006-07 and 2007-08 in assessee's own case which was adjudicated by Mumbai-tribunal vide ITA no. 3114/Mum/2011 and ITA no. 1063/Mum/2011 vide orders dated 26.12.2012 in favour of the assessee, wherein additions as were made by the AO which were partly confirmed by learned CIT(A) were deleted by Mumbai-tribunal. The learned CIT(A) by Respectfully following the appellate orders passed by Mumbai-tribunal for AY 2006-07 and 2007-08 in assessee's own case, allowed the appeal of the assessee vide appellate order dated 16.11.2015 passed by learned CIT(A), by holding as under:-

> *"7.3 I have gone through the submissions of the Appellant. It is also seen from the submissions that the ITAT, Mumbai has accepted the contentions of the Appellant and decided the issue in its favour for the Assessment Years 2006-07 and 2007-08. Vide ITA No.3114/Mum/2011 and ITA No. 1063/Mumbai/2011 dated 26.12.2012. Respectfully following the decision of Hon'ble ITAT. The AO is directed to delete the disallowance of expenditure of Rs.80,00,000/-."*

10.8 With respect to disallowance u/s. 14A r.w.s. 115JB of the 1961 Act for computing Book Profit on which MAT is payable , the Ld. CIT(A) dismissed the ground of appeal raised by the assessee in its first appeal challenging the additions as made by the AO, wherein learned CIT(A) vide appellate order dated 16.11.2015, held as under:-

> *"8.2 I have considered the issue under appeal carefully. Under section 115JB , Explanation 1 provides for increase of Book Profit by adjusting amount of expenditure relatable to any income to which section 10 (other than provisions contained in clause (38) thereof) or section 11 or section 12 apply. Thus, the expenditure disallowed u/s. 14A has to be adjusted. As Far as section 115JB is concerned, at the outset it is necessary to clarify that the case of the present appeal falls under this section and not under section 115J of the Act which has been relied upon by the Ld. AR for non disallowance under section 14A of the Act. However, in both sections 115J as well as in section I15JB of the Act a saving clause has been incorporated which is extracted as under:-*
>
> > *"Save as otherwise provided in this section, all other provisions of this Act shall apply in every assessee, being a company, mentioned in this section."*
>
> *It is relevant to note that decisions relied upon by the Ld. A.R. were rendered under section 115J wherein such a saving clause was not incorporated. The said reasoning was based on the fact that it is only in respect of the deemed income for which the provision of section 115J had been incorporated and when a deemed fiction is brought under the statute, it should be carried to the logical conclusion but without creating further deeming fiction so as to include other provisions of the Act which are not specifically made applicable. The case laws cited by the Ld. A.R. are distinguishable on facts of the case. Under section 115JB of the Act, sub-section (5) clearly states that other provisions of the Act shall apply to every assessee being a company, save as otherwise provided in the said section. In this context , Circular No. 14 of 2001 has also been issued by the CBDT as per which companies covered by the provisions of section 115JB are liable to pay advance tax and consequently, section 234B and 234C of the Act are applicable. The Hon'ble Supreme Court in the case of JCIT Vs. Rolta India Ltd. (2011) 330 ITR 470(SC) has ruled that section 115J is a special provision. It is clear from reading section 115J and 115JB that the question whether a company which is liable to pay tax under either provisions does not receive importance because specific provisions are made in the section saying that all other provisions of the Act so apply to MAT copy under Section 115(A) and 115JB(5). Respectfully following the proposition declared by the Hon'ble Supreme Court in the case of JCIT Vs. Rolta India Limited and in view of the fact that there is no exclusion of Section 115JB in the statutory disallowance of expenses to earn*

exempt income under section 14A of the Act r.w.r. 8D of I.T. Rules. 1962, it is held that statutory disallowance under section 14A r.w.r.8D of I.T. Rules, 1962 is applicable to the facts of the present case. In view of the specific provisions in section 115JB(5) to the effect that all other provisions of the Act shall apply to the MAT company, the statutory disallowance under section 14A r.w.r.8D is applicable in respect of working out the book profit under section 1I5JB of the Act. Therefore, the appellant is responsible for MAT and such enhancement of book profit made by the A.O. is within the ambit of law prescribed u/s. 115JB. As such, the addition so made of Rs.62,16,426/-in book profit is sustained.

8.3. In the result, Ground No.7 is dismissed."

11. Aggrieved by an appellate order dated 16.11.2015 passed by learned CIT(A), both assessee and revenue have come in appeal before the tribunal as cross appeals are filed by both the rival parties.

11.2. The learned counsel for the assessee opened arguments before the Bench. The first issue concerns itself with disallowance by the AO of advertising commission paid to advertising agency by the assessee and its addition to income of the assessee by the AO on the grounds that no income-tax was deducted at source by assessee on these payments by invoking provisions of Section 40(a)(ia) read with Section 194H of the 1961 Act , wherein later said additions stood deleted by learned CIT(A). The Revenue is aggrieved by said deletion of additions by learned CIT(A) and has come in appeal before the tribunal vide ground number 1 to 3 raised in its memo of appeal filed with tribunal. It is submitted by learned counsel for the assessee at the outset that this issue is covered by the decision of Mumbai-tribunal in assessee's own case for AY 2011-12 and 2012-13. The assessee has filed copies of appellate orders passed by Mumbai-tribunal in assesse's own case in ITA no. 1352/Mum/2014 and ITA no. 5227/Mum/2014 , vide common orders dated 11.01.2017 , for AY 2011-12 and 2012-13 respectively. It was also fairly brought to our notice by learned counsel for the assessee that Hon'ble Supreme Court has now decided this issue in the case of Director, Prasar Bharati v. CIT reported in (2018) 92 taxmann.com 11(SC) ; (2018) 403 ITR 161(SC), which appeal before Hon'ble Supreme Court arose from judgment of Hon'ble Kerala High Court decision in the case of Director Prasar Bharati(supra) , which decision of Hon'ble Kerala High

Court was referred to in by the authorities below while adjudicating this issue . The learned counsel for the assessee has explained before the Bench that all other issues which arose in these cross appeals are covered by the decision of the Mumbai-tribunal in assessee's own case for earlier years except disallowance of website creation charges which is a new issue which is so far not adjudicated by tribunal in assessee's own case. The assessee has also prepared and filed a chart of various issues which are emanating in these cross appeals and details as to the how these issue's are covered by tribunal decision in assessee's own case . The said chart is placed in file. The assessee has made statement before us that no exempt income was received by the assessee during the previous year relevant to the impugned assessment year. The assessee has also filed earlier years appellate orders passed by Mumbai-tribunal in cross appeals in assessee's own case in ITA no. 181 & 238/Mum/2012 for AY 2008-09 and Mumbai-tribunal decision in ITA No. 1864 & 1910/Mum/2013 for AY 2009-10 respectively , vide common orders dated 04.10.2017. The assessee has also filed before the Bench , decision of Mumbai-tribunal in assessee's own case in ITA no. 3114 & 1863/Mum/2011 for AY 2006-07 and ITA no. 3115/Mum/2011 for AY 2007-08, vide common order dated 26.12.2012. The assessee has also relied on judgment of Hon'ble Delhi High Court decision in the case of CIT v. Indian Visit.com Private Limited (2009) 176 Taxman 0164(Del. HC) to contend that website creation charges be allowed as Revenue expenses u/s 37(1) of the 1961 Act. All these orders/judgments are placed in file.

11.3. The Ld. DR would rely upon the orders of the authorities below viz. appellate order passed by learned CIT(A) for the issues adjudicated against the assessee while reliance is placed by learned DR on assessment order passed by AO with respects to issues wherein part relief was granted by learned CIT(A) to the assessee.

12. First we will dispose of Revenue's appeal in ITA no. 812/Mum/2016 filed with tribunal for AY 2010-11. We have considered rival contentions and have perused the material on record including cited case laws . We have observed that the assessee is operating FM Radio Broadcasting Service. The gross revenue earned by the assessee from advertisement was Rs. 257.95 crores while agency commission expenses were to the tune of Rs. 27.43 crores which was not separately reflected in the books of accounts and net

revenue from advertisement viz. gross advertising revenue less advertising commission paid to advertising agency, is reflected in its books of accounts and in audited P&L Account. We have observed that the assessee has not deducted income-tax at source u/s 194H of the 1961 Act on such agency commission paid by assessee to advertising agency . It is observed that there are three entities to the transactions involving 'Agency Commission' , as under:-

Broadcast (assessee)
Advertising Agent
Advertiser

- *Broadcaster is an entity which broadcasts the advertisements.*
- *Advertising Agency is an entity which sources advertisements for advertiser.*
- *Advertiser is an entity which advertised its product/ service.*

12.2 The assessee is using the terminology 'Agency Discounts' as against 'Agency Commission' for commissions paid to advertising agencies. We have observed that the advertisers pays for advertisements placed in FM radio channel broadcasted by assessee. The said payment is firstly made by advertiser to the advertising agency on which income-tax is deducted at source u/s 194C by advertiser while making payment to advertising agency. The advertising agency in turn make payments to assessee after retaining their commission @15% and net revenue is received by assessee after retention of agency commission by the advertising agency on advertisements procured by them from advertisers. The assessee did not deducted income-tax at source on these advertising agency commission retained by advertising agency. The said net revenue from advertisement after adjusting of advertising agency commission is accounted for by the assessee in its books of accounts and Profit and Loss Account. Thus, the assessee has not claimed advertising agency commission expenses as separate expenses in its books of accounts and in P&L account prepared by it. This issue came up

before tribunal for AY 2011-12 and 2012-13 in assessee's own case and we have observed that the tribunal in assessee's own case vide common order dated 11.01.2017 in ITA No. 1352/Mum/2014 and 5227/Mum/2014 for AY 2011-12 and 2012-13 respectively has adjudicated this issue in favour of the assessee wherein the tribunal came to the conclusion that no income-tax was required to be deducted at source by assessee under Chapter XVII-B on these advertising agency commission paid to advertising agencies , by holding as under:-

> *"4.8. We have gone through the orders passed by the lower authorities and facts of this case and also the judgment relied upon before us. It is noted by us that now the issue of obligation of deduction of tax at source by the Television Channels or Media Companies upon the payments made to advertising agencies has been settled by the board in its circular No.5/2016 dated 29th February 2016. We find it appropriate to reproduce the relevant part of this circular as under:*
>
>> *Sub: Tax Deduction at Source (TDS) on payments by television channels and publishing houses to advertisement companies for procuring or canvassing for advertisements.*
>>
>> *The issue of applicability of TDS provisions on payments made by television channels or media houses publishing newspapers or magazines to advertising agencies for procuring and canvassing for advertisements has been examined by the Board in view of representations received in this regard.*
>>
>> *2. It is noted that there are two types of payments involved in the advertising business:*
>>
>> *(i) Payment by client to the advertising agency, and*
>>
>> *(ii) Payment by advertising agency to the television channel/ newspaper company*
>>
>> *The applicability of TDS on these payments has already been dealt with in Circular No. 715 dated 8.8.1995, where it has been clarified in Questions No. 1 & 2 that while TDS under section 194C (as work contract) will be applicable on the first type of payment, there will be no TDS under section 194C on the second type of payment e.g. payment by advertising agency to the media company.*
>>
>> *3. However, another issue has been raised in various cases as to whether the fees/ charges taken or retained by advertising companies from media companies for canvasing/ booking advertisements*

(typically 15% of the billing) is 'commission' or 'discount'. It has been argued by the assessees that since the relationship between the media company and the advertising company is on a principal-to principal basis, such payments are in the nature of trade discount and not commission and, therefore, outside the purview of TDS under section 194H. The Department, on the other hand, has taken the stand in some cases that since the advertising agencies act on behalf of the media companies for procuring advertisements, the margin retained by the former amounts to constructive payment of commission and, accordingly, TDS under section 194H is attracted.

4. The issue has been examined by the Allahabad High Court in the case of Jagran Prakashan Ltd and Delhi High Court in the matter of Living Media Limited and it was held in both the cases that the relationship between the media company and the advertising agency is that of a 'principal to principal' and, therefore, not liable for TDS under section 194H. The SLPs filed by the Department in the matter of Living Media Ltd. and Jagran Prakashan Ltd have been dismissed by the Supreme Court vide order dated 11.12.2009 and order dated 05.05.2014, respectively. Though these decisions are in respect of print media, the ratio is also applicable to electronic media/ television advertising as the broad nature of the activities involved is similar.

5. In view of the above, it is hereby clarified that no TDS is attracted on payments made by television channels/ newspaper companies to the advertising agency for booking or procuring of or canvassing for advertisements. It is also further clarified that 'commission' referred to in Question No.27 of the Board's Circular No. 715 dated 8.8.95 does not refer to payments by media companies to advertising companies for booking of advertisements but to payments for engagement of models, artists, photographers, sportspersons, etc. and, therefore, is not relevant to the issue of TDS referred to in this Circular.

4.8. Thus, from the above circular it is clear that this issue is now settled in favour of the assessee on the basis of judgments of Hon'ble Allahabad High Court in the case of Jagran Prakashan Ltd. and Delhi High Court in the matter of T.V. Today Network Ltd. Both these judgments have been accepted by Hon'ble Supreme Court by dismissing SLP's filed by the department against these judgments. Further, relying upon these judgments, now Board has also taken a clear stand that no TDS is required to be deducted on the impugned payments made by the assessee to the advertising agency. Thus, we find

> *that the order passed by the Ld. CIT(A) is in consonance with the aforesaid judgments and Board's circular. Therefore, no interference is called for in the order passed by Ld. CIT(A). Thus, ground no.1 raised by the Revenue is dismissed."*

12.3 We have also observed that now this issue is no more res integra as Hon'ble Supreme Court has decided this issue by analysing the whole gamut of deductibility of income-tax at source under section 194H of the 1961 Act on payments made by Media Houses/Broadcasters to advertising agencies in a recent judgment pronounced on 03.04.2018 in Director, Prasar Bharati v. CIT reported in (2018) 403 ITR 161(SC) wherein several tests were laid down by Hon'ble Supreme Court as to applicability of Section 194H on these advertising agency commissions, by holding as under:-

> " ***3.*** *These appeals are directed against the final judgment and order dated 20.11.2009 passed by the High Court of Kerala at Ernakulam in Income Tax Appeal No.27 of 2009 and Income Tax Appeal No.62 of 2009 whereby the High Court allowed the appeals preferred by the respondent herein and reversed the order dated 28.03.2007 passed by the Income Tax Appellate Tribunal, Cochin Bench in Income Tax Appeal Nos. 926 & 927/COCH/2005 for the Assessment Years 2002-2003 and 2003-2004 and restored the order dated 04.03.2005 passed by the Commissioner of Income Tax(Appeals)-II, Thiruvananthapuram and the order dated 22.09.2003 passed by the Assessing Officer.*
>
> ***4.*** *In order to appreciate the issue involved in these appeals, it is necessary to set out the facts hereinbelow.*
>
> ***5.*** *The appellant is known as "Prasar Bharati Doordarshan Kendra". It functions under the Ministry of Information and Broadcasting, Government of India. The dispute in this case relates to the appellant's Regional Branch at Trivandrum.*
>
> ***6.*** *The appellant, in the course of their business activities, which include the running of the TV channel called "Doordarshan", has been regularly telecasting advertisements of several consumer companies.*
>
> ***7.*** *With a view to have a better regulation of the practice of advertising and to secure the best advertising services for the advertisers, the appellant entered into an agreement with several advertising agencies (Annexure-P-12).*
>
> ***8.*** *In terms of the agreement, the advertising agency (hereinafter referred to as "the Agency") was required to make an application to the appellant to get the "accredited status" for their Agency so as to enable them to do business with the appellant of telecasting the*

advertisements of several consumer products manufactured by several companies on the appellant's Doordarshan TV Channel.

9. *The agreement, inter alia, provided that the appellant would pay 15% by way of commission to the Agency. The Agency was to retain the commission/remuneration earned and not to part the same either directly or indirectly with any other person, advertiser or representative of any advertiser for whom it may be acting or has acted as an advertising agency. The agreement also provided the manner, mode and the time within which the payment was to be made by the Agency to the appellant. The failure to make the payment was to result in losing the accredited status by the Agency. The Agency was to give minimum annual business of Rs.6 Lakhs to the appellant in a financial year failing which their accredited status was liable to be withdrawn. The Agency was to furnish a bank guarantee for a sum of Rs.3 Lakhs. There are other clauses also in the agreement but they are not relevant for the purpose of disposal of these appeals.*

10. *The appellant is an assessee under the Income Tax Act (hereinafter referred to as "the Act"). In the assessment year 2002-2003(01.06.2001 to 31.03.2002) and 2003-2004 (01.04.2002 to 31.03.2003), the appellant paid a sum of Rs.2,56,75,165/- and Rs.2,29,65,922/- to various accredited Agencies, with whom they had entered into the aforementioned agreement for telecasting the advertisements given by these Agencies relating to products manufactured by several consumer companies. The amount was paid by the appellant to the Agencies towards the commission in terms of the agreement.*

11. *The question arose before the Assessing Officer (AO) in the assessment proceedings as to whether the provisions of Section 194H of the Act, which came into force with effect from 01.06.2001, are applicable to the payments in question made by the appellant to the Agencies and, if so, whether the appellant deducted "tax at source" as provided under Section 194H of the Act from the amount paid by the appellant to the Agencies.*

12. *The AO made the assessment vide its order dated 22.09.2003. Insofar as the aforementioned question was concerned, the AO was of the view that the provisions of Section 194H of the Act are applicable to the payments made by the appellant to the Agencies because the payments were made in the nature of "commission" as defined in Explanation appended to Section 194H of the Act. The AO held that the appellant, therefore, committed default thereby attracting the rigor of Section 201(1) of the Act because they failed to deduct the "tax at source" from the amount paid to various advertising agencies during the Assessment Years in question as provided under Section 194A of the Act.*

13. *On quantification, the AO found that during the Assessment Year 2002-2003, the appellant had paid a sum of Rs.2,56,75,165/- towards the commission to the Agencies and on this sum, they were required to*

deduct tax amount to Rs.16,34,283/- and a sum of Rs.3,80,611/- towards interest for delayed payment under Section 201(1-A) of the Act and during the Assessment Year 2003-2004, the appellant had paid a sum of Rs.2,29,65,922/- towards the commission to the Agencies and on this sum, they were required to deduct tax amounting to Rs.11,15,944/- and a sum of Rs.1,54,050/- towards interest for delayed payment under Section 201(1-A) of the Act.

***14.** The appellant felt aggrieved and filed appeals before the Commissioner of Income Tax (Appeals)-II, Thiruvanathapuram. By order dated 04.03.2005, the Commissioner concurred with the reasoning and conclusion arrived at by AO and accordingly dismissed the appeals.*

***15.** The appellant felt aggrieved and filed appeals before the Tribunal. By order dated 28.03.2007, the Tribunal following its earlier order allowed the appeals and set aside the orders passed by AO and CIT (Appeals).*

***16.** The Revenue (Income Tax Department), felt aggrieved by the order passed by the Tribunal, filed appeals under Section 260-A of the Act in the High Court. By impugned judgment, the High Court allowed the appeals and while setting aside the Tribunal's order restored the order of CIT (Appeals) and AO.*

***17.** The High Court was of the opinion that the provisions of Section 194H are applicable to the payments made by the appellant to the Agencies during the period in question because the payments made were in the nature of "commission" paid to the Agencies as defined in Explanation appended to Section 194H of the Act and since the appellant failed to deduct the "tax at source" while making these payments to the Agencies in terms of the agreement in question, they committed default of non-compliance of Section 194H resulting in attracting the provisions of Section 201 of the Act.*

***18.** The appellant (assessee) felt aggrieved and filed these appeals by way of special leave in this Court.*

***19.** Heard Mr. Rajeev Sharma, learned counsel for the appellant and Mr. Rupesh Kumar, learned counsel for the respondent.*

***20.** Submissions of learned counsel for the appellant (assesse) were two-fold. In the first place, he argued that the payments made by the appellant to the accredited agencies during the assessment years in question were not in the nature of commission. According to learned counsel, the relationship between the appellant and the accredited Agencies was not that of principal and the agent but it was in the nature of principal-to-principal. In other words, the submission was that the accredited agencies were not working as agent of the appellant and nor the appellant was paying them any amount by way of commission.*

21. *Referring to the terms of the agreement, learned counsel tried to point out that the Agencies, in terms of the agreement, purchased the air time from the appellant and then sold it in the market for advertisement to their customer after retaining 15% commission given to them by the appellant. It was, therefore, his submission that such transaction cannot be regarded as being between the principal and agent and nor the payment can be regarded as having been made by way of commission so as to attract the rigor of Section 194H and Section 201 of the Act.*

22. *Learned counsel also submitted that by mistake some other format of the agreement was placed by the appellant before the High Court and, therefore, the appellant suffered adverse order in question (see averments made in Paras 4 and 5 of the application seeking permission to file additional documents at page 134/135). Learned counsel then took us to the relevant provisions of the proper agreement filed in this Court as Annexure P-12 and contended that having regard to the nature of the agreement and its terms, the submission urged deserves acceptance.*

23. *In reply, learned counsel for the respondent (Revenue) supported the impugned judgment and contended that the order passed by the AO, CIT (Appeals) and the impugned judgment deserve to be upheld as all the three orders are based on proper reasoning calling no interference.*

24. *Having heard the learned counsel for the parties and on perusal of the record of the case, we find no merit in these appeals.*

25. *Section 194H, which is relevant for the disposal of these appeals reads as under:*

'194H. Commission or brokerage-Any person not being an individual or a Hindu undivided family, who is responsible for paying, on or after the 1st day of June, 2001, to a resident, any income by way of commission (not being insurance commission referred to in section 194D) or brokerage, shall, at the time of credit of such income to the account of the payee or at the time of payment of such income in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rate of five per cent.

Provided that no deduction shall be made under this section in a case where the amount of such income or, as the case may be, the aggregate of the amounts of such income credited or paid or likely to be credited or paid during the financial year to the account of, or to, the payee, does not exceed fifteen thousand rupees.

Provided further that an individual or a Hindu undivided family, whose total sales, gross receipts or turnover from the business or profession carried on by him exceed the monetary limits specified under clause (a) or clause (b) of section 44AB during the financial year immediately preceding the financial year in which such

commission or brokerage is credited or paid, shall be liable to deduct income-tax under this section.

Provided also that no deduction shall be made under this section on any commission or brokerage payable by Bharat Sanchar Nigam Limited or Mahanagar Telephone Nigam Limited to their public all office franchisees.

Explanation- For the purposes of this section,—

(i) "commission or brokerage" includes any payment received or receivable, directly or indirectly, by a person acting on behalf of another person for services rendered (not being professional services) or for any services in the course of buying or selling of goods or in relation to any transaction relating to any asset, valuable article or thing, not being securities;

(ii) the expression "professional services" means services rendered by a person in the course of carrying on a legal, medical, engineering or architectural profession or the profession of accountancy or technical consultancy or interior decoration or such other profession as is notified by the Board for the purposes of section 44AA;

(iii) the expression "securities" shall have the meaning assigned to it in clause (h) of section 2 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956);

(iv) where any income is credited to any account, whether called "suspense account' or by any other name, in the books of account of the person liable to pay such income, such crediting shall be deemed to be credit of such income to the account of the payee and the provisions of this section shall apply accordingly.'

26. *The aforementioned Section was inserted in the Act with effect from 01.06.2001 by replacing the earlier Section 194H. This Section deals with the payment of "commission or brokerage".*

27. *It provides that any person other than individual or HUF, responsible for paying any income by way of "commission" (not being insurance commission as specified in Section 194D) or "brokerage" to any person shall at the time of credit of such income to the account of payee or at the time of payment of such income in cash or by cheque or draft or any other mode will deduct income tax thereon at the rate of five percent. The first proviso specifies the limit. The second proviso makes the individual or HUF liable to deduct the income tax, if they exceed the limit specified therein. The third proviso exempts payment of commission or brokerage when made to BSNL and MTNL to their public call office franchisees.*

28. *The Explanation appended to Section 194H defines the expression "commission or brokerage". It is an inclusive definition and includes therein any payment received or receivable, directly or indirectly by a*

person acting on behalf of another person for services rendered (not being professional services) or for any services in the course of buying or selling of goods or in relation to any transaction relating to assets, valuable article or thing not being securities. Clause (ii) defines professional services; clause (iii) defines securities; and clause (iv) provides a deeming fiction for treating any income so as to attract the rigor of the Section for ensuring its compliance.

***29.** Keeping in mind the requirements of Section 194H when we examine the transaction in question, we are of the considered view that the reasoning and the conclusion arrived at by the AO, CIT (Appeals) and the High Court appears to be just and proper and does not call for any interference.*

***30.** In other words, in our considered view, the High Court was right in holding that the provisions of Section 194H are applicable to the appellant because the payments made by the appellant pursuant to the agreement in question were in the nature of payment made by way of "commission" and, therefore, the appellant was under statutory obligation to deduct the income tax at the time of credit or/and payment to the payee.*

***31.** The aforementioned conclusion of the High Court is clear from the undisputed facts emerging from the record of the case because we notice that the agreement itself has used the expression "commission" in all relevant clauses; Second, there is no ambiguity in any clause and no complaint was made to this effect by the appellant; Third, the terms of the agreement indicate that both the parties intended that the amount paid by the appellant to the agencies should be paid by way of "commission" and it was for this reason, the parties used the expression "commission" in the agreement; Fourth, keeping in view the tenure and the nature of transaction, it is clear that the appellant was paying 15% to the agencies by way of "commission" but not under any other head; Fifth, the transaction in question did not show that the relationship between the appellant and the accredited agencies was principal to principal rather it was principal and Agent; Sixth, it was also clear that payment of 15% was being made by the appellant to the agencies after collecting money from them and it was for securing more advertisements for them and to earn more business from the advertisement agencies; Seventh, there was a clause in the agreement that the tax shall be deducted at source on payment of trade discount; and lastly, the definition of expression "commission" in the Explanation appended to Section 194H being an inclusive definition giving wide meaning to the expression "commission", the transaction in question did fall under the definition of expression "commission" for the purpose of attracting rigor of Section 194H of the Act.*

***32.** For all these reasons, we find no difficulty in holding that the payment in question was in the nature of "commission" paid by the appellant to the advertisement agencies to secure more business for the appellant.*

33. *Once it is held that the provisions of Section 194H apply to the transactions in question, it is obligatory upon the appellant to have deducted the income tax while making payment to the advertisement agencies. The non-compliance of Section 194H by the assessee attracts the rigor of Section 201 which provides for consequences of failure to deduct or pay the tax as provided under Section 194H of the Act.*

34. *In our view, the provisions of Section 201 were, therefore, rightly invoked in this case against the appellant by the assessing authority once having held that the appellant failed to comply with the provisions of Section 194H of the Act.*

35. *Learned counsel for the appellant (assessee) placed reliance on the decision of the Allahabad High Court in Jagran Prakashan Ltd v. Dy. CIT (TDS) [2012] 345 ITR 288/209 Taxman 92/21 taxmann.com 489 in support of his submission.*

36. *On perusal of the said judgment, we find that the law laid down by the Allahabad High Court is not applicable to the facts of the case at hand and the learned Judges rightly distinguished the case at hand with the facts involved in the Allahabad case. The learned Judges of the Allahabad High Court in Paras 61 and 62 of the judgment dealt with the impugned judgment with which we are concerned in these appeals and distinguished it in the following words:*

"61. Now we come to the judgment of the Kerala High Court in the case of CIT v. Director, Prasar Bharti reported in [2010] 325 ITR 205(ker.) on which much reliance has been placed by the assessing authority. The Prasar Bharati is fully owned Government of India undertaking engaged in telecast of news, various sports, entertainments, cinemas and other programmes. The advertisements were canvassed through agents under the agreement with them. The advertising agencies and the Director, Prasar Bharati were principal and agent as per the agreement and the Doordarshan provided 15% discount on the basis of which it was contended that no deduction at source was required. The Tribunal held that there was no liability for deduction of tax at source under Section 194H which judgment was reversed by the Kerala High Court. From the facts of the aforesaid case, it is clear that Doordarshan had appointed agents i.e. advertising agencies and there was agreement entered between them. In the aforesaid circumstances, 15% advertisement charges collected and remitted was held to be in the form of commission payable to the agent by Doordarshan. There was explicit agreement between the agency and the Doordarshan where both understood that payment made to the agency was liable to tax deduction. It is useful to quote the following observations of the judgment of Kerala High Court:—

* * *
* * *

From the above, it is very clear that parties have understood their relationship as Principal and Agent and what is paid to the agent by Doordarshan is 15% of advertisement charges collected and remitted to it by the agent which is in the form of commission payable to the Agent by Doordarshan. Counsel for the respondent referred to one of the agreements where the commission is referred to as standard discount and contended that the arrangement between respondent and advertising agency is not agency but is a Principal to Principal arrangement of sharing advertisement charges. We are unable to accept this contention because advertisement contract entered into between the customer and the agency is for telecasting advertisement in Doordarshan channels. The agent canvasses advertisement on behalf of Doordarshan under agreement between them and the advertisement charges recovered from the customers are also in accordance with tariff prescribed by Doordarshan which is incorporated in the agreement. Further it is specifically stated in the agreement that advertisement material should also conform to the discipline introduced by Doordarshan which is nothing but a Government agency which cannot telecast all what is desired to be telecast by advertising agencies. In fact, Doordarshan is bound by advertisement contract canvassed by advertising agencies and it is their duty under the agreement between them and the advertising agencies to telecast advertisement material in terms of the contract which the agency signs with the customer. In our view, the transaction is a pure agency arrangement between the respondent and the advertising agencies because one acts for the other and the act of the agent binds the respondent in their capacity as Principal of the agent. It is pertinent to note that commission or brokerage defined under explanation (i) to Section 194H has a wide meaning and it covers any payment received or receivable directly or indirectly by a person acting on behalf of another person for services rendered. In this case, no one can doubt that 15% commission paid to advertising agencies by the Doordarshan is for canvassing advertisements on behalf of the respondent. So much so, the payment of 15%, by whatever name called, whether discount or commission, falls within the definition of "commission" as defined under Explanation (i) to Section 194H of the Act.

* * *
* * *

It is very clear from the above provision that the advertising agency clearly understood the agreement as an agency arrangement and the commission payable by the respondent to such agency is subject to tax deduction at source under the Income Tax Act and so much so the provision in the agreement was for the agent after retaining 15% to give cheque or demand draft for TDS amount which was originally 5% until it was enhanced to 10% by Finance Act 2007 with effect from 1.6.2007.

> ***62. In the aforesaid case, the relationship of principal and agent was fully established since the advertising agency was appointed as agent by written agreement and there was specific clause that tax shall be deductible at source on payment of trade discount. In the said circumstances, the Kerala High Court held that Section 194H of the Income Tax Act was applicable. In the present case, there is no agreement between the petitioner and the advertising agency and the advertising agency has never been appointed as agent of the petitioner. Thus the above case of the Kerala High Court is clearly inapplicable and the reliance on the said judgment for fastening the liability of tax and interest on the petitioner is wholly untenable. The judgment of the Kerala High Court thus does not help the respondents in the present case."***
>
> ***37.*** *In our opinion, the Allahabad High Court very rightly noticed the distinction between the facts in the case of Jagaran Prakashan Ltd. (supra) and the case with which we are concerned in these appeals and held that it depends upon the facts of each case to decide as to what is the nature of payment made by the party concerned. Their Lordships rightly noticed that the case before them (**Jagaran Prakashan Ltd**.) did not have any agreement like the one in this case wherein in terms of the agreement, it is unmistakably proved that the payment was being made by the appellant (assessee) to the agencies by way of "commission". In our view, therefore, the decision of the Allahabad High Court is of no help to the case of the appellant for taking a different view.*
>
> ***38.*** *In the light of the foregoing discussion, we concur with the reasoning and the conclusion arrived at by the High Court and find no merit in these appeals. The appeals thus fail and are accordingly dismissed.*

12.4 This decision of Hon'ble Supreme Court in the case of Director, Prasar Bharati(supra) was rendered 3rd April, 2018 and Hon'ble Supreme Court has held that applicability of provisions of Section 194H of the 1961 Act will depend upon facts and circumstances of each case and hence it was held that there is a need to evaluate the factual matrix of each case before applying provisions of Section 194H of the 1961 Act to advertising agency commissions paid by Media/Broadcasting companies including evaluating commercial terms and conditions of the contract existing between and inter-se all the relevant parties to this process of advertisement in Media/Broadcasting companies. The Hon'ble Supreme Court has laid down tests to determine as to applicability of Section 194H to advertising commission paid by Media /Broadcasting companies to advertising agencies.

The aforesaid decision of Hon'ble Supreme Court was rendered on 03.04.2018 , while Mumbai-tribunal passed an orders in assessee's case for AY 2011-12 and 2012-13 vide common order dated 11.01.2017, which was pronounced prior to the aforesaid judgment of Hon'ble Supreme Court. Thus, tribunal did not had the benefit of judgment of Hon'ble Supreme Court in the case of Director, Prasar Bharati(supra). In fitness of things and in the interest of justice and fairness , we are of the considered view that this issue needs to be restored to the file of the AO to determine applicability of Section 194H to advertising commission paid by assessee to advertising agencies keeping in view prevailing factual matrix of the case in accordance with ratio of recent decision of Hon'ble Supreme Court in the case of Director , Prasar Bharati(supra) as the issue is no more res integra and is now settled by Hon'ble Supreme Court in the aforesaid judgment in the case of Director, Prasar Bharati (supra) . Thus, we set aside and restore the matter back to the file of the AO to decide this issue denovo afresh on merit in accordance with ratio of decision of Hon'ble Supreme Court in the case of Director, Prasar Bharati(supra) applied to prevailing factual matrix of the assessee's case. Needless to say that proper and adequate opportunity of being heard shall be provided by the AO to the assessee in accordance with principles of natural justice in accordance with law. The assessee is directed to produce all relevant material before the AO for verification and to adjudicate this issue denovo in set aside proceedings . The Revenue succeeds on ground number 1 to 3 raised by it in its appeal filed with tribunal for statistical purposes. We order accordingly.

13. The Revenue is aggrieved vide ground number 4 raised by it in memo of appeal filed with tribunal with the decision of learned CIT(A) in allowing of website development expenses. We have observed that the assessee had incurred websites development expenses on creation of website to the tune of Rs. 3,87,047/- which were directed to be capitalised by the AO on which depreciation @ 60% was allowed by the AO . The Ld. CIT(A) by following the judicial precedents as cited in its appellate order allowed the said expenses as Revenue Expenses in its entirety .We have heard both the parties. The assessee has relied upon decisions of Hon'ble Delhi High Court in the case of CIT v. Indian Visit.com Private Limited (2009) 176 Taxman 0164(Del. HC) . We do not find any fault with the decision of Ld. CIT(A) as in catena of

judgments , a consistent view have been taken by Hon'ble Courts/tribunal wherein website development expenses were held to be revenue expenditure. The Hon'ble Dellhi High Court in the case of Indian Visit.com Private Limited(supra) had held website development charges to be Revenue Expenses u/s 37(1) of the 1961 Act, by holding as under:

> ***"7.*** *Considered in the light of these principles enunciated by the Supreme Court, it is clear that just because a particular expenditure may result in an enduring benefit would not make such an expenditure of a capital nature. What is to be seen is what is the real intent and purpose of the expenditure and as to whether there is any accretion to the fixed capital of the assessee. In the case of expenditure on a website, there is no change in the fixed capital of the assessee. Although the website may provide an enduring benefit to an assessee, the intent and purpose behind the purpose for a website is not to create an asset but only to provide a means for disseminating the information about the assessee. The same could very well have been achieved and, indeed, in the past, it was achieved by printing travel brochures and other published materials and pamphlets. The advance of technology and the wide spread use of the internet has provided a very powerful medium to companies to publicize their activities to a larger spectrum of people at a much lower cost. Websites enable companies to do what the printed brochures did but, in a much more efficient manner as well as in a much shorter period of time and covering a much larger set of people worldwide.*
>
> ***8.*** *The Tribunal has correctly appreciated the facts as well as the law on the subject and has come to the conclusion that the expenditure on the website was of a revenue nature and not of a capital nature. We see no reason to interfere with the impugned order. No such substantial question of law arises for our consideration. The appeal is dismissed."*

Reference is also drawn to decision of Delhi-tribunal in the case of Polyplex Corporation Limited v. ITO, reported in (2009) 122 TTJ 0949(Delhi-trib.) and decision of Mumbai-tribunal in the case of R.R.Kabel Limited v. Addl.CIT reported in (2012) 54 SOT 0374(Mum-trib.) , wherein website development expenses were held to be Revenue expenses. Respectfully following the foresaid decisions , we decide this issue in favour of the assesse by holding these website creation charges as revenue expenses and are allowed u/s 37(1) of the 1961 Act. We uphold the appellate orders of learned CIT(A) . The ground number 4 raised by Revenue stand dismissed. We order accordingly.

14. The next issue raised by Revenue in its appeal filed with tribunal vide ground of appeal number 5 concerns itself with excess commission paid to BCCL which was disallowed by the AO to the tune of 50% being 2.5% of the commission expenses paid to BCCL on business procured by BCCL for the assessee. The learned CIT(A) has granted relief to the assessee by following

earlier years orders passed by learned CIT(A) for AY 2009-10 in assessee's own case. We have observed that this issue was decided by tribunal in assessee's own case in ITA no. 181 & 238/Mum/2012 and ITA no. 1864 & 1910/Mum/2013 for AY 2008-09 and 2009-10 respectively vide common order dated 04.10.2017, wherein tribunal decided this issue for AY 2008-09 and 2009-10 in assesse's own case in favour of the assessee by holding as under:-

> " *35. On appraisal of the above said finding, We noticed that the CIT(A) has examined the payment from every angle and found that the commission was not paid in higher side. No distinguishable material was produced. The commission @ 5% was paid to BCCL. The range of commission in such type of business varies from 5% to 20%. It does not seems justifiable in view of the law settled in Upper India Publishing House P. Ltd. Vs. CIT (1979) 117 ITR 569(SC), CIT Vs. V.S. Dempo & Co. (P.) Ltd. (2011) 336 ITR 209 (Bom), CIT Vs. Raman Boards Ltd. (2013) 355 ITR 305 (Karnataka), CIT Vs. Modi Revlon (P.) Ltd. (2012) 210 taxman 161 (Delhi) (MAG) & CIT(A) in own case for A.Y. 2010-11 dated 16.11.2015. In view of the facts and circumstances of the case and relying upon the law relied by the assessee we are of the view that the CIT(A) has decided the matter of controversy judiciously and correctly which is required to be interfered with at this appellate stage. Accordingly, this issue is decided in favour of the assessee against the revenue."*

Respectfully following the aforesaid decision of the Mumbai-tribunal in assessee's own case for AY 2008-09 and 2009-10 vide common order dated 04.10.2017 with a view to maintain consistency, we decide this issue in favour of the assessee. The decision of Hon'ble Supreme Court in the case of Radhasoami Satsang v. CIT (1992) 193 ITR 321(SC) is relevant. The Revenue fails on this Ground number 5 raised by it in its appeal filed with tribunal .We order accordingly.

15. The next issue raised by Revenue in its appeal vide ground number 6 and 7 concerns itself with disallowance of interest of Rs. 80 lacs u/s. 36(1)(iii) of the 1961 Act. The AO made additions as it could not be proved that borrowed funds were used for business purposes. Similar disallowance was made by the AO for earlier years also viz. AY 2006-07, 2008-09 and 2009-10. The learned CIT(A) granted part relief for earlier year by disallowing proportionate interest expenses based on which AO made disallowance. The learned CIT(A) for the impugned year under consideration deleted

disallowance by following ITAT, Mumbai decision in the case of assessee itself for AY 2006-07 and 2007-08 in ITA no. 3114/Mum/2011 and ITA no. 1063/Mum/2011 vide orders dated 26.12.2012. This issue is also decided by tribunal in ITA no. 181 & 238/Mum/2012 and ITA no. 1864 & 1910/Mum/2013 for AY 2008-09 & 2009-10 respectively vide common order dated 04.10.2017 in assessee's own case , wherein tribunal held in favour of the assessee , by holding as under:-

> *" 5. Under this issue the assessee has challenged the disallowance of interest to the tune of Rs.17,37,88,101/- paid to the different banks etc. The CIT(A) reduced the disallowance u/s 36(1)(iii) of the Act of Rs.17,37,88,101/- being proportionate amount of interest on account of investment in the equity-shares of subsidiary companies in view of the order for the A.Y. 2006-07. The contention of the assessee is that the investment was made in business assets being equity-shares in time Innovative Media Ltd. and alternate brand solution India Ltd. (subsidiary company) for strategic business purpose out of funds from initial public offer of Rs.194.4 crores received by the appellant in the A.Y. 2006-07. Therefore, no disallowance is required in view of the provision u/s 36(1)(iii) of the Act. It is also argued that the case of the assessee is fully covered by the order dated 26.12.2012 passed by the Hon'ble ITAT in the assessee's own case for the A.Y. 2006-07 & 2007-08. The investment was made on account of commercial expediency and sufficient interest free funds were available. The Ld. Representative of the assessee also placed reliance upon the law settled in S.A. Builders Ltd. Vs. CIT (2007) 288 ITR 1 (SC). It is also argued that the capital and reserves were substantially higher than investments which was to the tune of Rs.47.66 crores where as capital & reserves were Rs. 262.92 crores. The investment in the subsidiary company was 35.03 crores which has been shown at page 7 of the paper book. The Ld. Representative of the assessee also placed reliance upon the case in CIT Vs. Reliance Utilities & Power Ltd (2009) 313 ITR 340 (Bom). It is also argued that the cash flow statement was having closing balance to the tune of Rs.12,08,89,847/- and if the subsidiary company be considered to the tune of Rs.35,02,50,000/- then the closing balance would be Rs.47,11,39,847/- and no loan was given to the subsidiary company. However, on the other hand the Ld. Representative of the revenue has strongly relied upon the order passed in the CIT(A) in question. With due regards to the contention raised by the Ld. Representative of the parties and perusing the record. We noticed that the matter of controversy has already been adjudicated by the Hon'ble ITAT in the assessee's own case for the A.Y. 2006-07 & 2007-08 in ITA. No. 3114/M/2011, 3115/M/2011 &1863/M/2011.The relevant para is hereby reproduced as under.:-*
>
> *"3. Before us, while the Revenue disputes the relief in respect of interest paid to MIB (Rs. 191.39 lakhs), the assessee challenges the proportionate disallowance of interest on borrowing (Rs. 67.86 lakhs). The assessee, apart from on its financial statements, claiming of them to be in support of its case – the reserves & surplus as at the year-end being at Rs. 216.18 lakhs, also relied on the decision in the case of S.A. Builders Ltd. vs. CIT(Appeals) (2007) 288 ITR 1 (SC) and CIT vs. Reliance Utilities & Power Ltd. (2009) 313 ITR 340 (Bom). On being queried by the Bench as to the purpose of the loans and advances to sister concern/s, the ld. AR explained that the*

same was to a subsidiary company and, in fact, carried interest @ 8% p.a., i.e., the rate at which interest was paid on the borrowings. Further, as regard investments, these could not be termed as tax-exempt in as much as the investments were in 'Mutual Funds' with growth option, yielding capital gains. These could not, accordingly, be termed as 'tax-exempt'. 4. We have heard the parties, and perused the material on record, as also the case law cited. 4.1 Our first observation is that the sum under dispute has been wrongly mentioned in both the appeals. While Revenue's appeal states the figure at Rs. 191,30,764/-, the interest paid to MIB is actually Rs. 1,91,40,760/- (refer pg. 7 and para 2.1.6 of the assessment order and the appellate order respectively). The disallowance in its respect has been actually made at Rs. 191,39,268/-, i.e., at net of interest received on security with MPSEB. The assessee, on the other hand, mentions the entire interest disallowed in its appeal memo (Rs. 259,25,610/-), even as it has been allowed relief to a substantial extent thereof by the first appellate authority. 4.2 On merits, we may, to begin with, examine the assessee's cash flow statement for the year. The total cash inflow is at Rs. 49,666.15 lakhs. Excluding the short term borrowings and its repayment (Rs. 177 lakhs) from both the sides; the same having been re-paid during the year itself in full, as well as netting the movement of funds in 'investments' (on their purchase and sale during the year), as well as the financing cost, the same would be as under:- A. Source of funds:

		Rs. In Lakhs	*Remarks*
A	*Cash in flow from operating activities*	*2,283.55*	
B	*Proceeds from fresh issue of shares*	*20,025.87/-*	
C	*Proceeds from long term borrowings*	*3,500.00*	
		25,809.42	

B Utilization of funds:

		Rs. In Lakhs	*Remarks*
A	*Purchase of fixed assets*	*21,672.22*	
B	*Increase in investment*	*2326.80*	
C	*Loans and investment in subsidiary*	*760.00*	
D	*Preoperative expenses*	*811.04*	
		25,570.06	

C Surplus	*239.36*	*(A-B)*
D Financing cost (net of interest 2.05L)	*259.20*	*(259.25-2.05)*
E Shortfall @	*17.84*	*(D-C)*

[@ implying a reduction in cash/cash equivalents, i.e., at the end of the current year vis-a-vis the beginning of the year.]

4.3 How could, we wonder, the borrowed funds, forming part of the long term funds, generated at Rs. 258.09 crores during the relevant year, be said to have been utilized for non-business purposes? That is,

assuming the investments and the loans and advances to subsidiary to represent a non-business purpose. In other words, the Revenue could at best claim a proportionate disallowance u/s. 36(1)(iii) in respect of interest on long term borrowings (Rs.67.86 lakhs), which though would be on the funds available, on an average, during the year. We may not attempt to reflect the working here (for which the figures afore-mentioned would have be substituted by average figures for the year – Rs.30 crores, entailing an interest payment of Rs.28.23 lacs, having been repaid during the year), it would suffice to say that the same shall scale down the extent of disallowance, i.e., assuming so, to around 10% of the interest thereon (Rs. 67.86 lakhs). We state so only to emphasize the un-tenability of the Revenue's case on the very face of the cash flow statement, even as there is no case for disallowance in as much as there can be no presumption that the borrowed interest bearing funds are utilized for which purpose. The only exception would be in case of dedicated funds or borrowings, which have to be or are required to be expended toward the stated purpose, so that where not for the purpose of business, disallowance to the proportionate extent would follow. Further, the investment, as it appears to us, is only in business assets, perhaps held to provide a liquidity reserve. Where some income therefrom is tax-exempt, a disallowance u/s. 14A, rather u/s. 36(1)(iii), would arise, for which there is no case by the Revenue. The loan to subsidiary, as afore-stated, is interest bearing, yielding an interest of Rs. 2.05 lacs for the year. No case for disallowance, even where financed or considered as financed out of borrowed funds, in the facts and circumstances of the case, thus, arises.

4.4 With regard to deduction in respect of interest paid to MIB, our first observation is that the same stands claimed not u/s. 36(1)(iii), but only u/s. 37(1), given the assessee's claim that the borrowed funds were utilized for working capital requirements and for setting up radio stations. The contract with Govt. of India is only a business contract as far as assessee-company is concerned. Even assuming a default on its part, which though it contests in a court of law, the interest obligation, even as stated by the first appellate authority, is only a contractual default or liability. There is no question or case of any infraction or breach of any law. In fact, it is not even clear if the same arises under the terms of the contract or is as per the directions of the hon'ble court. It would thus be a little consequence even if some borrowed capital was utilized (for a given period) to pay the same, being only a business purpose, as is a payment of license fee itself. The payment, in any case, is compensatory in character. The Revenue's only case, rather, could be that interest, corresponding to the period for which the radio stations were not operative and under installation, be capitalized, as itself done by the assessee for a part of interest paid during the year. No case for a disallowance would arise unless the Revenue shows the payment to be not for business purpose or for any infraction of law, in which case the entire of it, and not the interest incurred on the corresponding borrowings (where so), would stand to be disallowed, and as in fact stands done by the Revenue. The impugned order thus merits confirmation in respect of this disallowance also. We decide accordingly.

5. We next consider the assessee's appeal for the second year under reference, i.e., AY 2007-08. The AO's order, who has proceeded to disallow the entire interest expenditure as debited by the assessee in its accounts (operating statement) is bereft of any details, apart from the names of the payees to whom it stands paid. That is, no case for

disallowance is made out, while the assessee's case, as we understand, continues to be the same. The ld. CIT(A), in appeal, followed his earlier order, i.e., for AY 2006-07, observing the facts of the case and, thus, the respective cases of the parties, to be similar. Aggrieved, the assessee in appeal.

6. The interest, in the main, is to BCCL, from which Rs. 35 crores, carrying interest @ 8% p.a., was outstanding as at the end of the immediately preceding year. We have already found the same to have been utilized for business purposes. Further, even if there were to be a finding as to some part thereof having been expended for non-business purposes, the funds being fungible, as soon as fresh funds are ploughed back or infused by the assessee in its business, the same (unless dedicated for a particular purpose under the terms of their raising) or the funds generated by the business operations, would to that extent substitute the borrowed funds qua the non-business purpose. In other words, there can be no continuing presumption as to utilization for a non-business purpose, and the facts of each year have to be considered separately. The assessee returning income, prior to financial expenses and depreciation, at Rs. 13.42 crores, the Revenue's case is wholly without merit. We decide accordingly."

6. The facts of the present case are that quite similar. However, the figure is different. The capital and reserve funds are substantially higher then the investment. The capital is to the tune of Rs.47.66 crores and the reserve is 262.92 crores whereas the investment is only to the tune of Rs.35.03 crores. Since, the matter of controversy has squarely covered by the decision of the Hon'ble ITAT in the assessee's own case for the A.Y.2006-07& 2007-08 in ITA. No.3114/M/2011, 3115/M/2011 & 1863/M/2011 dated 26.12.2012. Therefore, we set aside the finding of the CIT(A) on this issue and allowed the claim of the assessee on this issue."

15.2 We have observed from audited financial statements filed by the Assessee that assessee has its own interest free funds available with it comprising of share capital of Rs. 47.67 crores (Rs. 47.67 crores as at 31.03.2009) and Reserves & Surplus to the tune of Rs. 283.82 crores(Rs. 265.95 crores as at 31.03.2009) as at 31.03.2010 , aggregating to Rs. 331.49 crores as at 31.03.2010(Rs. 313.62 crores as at 31.03.2009) , while the investments are to the tune of Rs. 40.02 crore as at 31st March 2010 and Rs. 39.03 crores as at 31.03.2009. The investments/loans to subsidiary namely 'Times Innovative Media Limited' and 'Alternate Brand Solutions Limited' to the tune of Rs. 10 crores were considered for disallowance of interest expenses u/s 36(1)(iii) of the 1961 Act . Thus, as can be seen from above the interest free own funds available with the assessee were higher than

investments/loans made by the assessee and in the absence of any specific findings that interest bearing borrowed funds were used for making investments/loans , the presumption shall apply that the assessee invested its own interest free funds for making investments in securities. The decision of Hon'ble Bombay High Court in the case of CIT v. Reliance Utilities and Power Limited (2009) 313 ITR 340(Bom) and also decision of Hon'ble Bombay High Court in the case of CIT v. HDFC Bank Limited (2014) 366 ITR 505(Bom. HC) are relevant. However, this claim of the assessee that interest free funds available with it are more than investments/loans made by it requires verification of facts from records and for this very limited purposes , we are remitting the issue back to file of the AO for verification from records that its own interest free funds were higher than investments/loans made by it as there are no categorical finding of fact recorded by authorities below on these facts which are contended by assessee before the Bench .We also noted that Mumbai-tribunal in assessee's own case in ITA no. 181 & 238/Mum/2012 and ITA no. 1864 & 1910/Mum/2013 for AY 2008-09 and 2010-10 respectively vide common order dated 04.10.2017 has granted relief to the assessee on similar issue. in order to maintain consistency and judicial discipline, we decide this issue in favour of the assessee subject to limited verification as ordered by us as above. The decision of Hon'ble Supreme Court in the case of Radhasoami Satsang v. CIT (1992) 193 ITR 321(SC) is relevant . It is settled proposition in tax-laws that every assessment year is a separate unit and facts may vary from year to year and hence limited verifications as above is ordered by us. This disposes of ground number 6 and 7 raised by Revenue in its appeal filed with tribunal. We order accordingly.

16. The Revenue has also raised ground number 8 and 9 which are general in nature and does not requires separate adjudication. The ground number 8

and 9 raised by Revenue in its appeal stand dismissed. We order accordingly.

ITA NO.852/Mum/2016-Assessee's Appeal –AY 2010-11

17. The first issue raised by assessee in its appeal vide ground number 1 concerns itself with disallowance of business promotion expenses u/s. 37(1) of the 1961 Act to the tune of 20% of the expenses incurred on the ground that the assessee could not prove business nexus of these expenses. The learned CIT(A) was pleased to dismiss appeal of the assessee and additions were sustained by learned CIT(A). We have observed that Mumbai-tribunal in assessee's own case in ITA no. 181 & 238/Mum/2012 and 1864 & 1910/Mum/2013 for AY 2008-09 and 2009-10 respectively , vide common order dated 04.10.2017 has held that an adhoc disallowances of Business Promotion expenses are not warranted , by holding as under:-

> " *8. Under this issue the assessee has challenged the ad hoc disallowance to the extent of 10% of the Business Promotion Expenses to the tune of Rs.3,14,292/. The Ld. Representative of the assessee has argued that the assessee has given the detail of the Business Promotion Expenses which lies at page no. 62 of the paper book and also submitted the copy of Tax Audit Report which lies at page no. 37 to 59 of the paper book. The AO disallowed the 20% of the Business Promotion Expenses without any basis and the CIT(A) has restricted the disallowance to the extent of 10% of the Business Promotion expenses just on estimation basis which is wrong against law and fact, therefore, the said expenses are liable to be allowed in the interest of justice. It is also argued that the appellant has paid the fringe benefits Tax on these expenditures incurred for the purpose of business and the case of the assessee has duly been covered by the order of CIT(A) dated 01.12.2010 for the A.Y. 2006-07 and the department appeal before the ITAT. In support of this contentions, the Ld. Representative of the assessee has placed reliance upon the law settled in ACIT Vs. Arthur Anderson & Co. (2005) 94 TTJ 736 (Mumbai), S.B. Billimoria & CO Vs. ACIT (2010) 125 ITD 122 (Mum), Raj Enterprises Vs. ITO (1995) 51 TTJ (Jp.) 408& M/s. Gillette India Limited Vs. ACIT (2014) 162 TTJ 137 (Jaipur Trib.). On the other hand, the Ld. Representative of the Revenue has strongly relied upon the order passed by the CIT(A) in question.we have heard the argument advanced by the Ld Representative of the parties and perused the record. We noticed that the assessee has filed the detail of Business Promotion Expenses which lies at page no. 62 of the paper book. Copy of the Tax Audit Report has already been filed which lies at page no.37 to 59 of the paper book. The appellant has paid the fringe benefit tax and such type of expenses has already been allowed for the CIT(A) in the assessee's own case for the A.Y. 2006-07 vide order dated 01.12.2010. Assessing Officer disallowed the 20% of the Business Promotion Expenses on adhoc basis. On appeal the CIT(A) has restricted the said expenses to the extent of 10%. Disallowance on the basis of the estimation is not justifiable without rejecting the book of account if any.In this regard we find support of law settled in :-ACIT Vs. Arthur Anderson & Co. (2005) 94 TTJ 736 (Mumbai), S.B. Billimoria & CO Vs. ACIT (2010) 125 ITD 122 (Mum), Raj Enterprises Vs. ITO (1995) 51 TTJ (Jp.) 408 & M/s. Gillette India Limited Vs. ACIT (2014) 162 TTJ 137 (Jaipur Trib) Moreover, the CIT(A) has also allowed such expenses in the assessee's own case for the A.Y. 2006-07 by virtue of order dated 01.12.2010. Taken into account of all these facts and circumstances, we are of the view that the ad hoc disallowance on the basis of estimation is not justifiable, therefore, we allowed the claim of the assessee and set aside the finding*

> *of the CIT(A) on this issue. Accordingly, this issue is decided in favour of the assessee against the revenue."*

The learned DR could not distinguish the aforesaid decision of the tribunal as in the impugned year under consideration, disallowance of 20% of Business Promotion Expenses had been made on adhoc basis . Thus, we donot find any reason to deviate from the aforesaid decision of ITAT, Mumbai in assessee's own case for AY 2008-09 and 2009-10,, which we Respectfully follow. The decision of Hon'ble Supreme Court in the case of Radhasoami Satsang(supra) is relevant. Thus, ground number 1 of the assessee's appeal is allowed. We order deletion of the said disallowance of 20% of Business Promotion Expenses. The assessee succeeds on this ground. We order accordingly.

18. The next issue raised by assessee in its appeal filed with tribunal vide ground number 2 concerns itself with disallowance of expenditure of Rs. 62,16,426/- by authorities below purported to be incurred in relation to earning of an exempt income by invoking provisions of Section. 14A of the 1961 Act read with Rule 8D(2)(ii) and 8D(2)(iii) of the 1962 Rules. Both the authorities below had confirmed and sustained the aforesaid disallowances. Statement has been made by Ld. Counsel for the assessee before the Bench that there is no exempt income earned by the assessee during the previous year relevant to the impugned assessment year. It is also claimed before the Bench that investments in securities had been made out of own interest free funds available with the assessee by way of share capital and free reserves and no borrowed funds were utilised for making investments. Our attention was drawn to the contentions made before learned CIT(A) during first appellate proceedings. Secondly it is also claimed by the assessee that own interest free funds available with it are more than the investments made in securities and in the absence of any contrary finding by Revenue presumption will apply that the assessee had invested its own interest free funds available with it for making investments. Thus, it is claimed that no disallowance of expenses is warranted u/s. 14A r.w.r 8D(2)(ii) of the 1962 Rules in the absence of any finding by the authorities below that assessee had invested interest bearing borrowed funds in making investments. We have observed from the Balance Sheet filed by the assessee with the tribunal which is placed in paper book at page no. 1 to 35 that assessee has its own interest free funds available with it comprising of share capital of Rs. 47.67

crores (Rs. 47.67 crores as at 31.03.2009) and Reserves & Surplus to the tune of Rs. 283.82 crores(Rs. 265.95 crores as at 31.03.2009) as at 31.03.2010 , aggregating to Rs. 331.49 crores as at 31.03.2010(Rs. 313.62 crores as at 31.03.2009) , while the investments are to the tune of Rs. 40.02 crore as at 31st March 2010 and Rs. 39.03 crores as at 31.03.2009. Thus, as can be seen from above the interest free own funds available with the assessee were higher than investments made by the assessee and in the absence of any specific incriminating findings that interest bearing borrowed funds were used for making investments, the presumption shall apply that the assessee invested its own interest free funds for making investments in securities and no disallowance u/s 14A read with Rule 8D(2)(ii) is warranted. The decision of Hon'ble Bombay High Court in the case of CIT v. Reliance Utilities and Power Limited (2009) 313 ITR 340(Bom) and also decision of Hon'ble Bombay High Court in the case of CIT v. HDFC Bank Limited (2014) 366 ITR 505(Bom. HC) are relevant. However, the contentions of the assessee as was raised before authorities below that investments made by it in subsidiaries/associated companies which are strategic investments should not be taken into account while computing disallowance of expenditure incurred in relation to earning of an exempt income by invoking provisions of Section 14A, does not hold merit as the issue is no more res-integra keeping in view decision of Hon'ble Supreme Court in the case of Maxopp Investment Limited v. CIT reported in (2018) 402 ITR 640(SC) and hence this contention of the assessee stood rejected. We have observed that the assessee has claimed that no exempt income was earned by the assessee during the impugned assessment year and hence in view of decision(s) of Hon'ble Delhi High Court in the case of Cheminvest Ltd. v. CIT reported in (2015) 378 ITR 33(Delhi) and in the case Joint Investments Private Ltd. v. CIT reported in (2015) 372 ITR 694(Delhi) as well as decision of Hon'ble Bombay High Court in the case of The PCIT v. Ballarpur Industries Ltd. in ITA No. 51 of 2016 vide judgment dated 13.10.2016, we are of the view that no disallowance of expenditure purported to be incurred for earning of an exempt income be made u/s 14A of the 1961 Act in view of the claim that no exempt income being earned by the assessee. However, this claim of the assessee that it did not earn any exempt income and also that interest free funds available with it are more than investments made by it requires verification of facts from records and for this very limited purposes , we are remitting the issue back

to file of the AO for verification from records that no exempt income was earned by the assessee and secondly that its own interest free funds were higher than investments made by it as there are no categorical finding of fact recorded by authorities below on these two facts which are now contended by assessee before the Bench .We have , however noted that Mumbai-tribunal in assessee's own case in ITA no. 181 & 238/Mum/2012 and ITA no. 1864 & 1910/Mum/2013 for AY 2008-09 and 2010-10 respectively vide common order dated 04.10.2017 has granted relief to the assessee on similar issue concerning disallowance of expenditure incurred in relation to earning of an exempt income by invocation of provisions of Section 14A of the 1961 Act . It is settled proposition in tax-laws that every assessment year is a separate unit and facts may vary from year to year and hence limited verifications as above is ordered by us. We order accordingly.

19. The next issue raised by assessee in its appeal vide ground number 3 in memo of appeal filed with tribunal concerns itself with disallowance made by the AO u/s. 14A r.w.s. 115JB to compute book profit on which MAT can be levied. We are of the view that this issue is required to be restored to the file of AO to be decided afresh in accordance with ratio of law laid down by Hon'ble Special Bench of Delhi Tribunal in the case of ACIT v. Vireet Investment Private Limited reported in (2017) 165 ITD 27(Delhi-trib.)(SB). This ground of appeal filed by the assessee is allowed for statistical purposes. We order accordingly.

20. The assessee has also raised an issue vide ground number 4 in memo of appeal filed with tribunal as to not allowing depreciation of Rs. 15,720/- on software expenses which were capitalised in AY 2007-08. Prayers are made by learned counsel for the assessee to restore this issue back to the file of the AO for necessary verifications and grant of appropriate depreciation on merits in accordance with law after due verifications. The learned DR did not object if the issue is restored back to the file of the AO for necessary verifications and fresh adjudication on merits in accordance with law. After hearing both the parties, we direct AO to verify the facts from records as contended by assessee and allow appropriate depreciation on software on merits in accordance with law after conducting due verifications. Thus, this issue is restored back to the file of the AO for fresh adjudication on merits in

accordance with law after verification of factual matrix of the case. We order accordingly.

21. The next issue concerns itself vide ground no 5 with regard to non grant of credit by the AO for income-tax deducted at source(TDS) of Rs. 1,75,228/- from the income of the assessee for the year under consideration. Prayer are made by learned counsel for the assessee to restore this issue back to the file of the AO for verification and grant of appropriate credit for TDS after due verification. The learned DR did not object if the issue is restored back to the file of the AO for necessary verifications and grant of appropriate credit for TDS on merits in accordance with law . After hearing both the parties we restore this issue back to the file of the AO for necessary verification and grant of TDS credit on merits in accordance with law. We order accordingly.

22. The other grounds raised by the assessee in memo of appeal filed with tribunal vide ground number 6 to 8 are consequential in nature and does not require separate adjudication. Accordingly, we dismiss ground number 6 to 8 raised by assessee in memo of appeal filed with tribunal. We order accordingly.

23. In the result, the appeals of the assessee in ITA No. 852/Mum/2016 for AY 2010-11 and revenue's appeal in ITA No. 812/Mum/2016 for AY 2010-11 are partly allowed as indicated above. We order accordingly.

Order pronounced in the open court on 26.06.2019

आदेश की घोषणा खुले न्यायालय में दिनांकः 26.06.2019 को की गई ।

Sd/-	Sd/-
(SANDEEP GOSAIN)	(RAMIT KOCHAR)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai, dated: 26.06.2019

Nishant Verma
Sr. Private Secretary

copy to…

1. The appellant
2. The Respondent
3. The CIT(A) – Concerned, Mumbai
4. The CIT- Concerned, Mumbai
5. The DR Bench,
6. Master File

// Tue copy//

BY ORDER

DY/ASSTT. REGISTRAR
ITAT, MUMBAI