आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ - अहमदाबाद ।

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

BEFORE SHRI RAJPAL YADAV, JUDICIAL MEMBER
AND
SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER

Sr. No.	ITA No./Asstt.Year	**Appellant**	**Respondent**
1-2	1379 and 1380/Ahd/2009 Asstt.Year 2005-06 and 2006-07	Gujarat Fluorochemicals Ltd. ABS Towers, 2nd Floor Old Padra Road Baroda 390 007 PAN : AAACG 6725 H	ACIT, Range-1 Ahmedabad.
3-4	ITA No. 1661, 1662/Ahd/2009 2005-06, 2006-07	ACIT, Range-1 Ahmedabad.	Gujarat Fluorochemicals Ltd. Baroda 390 007
5	1064/Ahd/2010 Asstt.Year 2007-08	Gujarat Fluorochemicals Ltd. Baroda 390 007	ACIT, Range-1 Ahmedabad.
6	No.1825/Ahd/2010 Asstt.Year 2007-08	ACIT, Range-1 Ahmedabad.	Gujarat Fluorochemicals Ltd.
7	172/Ahd/2012 Asstt.Year 2008-09	Gujarat Fluorochemicals Ltd. Baroda 390 007	ACIT, Range-1 Ahmedabad.
8	ITA No.322/Ahd/2012 Asstt.Year 2008-09	ACIT, Range-1 Ahmedabad.	Gujarat Fluorochemicals Ltd. Baroda 390 007
9	135/Ahd/2015 Asstt.Year 2008-09	Gujarat Fluorochemicals Ltd. Baroda 390 007	ACIT, Range-1 Ahmedabad.
10	2365/Ahd/2012 Asstt.Year 2009-10	Gujarat Fluorochemicals Ltd. Baroda 390 007	ACIT, Range-1 Ahmedabad.
11	ITA No.2546/Ahd/2012 Asstt.Year 2009-10	ACIT, Range-1 Ahmedabad.	Gujarat Fluorochemicals Ltd. Baroda 390 007
12	ITA No.106/Ahd/2016 Asstt.Year 2010-11	ACIT, Range-1 Ahmedabad.	Gujarat Fluorochemicals Ltd. Baroda 390 007
13	ITA No.548/Ahd/2016 Astt.Year 2010-11	ACIT, Range-1 Ahmedabad.	Gujarat Fluorochemicals Ltd. Baroda 390 007
14-15	116 and 117/Ahd/2016 Asstt.Year 2010-11 and 2011-12	Gujarat Fluorochemicals Ltd. Baroda 390 007	ACIT, Range-1 Ahmedabad.

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

Assessee by :	Shri S.N. Soparkar, and Shri Parin Shah, AR
Revenue by :	Shri Subhas Bains, CIT-DR and Shri Vinod Tanwani, Sr.DR

सुनवाई की तारीख/Date of Hearing : 25/04/2019
घोषणा की तारीख /Date of Pronouncement : 28 /06/2019

O R D E R

PER RAJPAL YADAV, JUDICIAL MEMBER : This is a bunch of 15 appeals which are cross appeals i.e. six appeals by the Revenue and remaining appeals by the assessee against respective orders of the ld.CIT(A). Since issues involved in all these appeals are common, for the sake of convenience, we dispose of all these appeals by this single order.

2. We would like to take note of details of orders of the Revenue authorities, which are under challenge in order to give logical end to the proceedings before us. They are as under:

Sr. No.	ITA No.Asst.Year	Appeal by	Dt. of CIT(A)'s order	AO's order
1-2	1379 and 1380/Ahd/2009 Asstt.Year 2005-06 and 2006-07	Assessee	12.03.2009 12.03.2009	31.12.2017 24.12.2008
3-4	ITA No. 1661, 1662/Ahd/2009 2005-06, 2006-07	Revenue	12.03.2009 12.03.2009	31.12.2007 24.12.2008
5	1064/Ahd/2010 Asstt.Year 2007-08	Assessee	17.12.2010	31.12.2009
6	No.1825/Ahd/2010 Asstt.Year 2007-08	Revenue	17.2.2010	31.12.2009
7	172/Ahd/2012 Asstt.Year 2008-09	Assessee	16.11.2011	31.12.2010
8	No.322/Ahd/2012	Revenue	16.11.2011	31.12.2010

	Asstt.Year 2008-09			
9	135/Ahd/2015 Asstt.Year 2008-09	Assessee	13.11.2014 Penalty Order	31.12.2010
10	2365/Ahd/2012 Asstt.Year 2009-10	Assessee	22.08.2012	30.12.2011
11	No.2546/Ahd/2012 Asstt.Year 2009-10	Revenue	22.08.2012	30.12.2011
12	No.106/Ahd/2016 Asstt.Year 2010-11	Revenue	30.10.2015	22.02.2013
13	No.548/Ahd/2016 Astt.Year 2010-11	Revenue	30.10.2015	22.02.2013
14-15	116 and 117/Ahd/2016 Asstt.Year 2010-11 and 2011-12	Assessee	30.10.2015 19.11.2015	22.02.2013 14.03.2013

3. First we take appeal of the Revenue in A.Y.2005-06, and if any ground taken by the assessee or revenue found to be inter-connected with the issue agitated by the Revenue in this assessment year, then we would take all such grounds together. First issue raised by the Revenue is that the ld.CIT(A) has erred in deleting disallowance out of village development expenses. This issue has been agitated by the Revenue in ground no.1 (Asstt.Year 2005-06 to 2008-09) and in ground no.2 (Asstt.Years 2009-10 and 2010-11). The assessee has debited expenditure of Rs.11,08,85,007/-; Rs.17,68,678/-; Rs.90,583/-; Rs.22,212/-; Rs.69,017/- and Rs.1,94,282/- in the Asstt.Years 2005-06 to 2010-11. Firstly, facts on all vital points on this issue are common in all the assessment years. For the sake of reference, we take up the facts from Asstt.Year 2005-06.

4. The ld.AO has issued show cause notice to the assessee inviting its explanation as to why the expenditure incurred towards village development should not be disallowed. The assessee had contended that in order to maintain cordial relationship with residents of

surrounding village of its factory, it has to undertake certain development activities. Such activities are also required under corporate social responsibility. Therefore, it has constructed/repaired village roads, given assistance to the schools and contribution towards local festivals. These activities create harmonious atmosphere with the management of the assessee-company vis-à-vis residents in that area. The ld.AO has disallowed this expenditure on the ground that either these expenditures were in the nature of donation or in the nature of gratuitous payments. There was no business exigency in incurring these expenditures. Dissatisfied with the disallowance, the assessee carried the matter in appeal before the ld.CIT(A). The ld.CIT(A) has deleted the disallowance by observing that similar expenditure were disallowed by the AO in earlier year, which were deleted by the CIT(A).

5. Before us, the ld.counsel for the assessee contended that identical disallowance were made in the Asstt.Years 1999-2000, 2002-03 upto 2004-05. The Tribunal has upheld the deletion of such disallowance. He has placed on record copies of the Tribunal's order passed in ITA No.3472/Ahd/2002 (Asstt.Year 1999-2000); ITA No.898, 1111 and 1108/Ahd/2009 (Asstt.Year 2002-03); ITA No.4 and 33/Ahd/2007 (Asstt.Year 2003-04); ITA No.4515 & 4563/Ahd/2007 (Asstt.Year 2003-04 and 2004-05). The ld.DR, on the other hand, relied upon the orders of the ld.AO.

6. On due consideration of the above facts, we are of the view that in order to earn goodwill of the people residing in the neighbor-hood area and to keep social relations with residents, assessee company has to incur certain expenditure, which would ultimately facilitate the

assessee's business, otherwise there would be friction or law and order situation which would arise if it adopt continuous unfriendly approach with the residents residing in the surrounding areas. In order to show good gesture, it has repaired certain village roads and given donations during social occasions. To our mind, such incurrence of expenditure are essential in running factory smoothly and the ld.CIT(A) has rightly deleted disallowance. It is also pertinent to note that in the past similar expenditures were claimed, which have been allowed by the ld.CIT(A), and orders of the ld.CIT(A) were upheld by the ITAT. Taking into consideration this consistent approach in the past, we do not see any reason to interfere in the orders of the ld.CIT(A). This issue is decided against the Revenue. All the grounds raised by the Revenue on this issue, in these assessment years are rejected.

7. Next issue is against deletion of disallowance on account of contribution to Refrigerant Gas Manufacturer Association. This issue has been agitated in ground no.2 in the Asstt.Years 2005-06 and 2008-09, and ground no.1 in the Asstt.Years 2009-10 and 2010-11.

8. Grievance of the Revenue is that the ld.CIT(A) has erred in deleting the disallowance of Rs.15,90,270/-; Rs.10,87,365; Rs.15,453/-; Rs.6100/-; Rs.2,00,000/- and Rs.1,94,282/- in the Asstt.Years 2005-06 to 2010-11 respectively.

9. Assessee has debited above expenditure in respective assessment years in its profit & loss account as contribution to Refrigerant Gas Manufacturer Association. The ld.AO confronted the assessee to show reasons, as to why these expenses should not be disallowed. The

assessee submitted its reply and contended that similar expenses were claimed in the Asstt.Year 2003-04 which has been allowed by the ld.CIT(A). However, the ld.AO was not satisfied with the explanation of the assessee, and he disallowed its claim. We find that order of the ld.CIT(A) in the Asstt.Year 2003-04 was upheld by the Tribunal in ITA No.4 & 33/Ahd/2007. Finding recorded by the Tribunal on this issue reads as under:

> *"10. We have heard the rival submissions, carefully perused the orders of the authorities below and considered the materials on record before us along with the paper book submitted by the assessee. On perusal of the records, it is apparent that this issue has been decided by ITAT Ahmedabad "A" Bench while adjudicating revenue's appeal in ITA No.3748/Ahd/2003 in assessee's case for AY 2000-01 cited supra in favour of the assessee and against the revenue vide order dated 17-02-2012 where in the Tribunal in Para 31 of the order has held as under:*
>
> > *"31. We have heard the rival contentions and perused the facts of the case. We concur with the view of the Ld. CIT(A) for the reasons that the payment is not a one-time contribution but a recurring one and such contributions have not resulted in creation of any asset for the assessee nor even for the association. There are very few members as only few companies are manufacturing refrigerant gases. Hence, the pro rata expenditure is large. They have enclosed balance-sheet and income expenditure account of the association to show that there has been no creation of any capital asset. On going through the income and expenditure account and balance-sheet of REGMA, the assets are mainly kept in the bank account and the expenses are for advertisement investigation charges, traveling etc., there is a positive balance left over which is kept in the bank account. The other members besides the assessee are SRF Ltd. of Delhi, M/s. Chemplast Sanmar Ltd. of Chennai, Naveen Flouorine Industries in Mumbai. In short, it is an association on the lines of trade association which look after the welfare of its members and takes up the issues relating to their activities. They call for contributions the basis of projected expense. For this, also correspondence was filed before the Ld. CIT(A) to show that these amounts are requested by circular letters after taking a decision*

during REGMA meetings. The amounts are duly paid by cheques to Gujarat Flurochemicals Ltd. the association which is based in New Delhi. The details in these correspondences show that the association which is a new one has put away Rs.5 lakhs which is in a corpus fund and the balance has been kept for meeting earlier expenses back- log and current and projected expenses. In short, the association keeps making a collection and calling it a corpus from which it incurs the expenditure. In our view, whatever name called the amount is collected for the purpose of defraying expense of the association. The assessee has no right to any of the sums. No capital asset is being build up in the association from which the assessee can derive any benefit. Therefore, such payment has to be treated as expenditure in the line of business and deductible u/s. 37(1). It is not the AO's contention that relevant services were not rendered or that there was any other motive for making such payment. In the circumstances and facts, we find no infirmity in the order of Ld. CIT(A). Thus ground No.4 of the Revenue is dismissed."

10.1 Since the facts of the present case on this issue are similar and identical as in the assessment years 2000-01 and 2001-02, following the decision of our Co-ordinate Bench in AY 2000-01 and 2001-02 cited supra, we uphold the order of the learned CIT(A) and dismiss this ground of appeal of the revenue."

10. There is no disparity on facts. In the past, similar expenditures have been allowed to the assessee. Therefore, respectfully following the order of the ITAT (supra) in earlier years, we do not see any reasons to interfere in the orders of the CIT(A) on this issue. All these grounds are rejected.

11. Ground No.4, 4 and 3 in the Asstt.Year 2005-06 to 2007-08: Grievance of the Revenue in these grounds is that the ld.CIT(A) has erred in deleting the disallowance of loss occurred due to fluctuation of foreign exchange amounting to Rs.73,054/-; Rs.1,65,75,256/-; Rs.2,16,23,967/- in the Asstt.Years 2005-06 to 2007-08 respectively. The

facts on vital points are common. For the facility of reference, we take the facts from the Asstt.Year 2005-06.

12. On scrutiny of the accounts, it revealed to the AO that he assessee has claimed Rs.6,73,054/- (net) on account of foreign exchange fluctuations loss due to translation of foreign currency transactions at the year end. The AO issued a show cause notice inviting explanation of the assessee as to why this claim be not disallowed. The assessee contended that Accounting Standard 11 authorise it to re-state all outstanding foreign exchange trading liabilities/assets as on the last date of the financial year at the exchange rate applicable on that date. Accordingly, it has to determine the loss or gain. It made reference to the decision of Hon'ble Delhi High Court in the case of CIT Vs. Woodword Governor India P.Ltd., and Others to demonstrate that such claim was not notional or contingent, rather it was a determined loss/gain. The ld.AO did not accept this contention of the assessee and held that such claim by the assessee is notional one and does not allowable. On appeal, the ld.CIT(A) has allowed such claim of the assessee by following the order of the ITAT passed in earlier years.

13. The ld.counsel for the assessee, at the very outset submitted that the issue in dispute is covered by the order of the ITAT passed in 4563/Ahd/2007 (Asstt.Year 2004-05). He further relied upon the judgment of Hon'ble Supreme Court in the case of Woodward Governor India Pvt. Ltd., 312 ITR 254 (SC). On the other hand, the ld.DR relied upon the orders of the Revenue authority.

14. We have duly considered rival contentions and gone through the record carefully. The issue is that at the end of the financial year, the assessee has prepared a re-statement of outstanding foreign exchange trading liabilities. This liability was in the revenue account. Thereafter, gain or loss was drawn at the last date; they were set off with each other and net was claimed if loss is there. If there is a gain, then it is offered as taxable income. In the Asstt.Year 2005-06, the assessee has submitted these details to the AO and the AO has reproduced the realignment of balance sheet on this issue on page no.7. The Tribunal in the Asstt.Year 2004-05 has examined this issue and held that as per judgment of the Hon'ble Supreme Court in the case of Woodward Governor India Pvt. Ltd. (supra), if there is a loss on account of foreign exchange fluctuations and liability was in the revenue account, then such loss is to be allowed to the assessee. The department has not demonstrated before us that this claim made by the assessee was not in revenue account in all these three years. Therefore, we are of the view that the ld.CIT(A) has rightly deleted the disallowance. This issue is also decided against the Revenue.

Capital Gain or business income:

15. Next common issue involved in all appeals of the Revenue as well as of the assessee is, whether purchase and sale of shares is to be treated as trading activity or an investment activity. The assessee has treated its activity of sale and purchase of shares as an investment activity and on sale of shares/mutual fund etc., it has shown short term capital gain as well as long term capital gain. The ld.AO did not accept this treatment of the assessee, and treated its activity as trading in shares. It is

pertinent to observe that upto Asstt.Year 2007-08, the ld.CIT(A) did not concur with the AO and accepted the claim of the assessee. The ld.CIT(A) has upheld that on sale and purchases of shares and mutual funds gain/loss is to be assessed under the head "Short term capital Gain or Long Term Capital Gain/Short Term Capital Loss or Long Term Capital loss". From the Asstt.Year 2008-09, the ld.CIT(A) did not concur with his predecessor and took a contrary view, whereby the alleged investment in the shares has been treated as a trading activity. Gain/loss on sale of such shares has been assessed as business income. But on sale of mutual funds, the ld.CIT(A) has accepted the stand of assessee that this activity is to be considered as an investment and profit/loss on sale of mutual fund is to be assessed as long term capital gain/short-term capital gain/loss. The Revenue is challenging this part of order in ground no.3 in Asstt.Year 2008-09, 2009-10 and ground no.1 in the Asstt.Year 2010-11. The ld.counsel for the assessee, for buttressing his claim, relied upon the orders of the ld.CIT(A) form the Asstt.Year 2005-06 to 2007-08. On the other hand, the ld.CIT-DR relied upon the orders of the ld.CIT(A) from the Asstt.Year 2008-09 to 2011-12.

16. During the course of hearing, we have directed the ld.counsel for the assessee to compile details in tabular form indicating various factors required to be visualized for forming the opinion, whether activities of purchase and sales of shares is to be treated as business activity or *simplicitor* as investment. On our directions, the ld.counsel for the assessee filed such details in tabular form. The details are also on the record scattered in different orders of the Revenue authorities. They are also available in seven volumes of the paper book filed by the ld.counsel

for the assessee. For the facility of reference, and taking into consideration the relevant details in more scientific manner, we have directed the assessee to submit such details in tabular forms. It is also pertinent to note that the facts on all vital points are common except variation in quantum. We will be taking up the facts mainly from the Asstt.Year 2005-06 and 2008-09 because order of the ld.CIT(A) in the Asstt.Year 2005-06 on this issue is in favour of the assessee, which has been followed upto the Asstt.Year 2007-08. However, in the Asstt.Year 2008-09, the ld.CIT(A) did not concur with his predecessor and given a different finding. Therefore, it is imperative upon us to look his point of view of reasoning before forming a consolidated opinion on this activity for all these years. At the time of hearing, the ld.CIT-DR pointed out that written note was submitted by the then CIT-DR, Shri Ravindra I Patel vide letter dated 22.9.2015. In this letter, the ld.CIT-DR relied upon a large number of decisions whose copies have been placed on record. He relied upon this note, which reads as under:

> *"It is respectfully submitted that ground no.(5) relates to AO's action of treating the claim of the assessee for capital gain arising from purchase and sale of shares/units of mutual funds as business income. In support of AO's action, following judicial pronouncements are submitted for kind consideration of Hon'ble Bench.*
>
> *1) Manoj Kumar Samdaria Vs. CIT [228 Taxman 63 (Supreme Court)]*
>
> *Section 28(i), read with section 45 of the Income-tax Act, 1961 - Business income - chargeable as (Business income v. Capital gains: Share transactions) -Assessment year 2007-08 - Assessee declared income arising from sale of shares as short-term capital gain - Tribunal found that assessee had regularly dealt in purchase and sale of share which indicated period of holding to be very short and that he earned only a meager amount of dividend while gains from sale of shares was Rs.65.45 lakhs - High Court upheld order of Tribunal that income arising from sale of shares was assessable as business income - Whether special leave petition filed against impugned order was to be dismissed - Held, yes [in favour of revenue].*
>
> *I.a) Manoj Kumar Samdaria Vs. CIT [223 Taxman 245 (Delhi)]*

Section 28(i), read with section 45 of the Income-tax Act, 1961 - Business income - chargeable as (Share transactions) - Assessment year 2007-08 - Assessee declared income arising from sale of shares as short-term capital gain - Assessee had opening investment of Rs.1 crore in shares - During year under consideration shares worth Rs.4.10 crore had been sold while shares of Rs.4.9 crore were purchased –Tribunal found that assessee had regularly dealt in purchase and sale of share which indicated period of holding to be very short and that he earned only a meager amount of dividend of Rs.21,952 while gains from sale of shares was Rs.65.45 lakh - whether Tribunal. After analyzing turnover of shares, nature of transactions i.e. duration ot holding, proportion of income derived as dividend to investment made, had rightly held that income arising from sales of shares was assessable as business income - Held, yesfparas 7 & 8] [infavour of revenue].

2). New Jehangir Vakil Mills Co.Ltd. Vs. CIT [49 ITR 137 (Supreme Court)]

Section 28(i) of the Income-tax Act, 1961 [Corresponding to section 10(1) of the Indian Income-tax Act, 1922] - Business income - chargeable as - Assessment year 1945-46 - Whether extent to which a decision given bv ITO for one assessment year affects or binds a decision for another year, doctrine of res judicata or estoppels by record does not apply to such decisions - Held, yes - Whether circumstance that in earlier assessment relating to 1943 assessee was treated as investor, would not estop assessing authorities from considering, for purpose of computation of profits of 1944, as to when trading activity of assessee in shares began and, therefore, finding of assessing authorities that trading activity of assessee in shares began in 1943 and profits on sale of shares computed on basis of said find was justified - Held, yes

3) CIT Vs. Sutlej Cotton Mills Supply Agency Ltd. [100 ITR 706 (Supreme Court)]

Section 2(13) of the Income-tax Act, 961 - Business - Adventure in nature of trade - Assessment year 1956-57 - Assessee company purchased shares and sold part of it -Assessee claimed that shares were purchased by way of investment and profit amount to capital gains - Tribunal found as of fact that assessee purchased shares out of borrowed fund and did not make sale on account of any pressing necessity - Whether on facts dominant intention of assessee being to make profit by resale of shares and not to make investment. Tribunal was correct in holding that transaction was adventure in nature of trade - Held, yes

4) CIT Vs. Central News Agency (P) Ltd. [53 taxmann.com 305 (Delhi)]

Section 45 read with section 28(i), of the Income-tax Act, 1961 - Capital gains -Chargeable as (Capital gain v. business income/dealing in Mutual fund units) -Assessment year 2005-06 - Assessee - company had shown certain short-term capital gain on sale of mutual fund units - Assessing Officer taxed said income as business income - On appeal, Commissioner(Appeals) upheld order of Assessing Officer but Tribunal held that profit on sale of mutual fund

units was assessable as capital gain -whether since Tribunal had not determined whether any dividend had been received on units and frequency and volume of said transactions so as to know actual intention of assessee, matter was to be remanded to Tribunal for fresh consideration - Held, yes [para 9] [Matter remanded].

5. DCIT, Circle-3(1) Vs. Smt.Deepaben Amitbhal Shah [99 ITD 219 (AMD)]

Section 28(i) of the Income-tax Act, 1061 - Business income - Chargeable as -Assessment years 1992-93 to 1995-96 - Whether where looking into volume, frequency, continuity and regularity of transactions of purchase and sale in shares by assessee, it could be inferred that those transactions must have been entered into by assessee with a profit motive and not for purpose of investment, income arisen to assessee from such transactions would be assessable under head 'Profits and gains of business or profession' - Held, yes, Whether merely because shares were acquired by assessee from primary market and assessee had to wait for two to three months for allotment process, transaction could be held to be a non-business transaction - Held, no -Whether fact that shares purchased from secondary market were transferred in name of assessee, would make transaction as non-business transaction - Held, no

6. Smt.Harsha N.Mehta Vs. DCIT [43 SOT 332 (Mumbai)]

Section 28(i), read with section 45, of the Income-tax Act, 1061 - Business income - Chargeable as - Assessment year 2005-06 - During relevant assessment year, assessee filed her return showing income from sale and purchase of shares under head 'Capital Gains' - Assessing Officer did not agree with treatment given by assessee and treated said income as business income - On appeal, Commissioner (Appeals) partly accepted assessee's claim - On instant appeal, it was seen that during relevant period assessee had made 37 transactions in 35 scrips - It was also noticed that shares were held for a few days and in very few cases for a few months but in no case period of holding was exceeding 200 days - Whether activity of frequent buying and selling of shares over a short span of period had to be treated as business being adventure in nature of trade and, thus, income arising from said transactions was to be treated as business income and not as capital gain - Held, yes

7. Anand M.Fatehpuria HUF Vs. ACIT [153 ITD 145 (Mumbai)]

Section 28(i), read with section 45, of the Income-tax Act, 1061 - Business income - Chargeable as [Share dealings] - Assessment year 2008-09 - Assessee was an investor for past several years - During previous year, he sold certain shares and claimed gain arising on sale of shares as short-term capital gain - Assessing Officer treated said gain as business income - Commissioner (Appeals) held transactions to constitute business activity and accordingly upheld order of Assessing Officer - Assessee was maintaining same set of books of account for both its business transactions and purported investment activity out of same common pool of funds - All transactions of assessee were imbued with same profit motive, which continued not only

throughout year, but also from year to year - Whether findings by Commissioner (Appeals), that share transactions represented business transactions deserved to be affirmed - Held, yes [para 3] [Partly in favour of assessee].

8. Burnside Investments & Holding Ltd. Vs. DCIT [61 ITD 50 (MAD)]

Section 28(i) of the Income-tax Act, 1061 - Business income - Chargeable as -Assessment year 1991-92 - After sale of tea estate assessee-company was engaged in business of real estate and purchase and sale of shares - It showed profit on sale of shares on investment account and claimed such profit as capital gain - Assessing Officer found profit on sale of shares on investment account and claimed such profit as capital gain - Assessing Officer found that during previous year assessee had traded in shares of 30 companies - It was also fund that shares were purchased and sold within same accounting year - Income from shares was, thus, treated as business income -

Whether said transactions in shares had resulted in business profits assessable as such in bonds of assessee - Held, yes

2. Without prejudice to above discussed judicial pronouncements, a kind attention is drawn to provisions of S.73 Explanation which creates a legal fiction (deeming provision) to treat transactions of purchase and sale of shares as speculation business. It is true that S.73 relates losses but legislative intention is clear that purchase and sale of shares by a company (other than excluded categories) has to be treated as speculation business. Accordingly, there cannot be dispute to treat impugned transactions as business.

3. Keeping in view above mentioned judicial pronouncements, in light of facts of the extant case as discussed in the assessment order and more so, in view of Explanation to S.73, it immensely transpires that the action of the A.O. to treat impugned shares/mutual fund transactions as business activity is justified. Accordingly, it is humbly prayed that action of the A.O. may kindly be confirmed."

16. On the other hand, apart from the details compiled in tabular form, the ld.counsel for the assessee has also relied upon a large number of decisions in support of his contentions and copies of such decisions are being placed in the paper book from pages 100 to 187. He has also placed on record CBDT circular No.6 of 2016 at page no.150 to 151.

17. With the assistance of the ld.representatives, we have gone through the record. The issue whether gain from sale of shares/mutual funds is to be assessed as business income or short term capital gain/long term capital gain, is a highly debatable issue. It always puzzled the adjudicator even after availability of large numbers of authoritative pronouncements by the Hon'ble Supreme Court/Hon'ble High Court. The reason for the puzzle is, one has to gather the intention of an assessee while he entered into the transaction. The expression "intention" as defined in Meriam Webster Dictionary means, what one intends to accomplish or attain, it implies little more than what one has in mind to do or bring out. It suggests clear formulation or deliberation. Thus, it is always difficult to enter into the recess of the mind of an assessee to find out the operative forces exhibiting the intention for entering into the transaction. This would give rise a debate. Nevertheless, we have to look into the curious features of this case which will goad us on just conclusion.

18. Before we embark upon an inquiry on the facts of present case so as to find out, whether the assessee is to be termed as involving in the trading in shares or to be treated as a *simplicitor* investor, we would like to make reference to certain tests propounded by ITAT, Lucknow Bench in the case of Sarnath Infrastructure P.Ltd. Vs.ACIT, (2009) 120 TTJ 216. ITAT, Lucknow Bench has considered the issue, whether the assessee deserves to e treated as trader or investor. The following tests are worth to note. It reads as under:

> *"13. After considering above rulings we cull out following principles, which can be applied on the facts of a case to find out whether*

transaction(s) in question are in the nature of trade or are merely for investment purposes:

(1) What is the intention of the assessee at the time of purchase of the shares (or any other item). This can be found out from the treatment it gives to such purchase in its books of account. Whether it is treated stock-in-trade or investment. Whether shown in opening/closing stock or shown separately as investment or non-trading asset.

(2) Whether assessee has borrowed money to purchase and paid interest thereon? Normally, money is borrowed to purchase goods for the purpose of trade and not for investing in an asset for retaining.

(3) What is the frequency of such purchase and disposal in that particular item? If purchase and sale are frequent, or there are substantial transaction in that item, if would indicate trade. Habitual dealing in that particular item is indicative of intention of trade. Similarly, ratio between the purchases and sales and the holdings may show whether the assessee is trading or investing (high transactions and low holdings indicate trade whereas low transactions and high holdings indicate investment).

(4) Whether purchase and sale is for realizing profit or purchases are made for retention and appreciation its value? Former will indicate intention of trades and latter, an investment. In the case of shares whether intention was to enjoy dividend and not merely earn profit on sale and purchase of shares. A commercial motive is an essential ingredient of trade.

(5) How the value of the items has been taken in the balance sheet? If the items in question are valued at cost, it would indicate that they are investments or where they are valued at cost or market value or net realizable value (whichever is less), it will indicate that items in question are treated as stock-in-trade.
(6) How the company (assessee) is authorized in memorandum of association/articles of association? Whether for trade or for investment? If authorized only for trade, then whether there are separate resolutions of the board of directors to carry out investments in that commodity? And vice verse.

7. It is for the assessee to adduce evidence to show that his holding is for investment or for trading and what distinction he has kept in the records or otherwise, between two types of holdings. If the assessee is able to discharge the primary onus and could prima facie show that particular item is held as investment (or say, stock-in-trade) then onus would shift to Revenue to prove that apparent is not real.

8. The mere fact of credit of sale proceeds of shares (or for that matter any other item in question) in a particular account or not so much frequency of sale and purchase will alone will not be sufficient to say that assessee was holding the shares (or the items in question) for investment.

9. One has to find out what are the legal requisites for dealing as a trader in the items in question and whether the assessee is complying with them. Whether it is the argument of the assessee that it is violating those legal requirements, if it is claimed that it is dealing as a trader in that item? Whether it had such an intention (to carry on illegal business in that item) since beginning or when purchases were made?

10. It is permissible as per CBDT's Circular No. 4 of 2007 of 15th June, 2007 that an assessee can have both portfolios, one for trading and other for investment provided it is maintaining separate account for each type, there are distinctive features for both and there is no intermingling of holdings in the two portfolios.

11. Not one or two factors out of above alone will be sufficient to come to a definite conclusion but the cumulative effect of several factors has to be seen."

19. The Hon'ble Gujarat High Court had also an occasion to consider this issue in the case of Commissioner of Income Tax vs. Riva Sharkar A Kothari reported in 283 ITR 338. Hon'ble court has made reference to the test laid by it in its earlier decision rendered in the case of Pari Mangaldas Girdhardas vs. CIT reported in 1977 CTR 647. These tests read as under:

"After analyzing various decisions of the apex court, this court has formulated certain tests to determine as to whether an assessee can be said to be carrying on business.

(a) The first test is whether the initial acquisition of the subject-matter of transaction was with the intention of dealing in the item, or with a view to finding an investment. If the transaction, since the inception, appears to be impressed with the character of a commercial transaction entered into with a view to earn profit, it would furnish a valuable guideline.

(b) The second test that is often applied is as to why and how and for what purpose the sale was effected subsequently.

(c) The third test, which is frequently applied, is as to how the assessee dealt with the subject-matter of transaction during the time the asset was the assessee. Has it been treated as stock-in-trade, or has it been shown in the books of account and balance sheet as an investment. This inquiry, though relevant, is not conclusive.

(d) The fourth test is as to how the assessee himself has returned the income from such activities and how the Department has dealt with the same in the course of preceding and succeeding assessments. This factor, though not conclusive, can afford good and cogent evidence to judge the nature of the transaction and would be a relevant circumstance to be considered in the absence of any satisfactory explanation.

(e) The fifth test, normally applied in case of partnership firms and companies, is whether the deed of partnership or the memorandum of association, as the case may be, authorizes such an activity.

(f) The last but not the least, rather the most important test, is as to the volume, frequency, continuity and regularity of transaction of purchase and sale of the goods concerned. In a case where there is repetition and continuity, coupled with the magnitude of the transaction, bearing reasonable proposition to the strength of holding then an inference can readily be drawn that the activity is in the nature of business."

20. In the light of the above, let us examine the facts of the assessee's case. The first test propounded by the ITAT, Lucknow Bench as well as by the Hon'ble Gujarat High Court is, what was the intention of the assessee at the time of purchase of shares or any other time. The intention can be gathered from the treatment an assessee gives to such purchase in its books of accounts viz. whether it is to be treated as stock-in-trade or investment. On this account, the assessee has submitted as under:

21. The assessee has disclosed the purchase of shares as securities in its balance sheet under the head "investment" and not as purchase and sale of trading assets or as its stock-in-trade. The sale and purchase of investments are not routed through profit & and loss account, but only net gain/loss on such investments are reflected in the profit & loss account. The fact that the shares/securities were held as non-trading assets has been disclosed in Notes to the accounts in Schedule-15 at item 1(d). The assessee has valued its closing stock at lower of cost or market value, whereas the investment in shares securities has been valued at cost only. It is further seen that the provisions made for diminution in value of investment has been added back in the computation of income. Thus, in the assessment years under consideration and respective previous assessment years, the following amounts have been added back to the total income on this ccount in the computation and no deduction has been claimed under section 88E for the securities transaction tax paid during the year.

(Rs.in)

Asstt.Year	Amount added back to the total income	Amount added back in the total income in previous Asstt.Year
2005-06	Rs.31,565/-	Rs.6,02,99,64/-
2006-07	Rs.NIL	Rs.31,565/-
2007-08	Rs.27,58,400/-	-
2008-09	Rs.10,19,61,651/-	Rs.27,58,400/-
2009-10	Rs.2,68,08,789/-	Rs.10,19,61,561/-
2010-11	Rs.15,59,83,907	Rs.2,68,08,789/-

2011-12	Rs.60,75,000/-	Rs.15,59,83,907/-

22. It is further submitted that the assessee has made the investment without having recourse to borrowed funds. The entire funding for shares/securities has been made out of capital reserves and surplus available from time to time.

23. So far as frequency of purchase and sale of securities are concerned, it is submitted that the following details demonstrate bifurcation of total investment, purchase and sales in respect of shares and mutual funds etc. in the respective assessment years.

(Rs.in crores)

	Investment in			**Total Investment**	Purchases of			**Total Purchase**	Sales of			**Total Sales**
Asstt. Year	Mutual funds & bonds	Strategic Investment	Shares		Mutual Funds And Bonds	Shares	**Strategic** purchase		Mutual fund & Bonds	Strategic investment	Shares	
2005-06	124.79	76.91	23.01	**224.71**	507.03	45.31		**552.35**	551.35	5.19	51.92	**608.48**
2006-07	164.15	78.01	45.53	**287.69**	494.33	80.45		**574.78**	448.07	66.71	66.66	**581.44**
2007-08	333.98	84.99	111.56	**530.53**	950.97	180.80	29.81	**1161.58**	791.99	22.83	141.05	**955.87**
2008-09	166.52	139.33	240.63	**546.48**	583.75	444.38	62.75	**1090.88**	752.03	7.12	364.15	**1123.31**
2009-10	151.21	150.25	204.27	**505.73**	822.14	20.89	33.25	**876.28**	859.40	9.44	45.40	**914.24**
2010-11	395.74	204.49	148.44	**748.67**	1308.84	18.08	54.24	**1381.16**	1070.46	Nil	52.29	**1122.75**
2011-12	249.25	195.16	126.43	**570.84**	821.80	1.73	3.65	**827.18**	1005.65	17.51	24.04	**1047.20**

24. From the above table, it could be seen that out of total investment in shares/securities, investment in shares is very low as compared to investment in mutual funds and bonds and strategic investment. As regards purchase and sales of units in mutual funds cannot be said to constitute trade, since such units cannot be sold in the open market but can only be redeemed by the entity issuing the units. Apart from such entity, there is no buyer for units of mutual funds. Further, as regards the volume of purchase and sales, it can be noticed that out of total purchases, substantial amounts have been utilized for purchase of mutual funds and only minimal holding was made in share. Similarly,

in the case of sales also substantial chunk was in respect of mutual funds and only small quantity of shares was sold.

25. It is submitted that if the intention for purchase and sales of securities is for realization of profit, then it amounts to trade, whereas, the purpose is for appreciation of value, then it is in the nature of investment. In the case of shares, whether intention was to enjoy dividend and not merely earn profit on sale and purchase of shares. A commercial motive is an essential ingredient of trade. In this regard, it is further submitted that where purchase and sale is entered into for realisation of the same, it constituted trade and where the purchase of the asset is made for retention and appreciation of value, the same would indicate investment. In the instant case, the assessee has earned dividend income of Rs.5.37 crores, 5.33 crores, 8.20 crores, Rs.10.52 crores, Rs.7.35 crores, Rs.10.61 crores and Rs.4.85 crores for the Asstt.Years 2005-06 to 2011-12 respectively, and interest income on bonds of rs.3.07 crores, Rs.4.60 crores, Rs.6.47 crores, Rs.5.40 crores, Rs.3.15 crores for the Asstt.Years 2005-06 to 2009-10 respectively.

26. It is submitted that during the year, the company has earned capital gains from mutual funds, strategic investment and equity shares etc. Bifurcation of such capital gain is as under:

(Rs.in crores)

Asstt. Year	Gain from Mutual Fund	Gain/Loss from Strategic investment	Gain from Equity shares	Total capital gain
2005-06	24.32 (including LTG Rs.10.17)	7.61	2.98	19.69

2006-07	3.47 (including LTG Rs.1.22)	52.81	8.07	64.63
2007-08	11.46 (including LTG Rs.2.73)	-	26.67	38.12
2008-09	11.87 (including LTG Rs.7.64)	-	48.04	59.91
2009-10	During the year, the company has incurred loss of Rs.7.33 cores on sale of investments.			
2010-11	6.29 (including LTG Rs.6.29)	-	(-) 6.01 Capital loss	0.28
2011-12	37.37(including LTG Rs.32.59)	-	5.67	43.04

27. The ld.counsel for the assessee submitted that in the books of accounts, the assessee has valued the shares/securities at cost and not at lower of cost or market value. It is submitted that the main objects of the memorandum of association do not authorise the assessee to undertake business of purchase and sale of shares/securities unless the main objection of MOA permits, the company cannot do trading in shares and securities as business, being a listed company. Subsequently also MOA was amended from time to time but above clause was not made in object clause. However, Article No.9 and 32 of the Memorandum, being Ancillary Objects of the company, permit the assessee to invest in or acquire shares, stock, debenture and other security from time to time. The assessee has passed resolution u/s.372A of the Companies Act authorizing the investment in shares/securities.

28. As regards accounting treatment, it is pleaded that the assessee has maintained a distinction between trading assets and non-trading assets. The latter have been valued at cost, and sale/purchase thereof

has not been reflected in the P&L account. Only gains have been included in the other income. Provision for diminution in value of investment has been added back in the computation. Further, the assessee has itself added back Rs.20 lakhs u/s.14A on estimate basis in respect of tax free income earned on such investment. No deduction has been claimed under section 88E for the securities transaction tax paid during the year. The assessee-company has complied with the applicable legal provisions under the Companies Act, particularly, sections 149, 372A, 249, requirements of Schedule VI as well as the provisions of AS-13 on investment. The assessee has maintained only one portfolio. It is further pleaded that during the year there was speculative loss of Rs.0.67 lakhs and Rs.1.08 lakhs for the Asstt.year 2005-06 and 2008-09 respectively. Such small amount involving only six transactions should not be determining factor.

29. The ld.counsel for the assessee further relied upon the following decisions:

i) ACIT Vs. Shah Investor's Home Ltd., ITA No.1424/Ahd/2010 (ITAT, Ahmedabad Bench)
ii) DCIT Vs. Tejas Securities, IT(SS)A.531, 532/Ahd/2011 dated 22.3.2016 (ITAT, Ahmedabad.
iii) CIT Vs. Nita M. Patel, 42 taxmann.com 125 (Gujarat)
iv) CIT Vs. Smt. Datta Mahendra Shah, 62 taxmann.com 325 (Bombay)
v) Seer Finlease P.Ltd. Vs. ACIT, Ahmedabad ITA No.3326/Ahd/2009 and others order dated 17.3.2015, ITAT, Ahmedabad.
vi) CIT Vs. Kapur Investments P.Ltd. 61 taxmann.com 91 (Kar)
vii) ITA No.1912/Ahd/2012 and others in the case of Alembic Ltd. Vs. DCIT, order dated 9.12.2016 (ITAT, Ahmedabad.)

viii) Gajjala Madhusudhan Reddy Vs. ITO, 39 taxmann.com 157 (ITAT, Hyderabad)
ix) DCIT Vs. UMIL Share & Stock Broking Services Ltd., 96 taxmann.com 168 (Kol-Trib.)
x) PCIT Vs. Bhanuprasad D. Trivedi, HUF, 87 taxmann.com 137 (Gujarat)
xi) PCIT Vs. Bhhanuprasad D. Trivedi HUF, 94 taxmann.com 114 (SC)

He has placed on record copies of the above decisions.

30. We have duly gone through all these details. In the first test i.e. how to find out intention of the assessee that it has purchased shares for investment purpose, the assessee has pointed out that in the books of accounts, it has treated these shares in the investment account. It has not valued the shares at the end of the year at cost or market value whichever is less, rather it has valued them at the cost of acquisition. This treatment in the account is being given when the shares are being purchased in investment account. The assessee has also pointed out that provisions made for diminution in value of investment has been added back in the computation of income. While taking note of the assessee's submissions submitted in tabular form, we have specifically noted the figures. While differing with the conclusions of the CIT(A) in the Asstt.Years 2005-06 to 2007-08, the ld.CIT(A) in the Asstt.Year 2008-09 recorded that fact of recording transaction in the books of accounts etc. in a particular manner by the appellant was to justify the nature of transaction to be "investment". Merely because the assessee has given a particular treatment to the share transaction in its books of accounts, does not prove the nature of transaction to be a particular kind, and overall conduct of the assessee has to be seen. It appears that CIT(A)

failed to appreciate the requirement for maintaining accounts and the assessee has to give a particular treatment, and that treatment is one of the corroborative factors for indicating its intention. The ld.CIT(A) just brushed aside these circumstances on the ground that these treatment for valuing the shares at cost at the end of the closing year was done by the assessee so that it can demonstrate its purchase and sale as investment. This is the basic requirement, which an assessee has to follow for maintaining investment portfolio. It has given that very treatment in the accounts. There is nothing with the ld.CIT(A) on this aspect to differ with the conclusions of the predecessor in earlier years.

31. The next reason assigned by the assessee for terming its purchase of shares as investment that it has not borrowed funds for making investment. The ld.CIT(A) in the Asstt.Year 2008-09 has observed that the assessee had incurred interest expenditure of Rs.27.64 cores during the year. The assessee has not submitted separate accounts showing incurrence of expenditure for investment specific. The assessee has pointed out the volume of funds available with it in the shape of reserves and surplus. For example, in the Asstt.Year 2008-09, the share capital was Rs.1099 lakhs. The Reserves and surplus was Rs.1,21,844 lakhs. Gross investment in the Asstt.Year 2008-09 is Rs.51,861 lakhs. All these details have been compiled by the assessee in tabular form and available on page no.1 of the synopsis. This indicates that all funds were far more than the gross investment in that year. Similar is the position in all other years. Investment is far less than own funds available in the shape of share capital and reserves and surplus, therefore, if these figures are appreciated in the light of Hon'ble Bombay High Court

decision in the case of CIT Vs. Reliance Utilities & Powers Ltd., 313 ITR 340 (Bombay), then it would reveal that one has to draw an inference that the assessee must have made investment out of its own funds. The ld.CIT(A) cannot reject this argument simply for the reason that the assessee has incurred interest expenditure of Rs.27.64 cores. But this expenditure is attributable to manufacturing activities also. The ld.CIT(A) ought to have visualized the complete details of funds before assigning this reasoning for differing with the ld.CIT(A) in other assessment years.

32. Next reasons which emerges out from the order of the ld.CIT(A) in the Asstt.Year 2008-09 is that there were large number of share transacted by the assessee including in terms of scrip as well as in terms of transactions. The ld.CIT(A) also observed that if weighted average holding period is taken into consideration, then for the purpose of short capital gain it is 86 days. The ld.CIT(A) also took note of the purchases made by the assessee in the Asstt.Year 2003-04 to 2008-09. He observed that since there is a rising trend in purchase of the shares, it shows that the assessee was trading in the shares. No doubt volume of investment is higher, but it is to be appreciated in the light of total investment made by the assessee in the mutual funds, in the bonds for earning interest income. The ld.CIT(A) himself agreed with the contentions of the assessee even in the Asstt.Year 2008-09, as far as investment in mutual funds are concerned. She has accepted that gain on sale of mutual fund was to be assessed under the head "capital gain". This finding is being challenged in ground no.3 in the Asstt.Year 2008-09, 2009-10 and ground no.1 in the Asstt.Year 2010-11 by the Revenue. The higher volume is

because some of the investments were made by the assessee for strategic holding in the sister concerns, and therefore, this one factor alone be not construed that the assessee was trading in shares. It is pertinent to observe that when any explanation or a defence of an assessee based on number of facts supported by evidence and circumstances required consideration whether explanation is sound or not must be determined not by considering the weight to be attached to each single fact in isolation but by assessing the cumulative effect of all the facts in their setting as a whole. If all the factors discussed above are considered conjunctively then it would give an inference that the investments made by the assessee were for the purpose of achieving long term benefit and on sale of such investment any gain or loss is required to be assessed under the head "capital gain". Similarly, we do not find force in the grounds of appeal raised by the Revenue that on sale of mutual fund profit be assessed as isness income. The ld.CIT(A) has rightly held that on sale of mutual fund only capital gain arise to the assessee.

33. As far as decisions relied upon by the ld.CIT-DR are concerned, we have gone through the decisions. It is observed that each decision is given on the particular fact of that case. We have already observed that on this issue, whether the assessee is a trader or an investor, there are large numbers of decisions available. In the case laws cited by the ld.counsel for the assessee, Judicial Member (herein) is party to two of the cases viz. Shah Investor's Home Ltd., and Seer Finlease P. Ltd. (supra). All these cases were being decided by keeping in mind specific fact situation in them. The tests propounded in large numbers of cases have already been considered by us. Therefore, the ld.CIT(DR) could

not buttress the reasoning of the ld.CIT(A) in the Asstt.Year 2008-09 which has been followed in subsequent years with help of these case laws. We have considered specific reasons assigned by the ld.CIT(A) for differing with conclusions of his predecessor in earlier years. In view of the above discussion, we hold that gain arising on sale of shares or mutual fund is to be taxed in all these years as long term capital gain/short term capital gain. Orders of the ld.CIT(A) in the Asstt.Year 2005-06, 2006-07 and 2007-08 are upheld, whereas the finding of the ld.CIT(A) in the Asstt.Year 2008-09 upto the Asstt.Year 2011-12 are set aside. The finding of CIT(A) in Asstt.Year 2008-09, 2009-10 and 2010-11 that on sale of mutual funds, capital gain is to be assessed in the hands of assessee, is upheld, and ground of Revenue i.e. ground no.3 in Asstt.Year 2008-09, 2009-10 and ground no.1 in the Asstt.Year 2010-11 are rejected.

Similarly, all the grounds of Revenue in the Asstt.Year 2005-06 to 2007-08 challenging the finding of the ld.CIT9A) on this issue are rejected; whereas all the grounds of assessee in all the remaining years are allowed. In other words, in all these years assessee be treated as investors and on sale of shares/mutual funds, profit/loss be assessed under the head capital gain/loss. The ld.AO shall give effect accordingly.

34. Now, we deal with ground no.4 of the assessee's appeal in ITA No.1379/Ahd/2009. In this ground of appeal, the assessee has pleaded that the ld.CIT(A) has erred in confirming disallowance of Rs.60 lakhs out of expenses on professional fees. The ld.counsel for the assessee, at the time of hearing, contended that if the ground of appeal raised by the

Revenue in ground no.5 i.e. gain from transaction of securities amounting to Rs.16,59,53,272/- are being taxed as capital gain, and not as business income, as raised by the Revenue is rejected, and order of the ld.CIT(A) is being upheld, then disallowance of Rs.60 lakhs out of expenses on professional fees deserves to be confirmed. He pointed out that adjudication of this ground is subject to the decision of the Tribunal on the ground of Revenue's appeal. In the foregoing paragraphs, we have rejected the Revenue contentions and upheld order of the CIT(A) that gains from transactions of securities are to be taxed as capital gain, therefore, the expenditure towards professional fees whose disallowance was upheld by the ld.CIT(A), deserves to be upheld. Accordingly, ground no.4 raised by the assessee in the Asstt.Year 2005-06 is rejected.

35. Ground no.3 in ITA No.1661/Ahd/2009; ground no.5 in the ITA No.1379/Ahd/2009.

36. In both these grounds, issue involved is, what amount requires to be disallowed under section 14A of the Income Tax Act. The ld.AO has disallowed interest expenses of Rs.1,11,47,727/-, out of that the ld.CIT(A) has deleted the disallowance of Rs.91,63,869/-. Grievance of the Revenue is that the ld.CIT(A) has erred in deleting this disallowance, whereas grievance of the assessee in ground no.5 of its appeal is that the ld.CIT(A) has erred in confirming the disallowance of Rs.19,83,585/-.

37. Brief facts of the case are that the assessee has shown dividend income of Rs.5,32,00,000/-. The AO though treated the activity of the assessee of sale and purchase of shares as trading activity, he assessed the profit on share transaction as business income, but on protective

basis, he disallowed expenditure of Rs.62,56,732/- out of professional fees and Rs.1,11,47,627/- on account of interest expenses. He observed that if at any appellate stage the same is held taxable under the heading "capital gain" then disallowance under section 14A should require to be made and this disallowance would be worked out accordingly. The ld.CIT(A) has held that profit on share transaction is to be assessed as capital gain. We have upheld this finding of the ld.CIT(A) while rejecting the ground of appeal taken by the Revenue in the above discussion. Therefore, we are required to adjudicate what amount ought to be disallowed under section 14A of the Act. A perusal of the record would indicate that the ld.AO has made disallowance under two heads; (a) out of professional fees, and (b) out of interest expenses. As far as out of professional fee of Rs.62,56,732/- is concerned, this disallowance has been confirmed by the ld.CIT(A) at Rs.60 lakhs. It has been challenged by the assessee in ground no.4 of ITA No.1379/Ahd/2009. We have discussed this issue while dealing with the issue, whether the assessee was indulged in share trading or its activities were of investments. We have confirmed this disallowance, after taking note of the submissions made by the ld.counsel for the assessee. Out of interest expenditure, the ld.AO has worked out the disallowance at Rs.1,11,47,727/-. He worked out this disallowance with help of the following formula:

$$\frac{\text{Investment}}{\text{Total Assets}} \times \text{Interest paid} =$$

$$\frac{\text{Rs.224,70,48,357}}{\text{----------}} \times 2,13,03,954 = 1,11,47,727$$

Rs.42942,39,902

38. The ld.CIT(A) has re-appreciated this aspect and observed that the assessee was having sufficient amount of share capital, reserves & surplus. It has earned profit at Rs.45 crores. Hence, no direct interest expenditure was required to be disallowed. The ld.CIT(A) confirmed the addition at Rs.19,83,858/- on the ground that these interest expenditure has a direct nexus with investment.

39. With the assistance of the ld.representatives, we have gone through the record. We find that the ld.AO has worked out disallowance on the basis of a formula. He failed to note that interest free funds available with the assessee were far more than the gross investment. Gross investment in Asstt.Year 2005-06 was Rs.28,769 lakhs, whereas share capital, reserves & surplus available with the assessee was of Rs.49,379 lakhs. This fund is far more than the investment. It can safely be harboured that interest bearing funds was not invested by the assessee. Apart from the above, the assessee has earned profit at Rs.45 crores. It has also received compensation under Montreal Protocol of Rs.8.96 crores. The ld.CIT(A) has observed that its borrowings decreased to the extent of Rs.40 crores, and also investment decreased by Rs.34 crores. In such situation interest expenses were not required to be calculated on the basis of an estimation using the above formula. While confirming the disallowance of Rs.19,83,858/- is concerned, the finding of the ld.CIT(A) is that it "it was fairly pointed out that on the basis of direct nexus the interest amount of Rs.19,83,858/- is in respect of investments. This amount worked out without prejudice to the stand that no disallowance is required out of interest on the basis of

submissions made earlier." Though the ld.CIT(A) has observed that this expenses has a direct nexus, but it is neither discernible from the assessment order nor from the CIT(A)'s order. Major part of the expenses i.e. Rs.91,63,869/- has been deleted by the CIT(A) by following judgment of Hon'ble Bombay High Court in the case of Reliance Utilities and Powers P.Ltd. (supra) on the basis that the assessee was having more interest free funds, than the investment. In this situation, part expenditure cannot be culled out unless a direct nexus has been demonstrated. It is neither discernible in the assessment order nor in the CIT(A)'s order. We have extracted relevant finding of the ld.CIT(A). In view of the above discussion, we are of the view that this disallowance is not discernible. Consequently, ground of appeal raised by the Revenue is rejected, whereas ground of appeal raised by the assessee is allowed. The disallowance of Rs.19,83,858/- stands deleted. No other ground remained in the appeal of the Revenue for the Asstt.Year 2005-06. Therefore, ITA No.1661/Ahd/2009 stands dismissed.

40. Now we take remaining grounds of assessee's appeal i.e. ITA No.1379/Ahd/2009 for the Asstt.Year 2005-06.

41. In the first ground of appeal, the assessee has pleaded that the ld.CIT(A) has erred in confirming the addition of Rs.17,86,644/- which according to the ld.Revenue authorities accrued on account of interest on refund.

42. The ld.counsel for the assessee raised a very brief submissions, and contended that whatever effect is being given to the orders of the higher appellate authorities in earlier years as well as this year, authorizing the

assessee to receive refund, then interest be calculated according to the amount of refund, if any, accrued to the assessee. In other words, according to the assessee, this issue requires to be decided against the assessee, but the amount of refund be determined after giving effect to the appellate orders, and accordingly, interest be computed on such refund. We direct the AO to carry out this exercise while determining the exact amount of interest accrued to the assessee on the basis of the refund. In this way, this ground is allowed for statistical purpose.

43. Ground No.2: This ground is inter-connected with ground no.2 of the assessee's appeal in ITA No.1380/Ahd/2009 for the Asstt.Year 2006-07. We take both these grounds together.

44. Grievance of the assessee is that the ld.CIT(A) has erred in confirming the disallowance of Rs.9,60,000/-. Brief facts of the case are that the assessee has taken land on lease at Noida for the purpose of business from New Okhla Industrial Development Authority. The said authority requires that construction should be done within the prescribed time limit. However, due to various commercial reasons, the company has deferred the construction plans, and thus, the assessee needed to pay fees towards extension of time limit to such authority in the Asstt.Year 2005-06. It has claimed extension charges of Rs.9,60,000/- whereas in the Asstt.Year 2006-07 it has claimed such charges at Rs.3,20,000/-. This claim of the assessee was not allowed by the AO. According to the AO, it was a capital expenditure, whereas the assessee has submitted that it was a paid for protecting the title of the land. The ld.counsel for the assessee has contended that this issue has been decided against the assessee consistently from the Asstt.Year 2002-03.

We find that the Tribunal has examined this aspect in detail in the Asstt.Year 2003-04 while deciding ITA No.33/Ahd/2007. Taking into consideration consistent stand of the authorities as well as appeal upto the level of ITAT, we do not find any merit in this ground of appeal. Both these grounds are rejected.

Ground No.3 in Asstt.Year 2005-06:

45. In this ground, grievance of the assessee is that the ld.CIT(A) has erred in confirming the disallowance of Rs.9,883/- which has been disallowed out of sundry balance written off. The ld.counsel for the assessee did not press this ground of appeal on account of smallness of the amount involved therein. Accordingly, it is rejected.

46. Ground No.4. In this ground, grievance of the assessee is that the ld.CIT(A) has erred in confirming the disallowance of Rs.60 lakhs out of expenses of professional fees. This ground is inter-connected with ground no.2 of assessee's appeal i.e. ITA No.1380/Ahd/2009 for the Asstt.Year 2006-07. The grievance of the assessee in both the years relates to disallowance of Rs.60 lakhs (each year) out of the expenses of professional fees. We have considered this issue while dealing with the ground agitated on the ground that profit on sale of shares is required to be assessed as capital gain or business income. We have upheld disallowance in the Asstt.Year 2005-06. Once capital gain is required to be assessed on sale of shares then expenses attributable to exempt income are required to be disallowed under section 14A of the Act. We have discussed this issue, while disposing of ground no.3 of the Revenue's appeal for the Asstt.Year 2005-06 and ground no.4 of the

assessee's appeal. We have upheld the disallowance of Rs.60 lakhs incurred by the assessee on professional fees for taking care of the investment which would give rise to the dividend income, which will be exempt from tax. Similar logic is applicable in the Asstt.Year 2006-07 also. Hence, expenditure of Rs.60 lakhs out of professional fees deserves to be disallowed. This ground is rejected in both the years i.e. Asstt.Year 2005-06 and 2006-07.

47. No ground is remained for adjudication in both these assessment years. Appeal of the assessee in the Asstt.Year 2005-06 is partly allowed.

ITA No.1662/Ahd/2009: (Revenue's appeal for the Asstt.Year 2006-07)

48. Revenue has raised five grounds of appeal. We have already adjudicated four grounds of appeal while taking the grounds raised by the Revenue in the Asstt.Year 2005-06 i.e. ground no.1, ground no2, ground no.4 and ground no.5 have already been adjudicated while deciding the appeals for the Asstt.Year 2005-06. The only ground left for adjudication is ground no.3. In this ground, grievance of the Revenue is that the ld.CIT(A) has erred in deleting the disallowance at Rs.58,20,000/- which was disallowed by the AO out of interest expenditure under section 14A of the Act.

49. Brief facts of the case are that the ld.AO has computed disallowance of Rs.62,21,591/- out of professional fees and Rs.58,22,000/- out of interest expenditure on protective basis by observing that though profit on share transaction was held as business income, but if at any appellate stage, the same is held as taxable under

the head "capital gains", then disallowance under section 14A would be relevant. He has worked out the above disallowance. As far as disallowance out of professional fees is concerned, while deciding the appeal of the assessee, we have already confirmed the finding of the CIT(A) for disallowance to the extent of Rs.60 lakhs. At the time of hearing also, the ld.counsel for the assessee did not dispute confirmation of this disallowance on the ground that if the profit on share transaction is being taxed under the head "capital gain", then disallowance out of professional fees deserves to be confirmed. Therefore, we have rejected the ground of appeal bearing no.2 in ITA No.1380/Ahd/2009 raised by the assessee. As far as disallowance out of interest expenditure is concerned, the ld.CIT(A) has deleted this disallowance. We find that gross investment by the assessee in the Asstt.Year 2006-07 is of Rs.53,081 lakhs. It has reserves & surplus of Rs.71,153 lakhs. Thus, it has far more interest free funds than the investment. We find that the ld.CIT(A) has noticed the profit earned during the year at Rs.97 crores. Compensation received under Montreal Protocol at Rs.8.68 crores. The ld.CIT(A) thereafter made reference to the decision of Hon'ble Bombay High Court in the case of Reliance Utilities & Power P.Ltd. (supra) and observed that if the share capital and reserves & surplus including profit for the current year are higher than the amount of investment, no disallowance is required out of interest expenditure. We have upheld verbatim finding in the Asstt.Year 2005-06 in the foregoing paragraphs. Therefore, taking into consideration our discussion on this issue in the Asstt.Year 2005-06, we do not find any merit in this ground of appeal. It is rejected. No ground remained in the appeal of the Revenue in the Asstt.Year 2006-07. It is dismissed.

50. Revenue's appeal in the Asstt.Year 2007-08 i.e. ITA No.1825/Ahd/2010 and 1064/Ahd/2009 (cross appeals)

51. In Ground no.1, Revenue has pleaded that the ld.CIT(A) has erred in deleting disallowance of village development expenses of Rs.90,583/-. This ground has been disposed with ground no.1 in the Asstt.Year 2005-06.

52. Ground no.2. In this ground, Revenue has pleaded that the ld.CIT(A) has erred in deleting the disallowance of rs.15,453/- being contribution to Refrigerant Gas Manufacturer's Association. This ground has been disposed along with ground taken in the Asstt.Year 2005-06.

53. Ground No.5. This ground is inter-connected with ground no.1 of the assessee's appeal. Dispute in both these grounds relates to determination of amounts required to be disallowed under section 14A of the Income Tax Act.

54. Brief facts of the case are that the assessee has shown dividend income of Rs.12,40,12,284/-. It has claimed the same as exempt from tax. On scrutiny of the accounts, it revealed to the AO that the assessee has made *suo motto* disallowance of following items for the purpose of section 14A of the Act.

Sr.No.	*Particulars*	*Amount*
1.	*Securities Transaction tax*	*72,42,127*
2.	*Demat charges*	*5,88,448*
3.	*PMS*	*25,27,072*

4	*Consultancy fees for equity research*	*84,18,000*
5	*Out of other expenses – estimated*	*25,00,000/-*
	Total	*2,12,75,647/-*

55. The ld.AO thereafter worked out disallowance at Rs.4,85,04,149/- which comprised disallowance of Rs.2,65,26,656/- out of general administrative expenses and Rs.2,19,77,493/- on account of interest expenses. The AO has worked out this disallowance by following formulae provided in Rule 8D. Dissatisfied with the disallowance, assessee carried the matter in appeal before the ld.CIT(A). The ld.CIT(A) confirmed methodology adopted by the AO on the ground that Special Bench of ITAT in the case of Data Capital Management P.Ltd., 117 ITD 169 has held that Rule 8D is applicable with retrospective effect, and therefore, disallowance has rightly been computed by the AO. However with regard to the computation of interest expenses, the ld.CIT(A) did not concur with the AO. The ld.CIT(A) was of the opinion that the assessee was having more interest free funds than the interest expenses. Therefore, no disallowance out of interest expenses ought to be made. Theld.CIT(A) thereafter observed that disallowance of administrative expenses is required to be made at 0.5% of the average investment, which according to the CIT(A) comes to Rs.1,45,21,368/-. The ld.CIT(A) further found that the assessee itself has disallowed Rs.25 lakhs under this head. She confirmed the disallowance of Rs.1,20,78,214/-.

56. Before us, the ld.counsel for the assessee contended that the decision of Daga Capital Management P.Ltd., (supra) has been reversed by the Hon'ble Bombay High Court. It is reported in 228 ITR 81. Rule

8D has been made applicable from the Asstt.Year 2008-09 and not from retrospective effect. Thus, disallowance cannot be worked out on the basis of formula. When the ld.CIT(A) has decided the appeal, the decision of Hon'ble Bombay High Court has not come. He further contended that a perusal of *suo motto* disallowance made by the assessee would indicate that it has already disallowed a sum of Rs.2,12,75,647/- which consisted of consultancy charges of Rs.84,18,000/- and other expenses of Rs.25.00 lakhs. The assessee has paid security taxes, PMS fees etc. On the other hand, the ld.DR relied upon the order of the AO.

57. We have duly considered rival submissions and gone through the record carefully. It has been demonstrated before us that gross investment made by the assessee in this year was Rs.55,668 lakhs. Its interest free funds were of Rs.95,069 lakhs. Hence, it has far more interest free funds available than the investment. Therefore, according to the decision of Hon'ble Bombay High Court in the case of Reliance Utilities and Power Ltd. (supra), no disallowance was required to be made out of interest expenses. The ld.CIT(A) has rightly deleted such disallowance.

58. As far estimated disallowance required to be made on account of administrative expenses are concerned, then a perusal of the details would indicate that the assessee has already made disallowance of Rs.25 lakhs out of other expenses and Rs.84,18,000/- out consultancy fees for equity research. This amount is quite sufficient, if considered in the light of total tax free income shown by the assessee. It has earned Rs.12.40 crores dividend income against a disallowance of roughly Rs.1.05 crores, is quite reasonable. These expenses are apart from other

statutory expenditure incurred by the assessee. Therefore, we do not find any merit in the ground of appeal raised by the Revenue. It is rejected.

59. As far as ground of appeal of the assessee is concerned, it is allowed.

60. We delete the disallowance worked out by the AO on estimate basis. The disallowance already made by the assessee itself was sufficient to take care of the expenditure. Therefore, ground no.1 of the assessee's appeal is allowed.

61. Ground no.6 (a)& (b): In these grounds of appeal, grievance of the Revenue is that the ld.CIT(A) has erred in deleting disallowance of Rs.2,91,97,340/- which was added by the AO by making a disallowance of claim of deduction under section 80IA(4) of the Act.

62. Brief facts of the case are that assessee manufacturers chemicals. It also generates captive power, out of two captive power plants, one at Ranjitnagar and another at Dahej. The assessee claimed deduction under section 80IA(4) on the electricity generated by IT in these captive power plants and used by it for its own consumption. The AO has rejected this claim on the ground that deduction was available only when separate business undertaking was put up for generation/distribution of power. According to him, the assessee had set up the plant mainly for captive use, therefore deduction under section 80IA(4) would not available. The AO thereafter observed that even if the assessee is eligible for deduction, the quantum of deduction

was to be worked out with reference to the market rate of electricity generated by the assessee, and not at the rate claimed by it. The assessee had claimed deduction amounting to Rs.2,91,87,340/- on the basis of purchase price of power from GEB i.e. at the rate of Rs.4.72 per unit. The AO has held that it was not entitled for deduction. In case it is to be held that deduction is admissible then, he reduced quantum by adopting the rate at Rs.2.36 per unit of power, which according to the AO is the average rate at which GEB purchased power from different companies.

63. Dissatisfied with the disallowance the assessee carried the matter in appeal before the ld.CIT(A) and contended that similar disallowance was made in the case of CIT Vs. Alembic Ltd. and CIT Vs. Ahmedabad Manufacturing & Calico Printing Co. and others. The Tribunal has allowed deduction to the Alembic Ltd. in the Asstt.Year 2003-04. Copy of the order of the Tribunal was placed on record. The ld.CIT(A) has allowed deduction.

64. At the outset, the ld.counsel for the assessee contended that in assessee's own case for Asstt.Years 2012-13 and 2013-14, the Tribunal has allowed deduction to the assessee. He placed on record copies of the Tribunal's orders. On the other hand, the ld.DR relied on the order of the AO.

65. We have considered rival submissions and gone through the record carefully. We find that identical aspect has been considered by the Tribunal in the Asstt.Year 2012-13 and 2013-14 (Judicial Member,

herein was author of the order). The discussion made by the Tribunal on this issue reads as under:

> *"28. Grievance of the assessee in these grounds of appeal relate to denial of deduction under section 80IA(4) of the Income Tax act amounting to Rs.13,19,37,184/- and Rs.7,92,94,293/- in the assessment years 2012-13 and 2013-14 respectively.*
>
> *29. Brief facts of the case are that the assessee has captive power plants at Ranjinagar and Dahej. At Dahej, assessee has coal based captive power plant and gas based captive power plant. According to the AO, it did not claim deduction under section 80IA originally in the assessment year 2013-14. However, after the decision of Hon'ble Chhattisgarh High Court in the case of CIT Vs. Godawari Power & Ispat Ltd., 223 TAXMANN 234 it has filed a submission claiming deduction. It also revised return of income on 31.3.2015 in the assessment year 2013-14. Similarly, in the assessment year 2012-13, it has enhanced its claim by way of a letter pointing out that the rate for determining the valuation of power generated by it for the purpose of allowing deduction, the rate should be adopted equivalent to the rate at which Madhya Gujarat Vij Company Ltd. ("MGVCL" for short) and Dakshin Gujarat Vij Company Ltd. ("DGVCL" for short) etc. are supplied the electricity to the assessee's manufacturing unit. The ld.AO did not adjudicate the issue in the assessment year 2012-13 for the enhancement of deduction in the draft assessment order. Before the ld,DRP, the assessee raised specific objection about the non-adjudication of the issue by the AO. Also it raised that enhanced rate should be adopted for determining the value of electricity at which deduction under section 80IA has to be granted. The ld.DRP rejected the contentions of the simply for the reason that the AO cannot entertain any claim for allowing deduction resulting in reduction in the total income returned by the assessee. The ld.DRP placed reliance upon the decision of the Hon'ble Supreme Court in the case of Goetze (India) Ltd. (supra). It further rejected the contentions of the assessee that the identical issue was decided by the ld.CIT(A) in the assessment year 2011-12 and the matter is pending before the Tribunal. Thus, according to the DRP, the issue has not attained finality therefore, the deduction under section 80IA cannot be granted on the enhanced amount claimed by the assessee during the assessment proceedings.*
>
> *With regard to the assessment year 2013-14, the ld.DRP has observed that there is a little change in the statutory provision by virtue*

of section 80IA(8). The arm's length price of the goods sold by the assessee in the alleged captive power plant has to be determined. The ld.DRP thereafter observed that the TPO has determined value of the goods and services sold by its eligible units. According to the TPO captive power plant and electricity distributing companies are to be pitted at different pedestal. According to the DRP, there is a material difference between captive power plant as a seller and distribution/transmission entity. Thus, differences are both in terms of functions performed as well as asset used. In the case of distribution and transmission entities, apart from assets used for generation of electricity huge investments have gone in laying in transmission and distribution infrastructure. These investments and related transmission and distribution function are totally missing in the CPP. It also observed that sale of electricity is regulated activity, thus, as per the law, CPP could have sold to a distribution licensee (through transmission utility). The benchmarking of sale of CPP at the rate at which non-eligible units brought electricity from the grid is thus incorrect. The ld.DRP under this misconception construed that the rate at which electricity supply-companies are purchasing the electricity should be applied for benchmarking the value of electricity sold by the CPP to its manufacturing units. In other words, the DRP was of the view that non-eligible units cannot be taken for the benchmarking for determining the value at which electricity was sold by the CPP. DRP has emphasized that manufacturing units could have different source of procurement of electricity; say – from CPP or from electricity boards. But as electricity producer, in a CPP, it could only be sold to distribution licensee holder. In this way, the ld.DRP observed that value of electricity cannot be benchmarked by adopting the rate at which manufacturing units of the assessee has been purchasing the electricity, rather, according to the DRP, the rate at which supplier companies are purchasing the electricity ought to be applied.

Before us, the ld.counsel for the assessee contended that this controversy has been silenced by the Hon'ble Gujarat High Court in the case of CIT, Gujarat Alkalis and Chemicals Ltd. He placed on record copy of the Hon'ble High Court's decision and contended that for the purpose of computation of deduction admissible under section 80IA market price of the electricity supplied by a CPP is to be determined by adopting rate at which manufacturing unit has been purchasing the electricity from the open market. The ld.DR, on the other hand relied upon the order of the DRP, but unable to controvert the contentions raised by the assessee.

30. We have duly considered rival submissions and gone through the record carefully. Before us the dispute has two dimensions. In the first fold of dispute the issue is, whether the claim of the assessee for enhanced deduction can be entertained during the assessment proceedings by way of a letter. The ld.DRP after putting reliance on the judgment of Hon'ble Supreme Court in the case of Geotze India Ltd (supra) did not accept the claim of the assessee in the assessment year 2012-13. It has been brought to our notice that such claim can be made even before the ld.DRP in the form of objection. A reference to the decisions of ITAT, Mumbai and Bangalore Benches have been made; Asian Paints Vs. DCIT, Mumbai 88 taxmann.com 677, and Himalaya Drug Co. Vs. DCIT, Bangalore, 48 taxmann.com 65 (2017). The ld.counsel for the assessee also put reliance upon the decision of the Hon'ble Gujarat High Court in the cases of Mitesh Impex, 270 CTR 66. This decision propounds that when the taxability of the assessee is going to be effected, then it can raise a fresh plea before the appellate authorities. Taking a leaf from this reasoning, ITAT, Mumbai and Bangalore have propounded that fresh claim can be made even before the DRP. Thus, respectfully following these decisions, we uphold that in the assessment year 2012-13, the DRP ought to have entertained the claim of the assessee.

31. So far as the issue on merit is concerned, the Hon'ble Gujarat High Court in the case of Gujarat Alkalies and Chemicals Ltd. has considered the following question:

> *"(ii) Whether the Tribunal was right in law in allowing the assessees claim of deduction of Rs.1954 crores u/s.80IA(4) of the I.T.Act, 1961, when the assessee had adopted rate of power generation at Rs.4.73 per unit, rate on which the GEB supplied power to its consumers, ignoring the rate of rs.2.36 per unit, the rate on which power generating company supplied its power to GEB?"*

32. The Hon'ble High Court has replied this question by recording the following finding:

> *"3. Since both the issues are covered by various judgments of this Court, we do not find it necessary to record facts at any length. Division Bench of this Court by judgment dated 22.11.2011 in Tax Appeal No.2092/2010 in somewhat similar controversy observed as under :*

"3. With respect to Question [B], the issue pertains to sub Section (8) of Section 80IA of the Income Tax Act, 1961. The assessee had a CPP Unit generating electricity, which was supplying it to a general unit. The electricity generated is being supplied to other consumers also. The CPP unit charged Rs. 5.40 ps. per unit from the general unit. The Assessing Officer applying sub-Section (8) of Section 80IA restricted the same to Rs. 5.32 ps. per unit and, thereby, restricted the deductions claimed by the assessee under Section 80IA of the Act. This restriction was primarily on the basis that the rate of Rs. 5.40 ps. charged by Gujarat Electricity Board (" GEB" for short) was inclusive of 8 paise per unit of electricity duty. This component of electricity duty the Assessing Officer discarded for the purposes of ascertaining market value of the electricity generated by the CPP Unit and supplied to its general unit.

4. CIT (Appeals) confirmed the view of the Assessing Officer on the same line of reasoning. The Tribunal, however, on further appeal by the assessee, reversed the orders passed by the Revenue authorities referring to and relying upon the decisions of other Tribunals. The Tribunal was of the opinion that the market value of the electricity supplied by the CPP Unit to the general unit would be the same being charged by GEB from the consumers.

5. Counsel for the Revenue contended that the component of 8 paise per unit was the electricity duty which GEB was not authorized to retain but had to pass on to the Government. In essence, GEB was only collecting 8 paise per unit as electricity duty for and on behalf of the Government. He submitted that the market value of the electricity should be reckoned on Rs. 5.32 ps. per unit as was done by the Revenue authority.

6. Under sub-Section(8) of Section 80IA of the Act, if it is found that where any goods or services held for the purposes of the eligible business are transferred to any other business carried on by the assessee or where any goods or services held for the purposes of any other business carried on by the assessee are transferred to the eligible business and in either case the consideration for such transfer does not correspond to the market value of such goods as on the date of the transfer, then for the purposes of deduction under Section 80IA in case of the eligible business as if the transfer had been made at the market value of such goods or services. It is in

this context that the question of substituting the actual consideration by the market value comes into picture.

7. We may notice that the Tribunal did not accept the contention of the assessee that the electricity is neither goods nor services and that, transfer of electricity, therefore, would not be covered under sub-Section (8) of Section 80IA of the Act. However, in so far as the Tribunal's reasoning to adopt the market value of the goods at Rs. 5.40 ps. per unit is concerned, we find no error. Undisputedly, GEB supplied the electricity to its consumers at the same rate. This, therefore, was a market value of the electricity supplied by the CPP Unit to the general unit. The fact that this amount of Rs. 5.40 ps. comprises of a component of 8 paise, which was electricity duty, to our mind, would make no difference in so far as the market value is concerned. To a consumer, the price being paid remains 5.40 ps. per unit. The fact that the seller retains only Rs. 5.32 ps. out of the said collection and passes on 8 paise per unit to the Government in the form of electricity duty, to our mind, would make no difference. This question is, therefore, not required to be considered."

4. This was followed in case of CIT v. Shah Alloys Ltd. in Tax Appeal No. 2093/2010. This was reiterated in Tax Appeal No.1646/2010 in case of ACITv. Pragati Glass Works (P.) Ltd. (order dated 30.1.2012), in which following observations were made :

"7. To our mind, Tribunal has committed no error. Assessing Officer and CIT (Appeals) while adopting Rs. 4.51 per unit as the value of electricity generated by eligible unit of assessee and supplied through its non eligible unit only worked out cost of such electricity generation. In fact CIT(Appeals) in terms recorded that Rs. 4.51 was computed as the reasonable value of the electricity generated by eligible unit of assessee. This amount included Rs. 4.17 per unit which was the cost of electricity generation and Rs. 0.34 per unit which was duty paid by the assessee to GEB for such power generation. Thus the sum of Rs. 4.51 per unit only represented the cost of electricity generation to the assessee. In Section 80IA(8) of the Act what is required to be ascertained is the market value of the goods transferred by the eligible business, when such transfer is by eligible business to another non eligible business of the same assessee and the consideration recorded in the accounts of the eligible business does not correspond to market value of such goods. Term "Market Value" is further explained in explanation to said sub-section to mean in relation to any goods or

services, price that such goods or services will ordinarily fetch in the open market. To our mind sum of Rs. 4.51 per unit of electricity only represented cost of electricity generation to the assessee and not the market value thereof. It is not in dispute that the GEB charged Rs. 5 per unit for supplying electricity to other industries including non eligible unit of the assessee itself. Tribunal therefore, while adopting the said base figure and excluding excise duty therefrom to work out Rs. 4.90 as the market value of the electricity generated by the assessee, to our mind, committed no error. It can be easily seen that if the assessee were to supply such electricity or was allowed to do so in the open market, surely it would not fetch Rs. 4.51 per unit but Rs. 5 per unit as was being charged by GEB. Since the excise duty component thereof would not be retained by the assessee, Tribunal reduced the said figure by the nature of excise duty and came to the figure of Rs. 4.90 to ascertain the market value of electricity generated by the eligible unit and supplied to non eligible business of the assessee. No error was committed by the Tribunal. No question of law therefore, arises. Tax Appeal is dismissed."

5. Issue once again reached the Division Bench of this Court in case of CIT v. Alembic Ltd. in Tax Appeal No.471/2009 and connected appeals. The Division Bench referring to earlier judgments of the Court held as under :

"11. We have considered the submissions made by the learned counsel for the parties. We have also considered the case laws cited by the learned counsel for the assessee. Taking into consideration the judements of this court and other High Courts, cited above, we are of the opinion that the Tribunal has rightly allowed the claim of the assessee. In that view of the matter, we do not find any infirmity in the order of the Tribunal. Therefore, we answer question (C) and (D) in favour of the assessee and against the revenue."

6. Issues are thus considered on number of occasions by the Court and held against the Revenue. Questions are answered against the Revenue. Both the tax appeals are therefore, dismissed."

This judgment of Hon'ble High Court is directly on the issue. Hon'ble Court has considered section 80IA(8), therefore, it is not

justifiable at the end of ld.DRP to ignore the judgment of Hon'ble jurisdictional High Court.

33. Respectfully following the authoritative pronouncements of the Hon'ble jurisdictional High Court, we allow these grounds of appeal. We direct the AO to grant deduction under section 80IA(4) on the value of electricity supplied by the CPP to its manufacturing units by adopting the average rate of electricity supplied to the assessee by MGVCL, DGVCL."

There is no disparity on facts. Therefore, respectfully following the order of the Tribunal in the Asstt.Years 2012-13 and 2013-14 passed in ITA No.805/Ahd/2017 and 2744/Ahd/2017, we do not find any merit in this ground of appeal. It is rejected.

66. Ground no.7(a) & (b): In this ground of appeal, grievance of the Revenue is that the ld.CIT(A) has erred in deleting the addition of Rs.3,95,56,650/- which was added by the AO by deleting the claim of capital loss made in the revised return of income.

66. Facts leading to this controversy has been noted down by the CIT(A) in para 11.2. We deem it necessary to take note of these facts from the order of the CIT(A) which reads as under:

"(i) The appellant company subscribed fresh cumulative redeemable preference shares of face value of Rs. 100/- each amounting to Rs. 18.83 crores (18,83,000 shares). These shares carried better terms for the assessee in as much as at the time of redemption at the end of the 5th year, i.e., in the FY 2011-2012, the shares would be redeemed at a premium of Rs. 35/- per share. Instead of carrying 5% dividend as earlier, the new preference shares carried 1% dividend and additional premium of Rs. 47- per share for every year during which the share was not redeemed.

(ii) IGSL redeemed the 18,83,000/- preference shares of Rs. 100/- each at the face value for total consideration of Rs. 18.83 crores.

(iii) This redemption was financed by the receipt of equivalent sum of Rs. 18.83 crores from the assessee as at (i) above.

(iv) The appellant had paid Rs. 18.83 crores for subscribing the 5% preference shares in 2002 and during this previous year it received back the same amount of Rs. 18.83 crores by way of redemption. Thus, there was no gain or loss per se in the transaction. The only loss was on account of indexation of the cost of acquisition.

(v) This long term capital loss has been carried forward to the subsequent years and not been set off against any taxable income."

67. The AO disallowed the claim of the assessee by observing that it holds 49.50% shares in Inox Global Services Ltd. and other group concerns are the major share holders. According to him, directors are also common in both the concerns, and therefore, it is a just paper transaction for claiming capital loss, which according to the AO cannot be accepted as a genuine transaction. On appeal, the ld.CI(A) has observed that Inox Global Services Ltd. has not been paying any dividend from the inception of the investment. It has no distributable profit through its operation, out of which it could pay dividend accrued while taking investment. The ld.CIT(A) thereafter referred to section 80 of the Companies Act, 1956 and observed that first proviso to this section provided that "no such shares shall be redeemed except out of profits of the company which would otherwise be available for dividend or out of the proceeds of a fresh issue of shares made for the purposes of the redemption". Thus, according to the ld.CIT(A) preferential shares can be redeemed only in two ways, viz. (a) out of profits available for payment of dividend; and/or (b) out of fresh issue of shares made for

the specific purpose of redemption. Since IGPSL was not having any distributable profits out of which dividend could be paid, the company chose to adopt the second route, i.e. to redeem the shares out of fresh issue of capital. Before the ld.CIT(A), the assessee brought to the notice copies of resolutions of both the companies, and therefore, the ld.CIT(A) was satisfied that it was not bogus transaction or a colourable transaction. The assessee basically has not suffered any loss, rather long term capital loss arose account of indexation of cost, as the investment was long term investment. Accordingly, the ld.CIT(A) has allowed the capital loss to the assessee, more so, this capital loss has not been claimed for set off in this year, rather it has been allowed to be carried forward.

68. With the assistance of the ld.representatives, we have tone through the record carefully. The ld.AO did not possess any material except a reference to the fact that 49.50% shares in Inox Global Services Ltd. were held by the assessee and group concerns, for treating the transactions as bogus. To our mind this reasoning is not sufficient, just to deny the identity of any corporate entity. On the other hand, the ld.CIT(A) took note of the facts how the assessee-company has subscribed preference shares in the F.Y.2001-02 and 2002-03, and how they have been redeemed by subscribing fresh cumulative redeemable preferential shares. In fact, there is no loss to the assessee-company except loss computed on account of indexation. In order to get the return on old investment, it has redeemed the shares by subscribing fresh shares with better return and term. It is decision for the benefit of the company. Simply because it is reducing taxable income does not mean that it will

become bogus. After considering the finding of the ld.CIT(A), we do not find any error in it, and this ground of appeal raised by the Revenue is rejected.

69. Ground no.8: This ground is connected with ground no.2 of the assessee's appeal and ground no.4 of Revenue's appeal in Asstt.Year 2008-09. Revenue has pleaded in these ground that the ld.CIT(A) has erred in deleting addition of Rs.77,23,66,644/- and Rs.59,74,86,404/- in Asstt.Year 2007-08 and 2008-09 respectively. These amounts were added by the AO on account of disallowance of depreciation with aid of section 40(a)(ia) r.w.s. 194C of the Act. On the other hand, the assessee has pleaded that provisions of section 40(a)(ia) of the Act does not apply to the purchase of capital assets and consequentially to the depreciation. In other words, the short issue involved in all these grounds is that on acquisition of capital asset, if an assessee failed to deduction TDS, then, can depreciation be disallowed to the assessee by holding that expenses incurred for acquiring the capital asset is not admissible for capitalisation on the basis of interpretation of section 194C and 40(a)(ia) of the Act.

70. Brief facts of the case are that the assessee has established a project to set up 14 units of wind mills at Gude, Panchghani district, Maharashtra. It was a turnkey project and given to M/s.Vestas Wind Technologies India P.Ltd. It has entered into two separate agreements dated 4.1.2007 for supply of 14 units Wind Mills and dated 6.1.2007 for errection and commissioning. The AO was of the opinion that the payments for supply of Wind mills are covered by provisions of section 194C. Since the assessee failed to deduct TDS on such payment,

therefore it is required to be disallowed under section 40(a)(ia) of the Act. Since the assessee has not claimed expenditure in the profit & loss account, rather it capitalized such expenditure and claimed depreciation, then, with help of section 40(a)(ia) the AO disallowed the depreciation. On the other hand, the case of the assessee is that it had entered into two separate contract; one for supply of the goods. This contract was executed on 4.1.2007. Under this contract, it had made payment for supply of material at Rs.149.37 cores. The second contract was entered into on 6.1.2007 vide which a payment was accrued at Rs.3.92 crores for errection and commission charges. In the contact for supply of goods, no work contract or services aspect is involved, and therefore, it does not fall within the ambit of definition provided in section 194C and no TDS requires to be deducted. As far contract for errection and commission is concerned, it already deducted TDS and no disallowance could be made. The ld.AO was not satisfied with the explanation of the assessee, and he did not allow the depreciation.

71. On appeal, the ld.CIT(A) allowed the claim of the assessee by recording the following findings:

> *"12.2 I have considered the submissions of the Id. AR and the facts of the case/ The disallowance of the claim of depreciation in respect of wind mills (wind turbine generators) has been made by the AO on the ground that tax was not deducted at source in respect of payment for the supply of such wind mills by the contractor M/s Vestas Wind Technologies (I) Pvt. Ltd (VWTIPL). The provisions of section 40a(ia) specify that certain amounts shall not be allowed as a deduction in computing the income chargeable under the head "profits and gains of business and profession", unless tax has been deducted from such payments at the prescribed rates. Such amounts include interest, commission, brokerage, rent, royalty, fees for professional or technical services, and amounts payable to resident*

contractor or a sub-contractor for carrying out any work on which tax was deductible at source under Chapter XVII-B. Chapter XVII-B deals with collection and recovery of tax. Part B of this chapter deals with deduction of tax at source. Section 194 C deals with payments to contractors.

12.3 In the instant case, clearly the impugned payments were not in respect of payment of interest, commission, brokerage, rent, royalty, fees, etc., but related to payments made to a supplier/contractor. Hence, the only applicable portion of the section would be in respect of "carrying out of any work by a contractor or subcontractor on which tax is deductible at source."

12.4 The assessment year in question is AY 2007-08. Hence the applicable provisions would be those which prevailed before the amendment of section 194C w.e.f. 1.10.2009 by Finance (No. 2) Act, 2009. As per the pre-amended provisions, any person responsible for paying any sum to any resident for carrying out any work shall at the time of credit of such sum to the account of the contractor or at the time of payment thereof deduct tax at the rates specified therein.

12.5 From a reading of section 194C as well as section 40(a)(ia), it is clear that the essence of liability to deduct tax arises from the carrying out of any work. "Work" has not been defined in the section. However, Explanation III of the pre-amended section 194C provided an inclusive definition of "work" so as to include advertising, broadcasting and telecasting, carriage of goods and catering. In the amended provisions, w.e.f. 1.10.2009, in clause (iv) "work" has been defined to include

> *"(e)' manufacturing or supplying a product according to the requirement or specification of a customer by using material purchased from such customer, but does not include manufacturing or supplying a product according to the requirement or specification of a customer by using material purchased from a person, other than such customer. "*

12.6 For the AY 2007-08, i.e. the year under consideration, no tax was deductible in respect of supply of goods, whether manufactured with inputs from the purchaser or otherwise. Hence on this ground alone the transaction of supply of wind turbine generators would be outside the purview of section 194C. However, it is instructive to refer to Board's Circular issued on this subject. The Circular No. 681 dt. 8.3.1994 relates

to TDS u/s 194C. In this circular, the CBDT, after considering the judgement of the Supreme Court in the case of Associated Cement Co. Ltd. v CIT, 201 ITR 435, laid down certain guidelines with regard to the applicability of the provisions of section 194C. Inter-alia, it provided as follows:

> *"(vi) The provisions of this section will not cover contracts for sale of goods.*
>
> *(a) Since contracts for the construction, repair, renovation or alteration of buildings or dams or laying of roads or airfields or railway lines or erection or installation of plant and machinery are in the nature of contracts for work and labour, income-tax will have to be deducted from payments made in respect of such contracts. Similarly, contracts granted for processing of goods supplied by Government or any other specified person, where the ownership of such goods remains at all times with the Government or such person, will also fall within the purview of this section. The same position will obtain in respect of contracts for fabrication of any article or thing where materials are supplied by the Government or any other specified person and the fabrication work is done by a contractor.*
>
> *(b) Where, however, the contractor undertakes to supply any article or thing fabricated according to the specifications given by Government or any other specified person and the property in such article or thing passes to the Government or such person only after such article or thing is delivered, the contract will be a contract for sale and as such outside the purview of this section. "*

12.7 Thus, it has been clearly stated by the Board that the guidelines relating to the provisions of tax deduction at source u/s 194C would not cover contracts for sale of goods, but would only be confined to contracts for fabrication of article or thing. Where the fabrication is carried out with materials supplied by the other specified persons and the fabrication work alone is done by the contractor, in such case tax would have to be deducted from the payment made in this regard. However, where the supply of any article or thing is the subject matter of the transaction and such article or thing is fabricated according to the specifications given by the specified persons, and no material is supplied by such specified persons, and the property in such article or thing passes to such person

only after the said article or thing is delivered, then the contract will be a contract for sale and thus outside the purview of section 194C. In the instant case, no material has been supplied by the assessee. The article or thing has been supplied by M/s. VWTIPL in accordance with the specifications given by the assesse. The property in the goods passed only after delivery by the supplier to the assessee and payment by the assessee to the supplier. Hence by applying the criteria laid down by the Board, the transaction in question would appear to be a contract of sale and not a contract for carrying out of any work.

12.8 At the same time I find that on very similar facts, the ITAT, Hyderabad Bench had occasion, in the case of Power-Grid; to examine the nature of works contract in contradistinction to sales contract. In that case also, as in the present case, the contract was bifurcated into two parts, i.e. contract for supply of equipment and contract for erection and commissioning of the said equipment. The applicability of the provisions of section 194C was the issue there, as here. The ITAT in that case held as under (head notes):-

> *"TDS - Under s. 194C - Works contract vis-a-vis contract for sale -If equipment are manufactured as per the design, engineering etc. supplied by the supplier, it -would not result in a works contract especially when all the materials belong to the supplier even though it produced a tailor made product - Erection portion being subsequent to passing of title by execution of supply portion, it cannot be said that the erection portion controls the supply portion even though fulfillment of erection contract is a condition precedent to fulfillment of supply contract — As the title in the equipment manufactured as per the design, engineering, etc supplied by assessee passed on to the assessee before commencement of the erection contract and assessee had entered the same in its stock register before issuing the same for erection, it was a contract of sale not attracting s. 194C - Assessee having already deducted tax at source qua the erection portion, provisions of s.194C shall not apply to remaining sale portion "*

12.9 Similarly, this issue was also considered by the ITAT Delhi Bench in the case of Haryana Power Generation Corporation. In that case too the issue related to whether TDS provisions were applicable in the case of a composite contract for supply of equipment and erection and

commissioning of the equipment. The Delhi Bench held as under (Head notes) :-

> *"TDS - Under s. 194C - Composite contract or separate contracts — Primary and dominant object of assessee being to purchase the material, i.e. two ESP s for its power plant, the contract for supply of material, freight, insurance and supply of spare parts constituted separate contract from, the. contract for civil work .of erection .and , .. commissioning of the plant though there is only one common purchase order - AO was not justified in treating the assessee-in-default by treating the two contracts as composite contract - AO directed to rework the TDS accordingly - Further, if the tax has already been paid by the contractor, the assesssee could not be treated in default under s. 201"*

12.10 Having regard to the provisions of law as contained in section 40(a)(ia) and 194C, the Boards view in the matter as expressed in Circular No. 681 and the decisions of the Hyderabad and Delhi Benches of ITAT as above, I am of the opinion that the impugned transaction amounted to a contract for sale of 14 numbers of wind turbine generators worth Rs. 149.37 crores and a separate contract for erection and commissioning of the WTGs for sum of Rs. 3.92 crores. The assessee has already deducted tax at source in respect of the payment of Rs. 3.92 crores. As noted above, the provisions of Chapter-XVIIB would not be applicable in the case of sale of goods. Hence it is held that the AO was not correct in disallowing the claim of depreciation for failure to deduct tax at source on payments pursuant to such contract of sale. Disallowance of depreciation amounting to Rs.77,23,66,644/- is therefore directed to be deleted."

72. We have duly considered rival contentions and gone through the record carefully. Assessment years involved before us are 2007-08 and 2008-09. Section 194C has been amended at different intervals even after 1.10.2009. A perusal of section 194C as well as section 40(a)(ia) as these are applicable in the Asstt.Year 2007-08 and 2008-09 would reveal that any person responsible for paying any sum to any resident for carrying out any work including supply of labour in pursuance of a contract

between the contractor and ….. State Government….. any company …. or any authority etc… then TDS has to be made. The expression "work" has not been defined in section, but has been explained in *Explanation III* appended to this section. According to this *Explanation* "work" shall include (a) advertising, (b) broadcasting and telecasting including production of programmes for such broadcasting or telecasting; (c) carriage of goods and passengers by any mode of transport other than by railways, (d) catering, and (e) manufacturing or supply of product according to the requirement or specification of a customer by using the material purchased from such customer. But it does not include manufacturing, supplying a product according to the requirement and specification of customer by using material purchased from a person other than such customer. If an assessee failed to deduct TDS on payment pertains to such work, then the expenses will be disallowed under section 40(a)(ia) of the Act because the assessee failed to deduct TDS. The issue before us is, whether the assessee has entered into two independent contracts; one for supply of goods, and other for erection and commissioning of wind mills. The ld.CIT(A) has made reference to the order of the ITAT, Hyderabad Bench in the case of Power Grid (supra) and observed that facts of this case are akin to case on hand. A perusal of the definition of the "work" provided in the Act would indicate that if equipments are being manufactured as per design, engineering etc. supplied by the suppliers, which would not result in a work contract. Mores so, even if it is according to the design supplied by the assessee, but material was not purchased from the assessee, then also equipments supplied by the supplier would not fall in the work contract. The assessee has emphasised that it has purchased 14 numbers

of wind turbine generators. These were not manufactured on the basis of supplies made by the assessee, rather supplier had purchased the goods or sourced it from third party, and thereafter manufactured them. Thus, for the purpose of 14 numbers of wind turbines, there was a separate contract and it was only for supply of goods. On this purchase price, the assessee was not required to deduct TDS under section 194C. The ld.CIT(A) has made reference to the Circular of the Board bearing no.681, and thereafter followed various orders of the ITAT on this point. The AO has erred in construing the purchases of 14 numbers of wind turbine as a work contract on whose payment the assessee was to deduct TDS. We have extracted finding of the ld.CIT(A), wherein the ld.CIT(A) has considered all aspects on this issue. After going through the finding we do not find any error in it. Accordingly, we do not find any merit in the grounds of appeal raised by the Revenue.

73. As far as the issue raised by the assessee in its appeal is concerned, that is just an argument, which has been taken into consideration by the ld.CIT(A) while holding that depreciation will be admissible to the assessee. Therefore, for statistical purpose, ground of appeal of the assessee is treated as allowed, whereas, the ground raised by the Revenue in both the years are rejected.

74. Ground no.9 in the Asstt.Year 2007-08 is inter-connected with ground no.3 of the assessee's appeal as well as ground no.5 of Revenue's appeal in the Asstt.Year 2008-09 and ground no.6 of assessee's appeal in the Asstt.Year 2008-09. We take all the grounds of appeals together.

75. Brief facts of the case are that the assessee has entered into a consultancy agreement with Mckinsey & Co. ("MC" for short) and it has capitalized a sum of Rs.5,10,17,289/- as fees paid to "MC". It has claimed depreciation of Rs.2,55,08,645/- in respect of this payment in the Asstt.Year 2008-09. Similarly it claimed depreciation in the Asstt.Year 2008-09. The AO has disallowed depreciation claimed on this amount by holding that (a) job assigned to "MC" was not complete in the present financial year, and (b) consultancy charges were paid towards a new business by another company of group and did not relate to the present business of the assessee. Dissatisfied with the finding of the AO, the assessee carried the matter in appeal in both years. The ld.CIT(A) has decided the issue in the Asstt.Year 2007-08 which has been followed in the Asstt.Year 2008-09. Therefore, we deem it appropriate to take note of finding of the CIT(A) in the Asstt.Year 2007-08, which read as under:

> *"13.2 I have considered the submissions of the Id. AR and the facts of the case. I find that the AO has noted that the invoices raised by McKinsey & Co in respect of consultancy services provided by them were in the name of M/s Inox and not in the name of the asessee. However, it is seen that the appointment letter dt. 4.9.2006 by which McKinsey & Co were appointed as consultant for identifying suitable business opportunities for growth of the assessee company as well as the group company, has been signed by Shri Deepak Asher, Group Head (Corporate Finance) on the letterhead of the assessee company (GFL). The discussion papers were also addressed by M/s McKinsey & Co to GFL. The report was also submitted to GFL. Hence the conclusion of the AO that the consultancy was unrelated to the assessee (GFL) is not strictly speaking correct. The assessee's Group is known as Inox Group. Therefore., it would not be correct to say that the entire expenditure was unrelatable to the assessee company. Subsequent to the submission of the report by McKinsey & Co, the assessee, set up a subsidiary company under the name and style of Inox Wind Ltd., for the purpose of manufacture of windmills (WTG). At*

the same time, the AOs observation that the invoices were raised in the name of the group company has not been controverted: This suggests that the group as a whole gained by commissioning the report from McKinsey & Co. Accordingly, in my view it would be fair to consider 20% of the expenditure on consultancy to be relatable to the assessee company (GFL). Regarding the other aspect, it is held that the assessee has rightly capatilised this amount and allocated the same to the capital cost of wind mills. The AO is therefore directed to allow 20% of Rs. 5,10,17,2897- as part of capital cost of wind mill and the disallowance of the balance of Rs. 4,08,13,8317- is confirmed."

76. The ld.counsel for the assessee while impugning orders of the CIT(A) contended that details with respect to this agreement are available on page no.394 to 431 of the paper book. In principle, the ld.CIT(A) has agreed that this agreement was with the assessee, but allowed 20% expenditure for capitalization in the case of the assessee only on the basis that in the copy of invoice name of "Inox" is appearing. Copies of the invoices are available on page no.424 and 428 of the paper book. He took us through these pages and submitted that the name of "Inox" was just appeared because of address purpose, otherwise every correspondence took place with the assessee. There is no justification for habouring a belief that only 20% consultancy was meant for assessee and it is entitled to crystalise 20% of such expenses.

77. We have duly considered rival contentions and gone through the record. It emerges out from the submission filed by the assessee and considered by the ld.CIT(A) that the assessee was having surplus funds and exploring some suitable business opportunities for future investment and growth. Therefore, it has appointed "MC" as consultant for exploring the business idea in some of sectors viz. wind farm, food service, budget hotel chain, cold chain, step down care, containerized

cargo, third party logistics etc. "MC" has submitted a consultancy report to the assessee about the above business items, and ultimately it was decided that "GFL" should embark on the power generation business by setting up and operating wind farms. According to the assessee, as a part of the study, it was also suggested by the "MC" that to strengthen the competitive advantage of setting up and operating wind farms, "GFL" may consider manufacturing of its own wind turbine generator sets. Now, the question before us is, how it is to be visualized that this consultancy report was not obtained by the assessee in connection with its business. The AO has assigned two reasons; the consultancy fees were paid towards a new business by another company of the assessee and did not relate to the present business of the assessee, and job assigned to "MC" was not complete in the present financial year. It is pertinent to note that except address of "Inox" on two invoices, there is no other material either discussed by the AO or by the CIT(A) exhibiting that this consultancy was meant for other companies of the group or they have commenced any line of business contemplated in the report. There is no evidence of payment of these charges by any other group company. The CIT(A) basically agreed with the assessee and held that AO is not correct in construing that this report is related to the assessee. There is no specific material with the AO nor he assigned any reason for holding that report was not meant for the assessee. However, simply for reason that one or two invoices contained address of "Inox" it does not mean that the assessee has used report only to the extent of 20% and rest is used for other. This aspect can be looked into with different angle. The AO could verify whether others have crystallized the amounts or claimed depreciation or revenue expenditure. There is no dispute with

regard to obtaining of report as well as recognizing payable amount to "MC". Now this expenditure is either allowed as a revenue expenditure or it is to be capitalised. If others have claimed the revenue expenditure, then, the AO should specify it, and if it has not been claimed by any-one than the assessee has capitalised, then it could not be partly allowed to the assessee. Therefore, the CIT(A) has committed an error in restricting the allowance to 20%. This order, therefore, is not sustainable. We allow both the grounds of appeal raised by the assessee and reject the grounds raised by the Revenue. We direct the AO permit the assessee to capitalised the payment made by the assessee to "MC" and allow depreciation consequentially in both the years.

78. Ground no.10 in the Asstt.Year 2007-08. In this ground of appeal, grievance of the Revenue is that the ld.CIT(A) has erred in deleting the addition of Rs.5,69,034/-.

79. Brief facts of the case are that the assessee has capitalised a sum of Rs.5,10,17,289/- as paid towards consultancy charges to "MC". The AO was of the opinion that this report is not related or connected to the present business of the assessee, hence, the amount incurred as consultancy charges was not for the purpose of business. He did not permit the assessee to capitalise those expenditure. Consequently, he proportionately disallowed the interest expenditure debited by the assessee in the accounts. In other words, the assessee has interest expenditure of Rs.495.63 lacs in the profit & loss account. The AO has worked out interest expenditure on the consultancy charges and disallowed that interest expenditure out of the total expenses debited by

the assessee in the profit & loss account. The ld.CIT(A) deleted this disallowance.

80. In the ground no.9, we have held that the assessee is entitled to capitalise expenditure as incurred towards consultancy charges. In consequence to that finding, no interest expenditure deserves to be artificially worked out for disallowance, because principal amount has been treated as for the purpose of business and permitted the assessee for capitalization of such expenditure being pre-operative expenditure. Therefore, in our opinion, the ld.CIT(A) has not committed any error while deleting the disallowance.

ITA No.172/Ahd/2012 (Asstt.Year 2008-09):

81. Ground No.1: In this ground the assessee has pleaded that the ld.CIT(A) has erred in confirming the disallowance of long term capital loss of Rs.1,75,31,935/-.

82. Brief facts of the case are that the assessee has entered into an agreement on 1-2-2008 with Humsay Information Services P.Ltd. (HISPL) for sale of 50.00 lakhs fully paid up equity shares and 18,83,000/- 1% cumulative preference shares of IGSL along with other entities. Out of the above, the assessee was owner of 24,74,930 equity shares (value at Rs.10/-) and 18,83,000 preferential shares (face value of Rs.100/- paid up value Rs.64/-). The assessee had claimed a long term capital loss of Rs.1,75,31,935/- on sale of shares of IGSL. The AO rejected its claim on the ground that though agreement to sell was executed on 1.2.008, but it did not mention that sale or purchase took place at the time of agreement and there was an addendum signed

between the parties on 3.4.2008. Thus, it is evident that transaction did not take place as per agreement dated 1.2.2008. Accordingly, the ld.AO disallowed capital loss. On appeal, it was contended by the assessee that HISPL was to make payment in instalment to the seller. In consideration of which sellers were to transfer preferential shares in IGSL to the assessee. Part of the shares was transferred and part payment at Rs.34,47,519/- was received during the accounting year relevant to this assessment year. The assessee has submitted copies of the agreement and other details in connection with this transaction. It also relied upon CBDT circular bearing no.704 dated 28.4.1995 stating that in case of share transaction taking place directly between the parties, and not through stock exchange, but a contract letter as declared by the parties is to be treated as date of transfer provided it is followed by actual delivery of shares. The ld.CIT(A) has considered this aspect, but did not concur with the assessee, and upheld the finding of the ld.AO. The discussion made by the ld.CIT(A) in para-5.2 reads as under:

> *"5.2 I have considered facts of the case and appellant's submissions. Appellant has considered date of "transfer" of 82,430 equity shares and 2,44,790 preference shares to be falling in FY 2007-08 on the basis of Share Purchase Agreement entered on 1.2.2008 between appellant and its related concerns with Humsay Information Services Pvt. Ltd. In Lhis regard, appellant has relied upon CBDTs Circular No. 704/1995 dt. 24.4.95, i.e. date of transfer in respect of outside the Stock Exchange transactions is date of contract of sale between parties provided it is followed up with actual delivery of shares and the transfer deeds. As per para 3.2 of the Agreement, transfer of shares in question was to be given effect to on the date of signing of the Agreement i.e. 1.2.2008. Terms & conditions for payment and delivery of shares as per para 2.9 of the Agreement were to make payment four days before the milestone dates in para 3.2, after which delivery of shares was to be done. The transfer of ownership as per share transfer forms took place on 9.4.2008 i.e. in the*

next financial year and the payment was received partly in March 2008 and partly in April 2008. Thus, the terms & conditions of the Share Purchase Agreement dt. 1.2.2008 were not complied with. In fact, the remaining conditions in this Share Purchase Agreement including schedule of transfer of balance shares and also receipt of additional amount of Rs 97,97,500/- by way of revenue sharing arrangement (as per para 3.5 of the Share Purchase Agreement) etc. was also not adhered to and in fact, the Share Transfer Agreement was not given effect to in substance. Since, the contract of sale, i.e Share Purchase Agreement dated 1.2.2008 was not followed in substance and the IGSL shares were actually transferred in FY 2008-09 i.e. on 9.4.2008, the date of transfer cannot be accepted to be in FY 2007-08. It is held that AO was justified^ in not allowing capital gains loss in respect of shares of IGSL in AY 2008-09.

5.2.1 However, there is merit in appellant's contention that addition of Rs.1,75,31,935/- under the head 'business income' was not required and instead long term capital gains are to be increased to the extent set off was claimed in this year i.e. Rs.45,79,704/- and balance loss of Rs.1,38,00,981/- is not allowed to be carried forward, due to transaction not having taken place in this year. AO is directed to modify the addition/disallowance accordingly. Further, as per the Share Purchase Agreement dated 1.2,2008, the rate at which all the shares held by appellant group were to be transferred to HISL was Rs.2.03 per equity share and Rs.13.4 per preference share. On being asked about the basis for these values, appellant company submitted that no valuation was done to arrive at the aforesaid values and consideration was fixed on mutual consent with the purchaser. Even this consideration fixed as per the Share Purchase Agreement was finally not adhered to and the remaining shares were transferred at a much lesser value through Addendum signed on 2.4.2010 i.e. at a value of Rs.0.01 per equity share and Rs.0.04 per preference share. Since the transaction has resulted in huge loss, sale rate of shares is an issue to be examined by the AO in relevant AYs. ;

83. With the assistance of the ld.representatives, we have gone through the record carefully. A perusal of the finding of the ld.CIT(A) would indicate that the ld.CIT(A) has considered all contentions of the assessee, and also CBDT circular 704 of 1995. It is pertinent to note that total shares were not owned by the assessee, rather on receipt of money

in instalment from the purchaser, HISL, it would buy from others. Thus, assessee was not in position to deliver the shares physically. The ld.CIT(A) has recorded a categorical finding that transaction did not materialize in this year. Transfer of ownership as per share transfer form took place on 9.4.2008 i.e. financial year relevant to the Asstt.Year 2009-10 and not 2008-09. Assessee is not entitled to claim loss on sale of IGSL shares. The loss has rightly been denied and we do not find any merit in this ground of appeal. It is rejected.

Ground No.2 and 3:

84. In these grounds of appeal, grievance of the assessee is that on sale of shares, profit/loss deserves to be assessed under the head capital gain.

85. We have already adjudicated this issue while taking up all these grounds along with grounds of appeal raised in the Asstt.Year 2005-06.

Ground no.4:

86. In this ground of appeal grievance of the assessee is that the ld.CIT(A) has erred in confirming disallowance under section 14A read with rule 8D of the Income Tax Act.

87. Brief facts of the case are that the assessee has shown dividend income of Rs.13,47,01,641/- which was claimed as exempt from tax. It emerges that the assessee has shown gross investment of Rs.51,861 lakhs in shares/mutual funds. This activity of the assessee has been upheld as investment which would give rise to long term capital gain or short term capital gain to the assessee on sale of shares/mutual funds/bonds. The

AO sought explanation of the assessee to demonstrate expenses relatable to earning of such income have been disallowed by the assessee. The assessee has *suo moto* disallowed a sum of Rs.2,59,75,022/-. Break-up of this amount has been given at page no.12 of the assessment order. It reads as under:

Sr. No.	*Particulars*	*Amount(Rs)*
I)	*Securities Transaction tax*	*I2985I2S*
2)	*Demat Charges*	*1423333*
3)	*PMS fees*	*4994001*
4)	*Consultancy Fees for Equity Research Services*	*1572760*
5)	*Out of other expenses- As estimated by Management*	*5000000*
	TOTAL	*25975022*

88. The ld.AO was not satisfied with the calculation made by the assessee. He worked out disallowance of Rs.16,04,08,332/-. Since the assessee itself has made disallowance of Rs.2,59,75,022/- he added difference i.e. Rs.16,04,08,332/- minus Rs.2,59,75,022/- i.e. Rs.13,44,33,310/-. Dissatisfied with this disallowance, the assessee carried the matter in appeal before the ld.CIT(A). The ld.CIT(A) has partly deleted the disallowance and partly confirmed. The ld.CIT(A) considered various aspects and thereafter directed the AO to verify contentions made by the assessee and re-calculate the disallowance.

89. Before us, the assessee has raised two fold of submissions. It contended that the AO has worked out disallowance of interest expenditure of Rs.10,75,08,033/-. This disallowance could not have been

made because the assessee has more surplus fund than the investment. He drew our attention towards details submitted in tabular form and pointed out gross investment was Rs.55,668 lakhs; whereas surplus funds in the shape of share capital and reserves & surplus in the Asstt.Year 2008-09 was Rs.99,069 lakhs. From the financial statement, it is discernible that the assessee was having much more surplus funds. He submitted that as far as administrative expenses disallowed by the AO at the rate of 0.5% of the average investment is concerned, this be considered in the light that the assessee itself has disallowed 2.59 crores. The ld.CIT-DR, on the other hand contended that the ld.CIT(A) has considered all these aspects, and thereafter observed that there is no specific identification of the expenditure. The assessee has incurred expenditure of Rs.27.64 crores, and it has not allocated any expenditure towards exempt dividend income of Rs.13.47 crors. He relied upon the order of the ld.CIT(A).

90. We have duly considered rival submissions and gone through the record carefully. There is no dispute that the assessee has shown gross investment of Rs.55,668 lakhs. It has debited interest expenditure of Rs.27.64 crores in the accounts. But that expenditure is meant for other manufacturing activity. For the purpose of investment, it has not used the interest bearing funds because surplus interest free funds available with the assessee are far more than the investment. We have considered this aspect while dealing with identical issue in earlier year. We have put reliance upon the decision of Hon'ble Bombay High Court in the case of Reliance Utilities & Power P.Ltd. (supra) wherein it has been held that if an assessee demonstrates more surplus funds available with

it than the investment, then an inference can be drawn that such investments have been made out of surplus fund. Therefore, no interest expenditure is to be allocated for making disallowance under section 14A of the Act.

91. As far as disallowance under clause (iii) of Rule 8D on account administrative expenditure are concerned, the ld.AO has worked out 0.5% of the average investment at Rs.2,69,25,307/-. This amount deserves to be set off against the expenses *suo moto* disallowed by the assessee at Rs.2.59 crores; whereas the activity of the assessee is being treated as "investor" and on sale of shares profit is to be assessed under the head "capital gain", then all these expenditure viz. security transaction tax, consultancy fees and other expenditure will not be admissible. This amount can take care *qua* the administrative expenses. Therefore, we confirm the addition worked out by the AO at Rs.2,69,25,307/-, but out of this expenditure a sum of Rs.2,59,75,022/- be set off. This ground raised by the assessee is partly allowed.

Ground No.5

92. This ground of appeal raised by the assessee is not in consonance with Rule 8 of the ITAT Rules. It has seven sub-grounds. In brief, the issue involved is, whether on valve power produced for self consumption, assessee is entitled to claim deduction under section 80IA(4). If yes, then at what rate.

93. The AO has adopted the rate at which Gujarat Electricity Board/GUVNL purchases the power from producers of the electricity. It has adopted average rate of such purchases for calculating eligible

profit for grant of deduction. The claim of the assessee is that such calculation be made at the average rate of electricity supplied by GUVNL to the assessee. We have considered this aspect while dealing with Ground No.6(a) and 6(b) of the Revenue's appeal for the Asstt.Year 2007-08. We have put reliance upon the finding of the Tribunal in the Asstt.Year 2012-13 and 2013-14. Considering our discussion made in the para 64 in this order, we allow this ground of appeal and direct the AO to follow the finding of the Tribunal in the Asstt.Year 2012-13 and 2013-14.

Ground no.6:

94. In this ground, grievance of the assessee is that the ld.CIT(A) has erred in directing to adopt 20% of consultancy fees paid by the assessee to M/s.Mckinsey & Co. for capitalization and allowance of depreciation that extent. The case of the assessee is that total amount incurred by the assessee towards consultancy fees ought to be capitalized and depreciation on such is to be allowed.

95. We have considered this issue while considering ground of appeal raised by the Revenue i.e. ground no.5 as well as ground no.9 of Revenue's appeal in the Asstt.Year 2006-07. Considering our finding, this ground of appeal is allowed because we have held that the assessee is entitled to capitalize total fees and entitled to claim depreciation on such amount. There cannot be any bifurcation.

ITA No.2546/Ahd/2012 (Asstt.Year 2009-10):

96. Revenue has taken three grounds of appeal. We have already adjudicated all these three grounds while taking up identical issues in the Asstt.Year 2007-08 and 2005-06 etc. Accordingly this appeal is dismissed.

ITA No.106/Ahd/2016 (Asstt.Year 2010-11):

97. Three grounds are taken in this appeal. We have already considered ground no.1 and 2 wherein Revenue has challenged allowance of contribution made to Refrigerant Gas Manufacturers Association and village development expenditure. We have already considered both the issues while taking identical issue in the Asstt.Year 2005-06, and rejected. Hence, these grounds of appeal are also rejected.

98. In ground no.3: Revenue has pleaded that the ld.CIT(A) has erred in holding that adjustment made on account of disallowance under section 14A cannot be made in the book profit under section 115JB of the Act. The ld.counsel for the assessee at the very outset submitted that Special Bench of the Tribunal in the case of ACIT Vs. Vireet Investments P.Ltd., 165 ITD 27 (SB) has held that no adjustment on account of 14A disallowance can be made in the book profit for the purpose of section 115JB. It is also pertinent to note that we have dealt with this issue in the Asstt.Year 2012-13 and 2013-14. Following the decision of the Special Bench, we have held that no such amount can be included in the book profit. Therefore, we do not find any merit in this ground of and others raised by the Revenue. Hence, this appeal is rejected.

ITA No.548/Ahd/2016:

99. This appeal is directed at the instance of the Revenue against order of the ld.CIT(A) dated 31.12.2015 passed for the Asstt.Year 2010-11. Originally, the ld.CIT(A) has decided the appeal of the assessee vide order dated 30.10.2015. Thereafter an application under section 154 of the Act was moved for rectification of certain apparent error. The ld.CIT(A) rectified the error and passed an order on 31.12.2015. The grievance of the Revenue is against this order i.e. the ld.CIT(A) has erred in holding that income arising from transfer of mutual funds and bonds be assessed under the head "capital gain" and not under the head "business income". We have already considered this issue while considering the aspect that profit on sale of shares/bonds/mutual fund will be assessed under the head "capital gain". Therefore, in view of our above finding, we do not find any merit in this ground of appeal it is rejected. Appeal of the Revenue is dismissed.

ITA No.2365/Ahd/2012, 116 and 117/Ahd/2016 :

100. In these appeals contained common issue relates to determination of expenditure required to be disallowed for the purpose of section 14A r.w. rule 8D of the Income Tax Rules.

101. Brief facts of the case are that the assessee has shown dividend of Rs.7,61,01,001/-, Rs.12,70,26,885 and Rs.4,84,53,224/- in the Asstt.Years 2009-10 to 2011-12 respectively. It has computed the following amounts for disallowance:

Asstt.Year 2009-10

Sr. No.	*Particulars*	*Amount(Rs)*
1)	*Securities Transaction tax*	*11,04,236*
2)	*Demat Charges*	*2,81,742*
3)	*PMS fees*	*6,77,405*
4)	*Consultancy Fees for Equity Research Services*	*1,12,360*
5)	*Out of other expenses- As estimated by Management*	*50.00,000*
	TOTAL	*71,75,743*

Asstt.Year 2010-11

Sr. No.	*Particulars*	*Amount(Rs)*
1)	*Securities Transaction tax*	*14,51,893*
2)	*Demat Charges*	*1,66,573*
3)	*Out of other expenses – as estimated by Management*	*75,00,000*
	Total	*91,18,466*

Asstt.Year 2011-12:

Sr. No.	*Particulars*	*Amount(Rs)*
1)	*Securities Transaction tax*	*23,60,273*
2)	*Demat Charges*	*2,81,917*
3)	*PMS fees*	*3,09,370*

3)	*Out of other expenses – as estimated by Management*	*75,00,000*
	Total	*1,04,51,560*

102. The ld.AO was not satisfied with the explanation of the assessee. He worked out disallowance of Rs.17,29,04,416/- Rs.17,55,02,134/-, and Rs.12,10,31,520/- in these assessment years respectively. The working made by the AO in each assessment year read as under:

"Asstt.Year 2009-10

(i) Amount of expenses directly attributable to income : Rs.71,75,743/- (as submitted by the assessee)

(ii) Interest expenses incurred which is not directly attributable to any particular income or receipts, amounts as computed with the formula = A x B / C

A . Interest : Rs. 49,99,97,000/-
B : Average investment : Rs. 526,10,38,500/-
C: Average assets : Rs.1794,35,02,000/-

Rs.49,99,97,000 x Rs.526,10,38,500 : Rs.14,65,99,223/-
Rs.1794,35,02,000
(iii) 0.5% of Average Investment
(0.5% on Rs. 526,10,38,500/-) : Rs. 2,63,05,193/-

Total Disallowance : Rs.18,00,80,159/-

Since the assessee itself disallowed an amount of Rs.71,75,743/-, remaining disallowance of Rs. 17,29,04,416/- is added to the total income of the assessee."

Asstt.Year 2010-11:

"(i)Amount of expenses directly attributable to income : Rs.91,18,466/- (as submitted by the assessee)

(ii) Interest expenses incurred which is not directly attributable to any particular income or receipts, amounts as computed with the formula = A x B / C

A : Interest : Rs. 48,03,33,000/-
B : Average investment :Rs. 6,27,19,94,500/-
C : Average assets : Rs.2090,05,18,500/-

Rs.48,03,33,000 x Rs.627,19,94,500 : Rs. 14,41,42,196/-
Rs.2090,05,18,500
(iii) 0.5% of Average Investment
(0.5% on Rs. 627,19,94,500/-) : Rs. 3,13,59,973/-

Total Disallowance : Rs. 18,46,20,600/-

Since the assessee itself disallowed an amount of Rs.91,18,466/-, remaining disallowance of Rs.17,55,02,134/- is added to the total income of the assessee."

Asstt.Year 2011-12:

(i)Amount of expenses directly attributable to income : 1,04,51,560/- (as submitted by the assessee)
(ii) Interest expenses incurred which is not directly attributable to any particular income or receipts, amounts as computed with the formula = A x B / C

A : Interest	*: Rs.34,54,64,000/-*
B : Average investment	*: Rs.659,75,75,000/-*
C : Average assets	*: Rs.2314,04,63,000/-*

Rs.34,54,64,000 x Rs.659,75,75,000 : Rs.9,84,95,205 /-
Rs.2314,04,63,000

(iii) 0.5% of Average Investment	
(0.5% on Rs. 659,75,75,000)	*: Rs. 32987875/-*
Total Disallowance	*: Rs. 13,14,83,080/-*

Since the assessee itself disallowed an amount of Rs.1,04,51,560/-, remaining disallowance of Rs.12,10,31,520/- is added to the total income of the assessee. (Addition: Rs.12,10,31,520)

103. With the assistance of the ld.representatives, we have gone through the record carefully. As observed earlier while dealing with identical issue, we find that the assessee has placed on record details of gross-investments, dividend income as well as surplus interest free fund available with it. A perusal of these details would indicate that the assessee has made gross investment of Rs.51,861 lakhs, Rs.77,715 lakhs and Rs.58,453 lakhs in the Asstt.Years 2009-10, 2010-1 and 2011-12 whereas it has surplus fund of Rs.1,23,083 lakhs, Rs.1,52,831 lakhs and Rs.1,74,721 lakhs. It suggests that the assessee was having more interest free funds than the investment it has made. Therefore, considering our finding in the immediately preceding year, we are of the view that no disallowance on account of interest expenditure deserves to be made. We put reliance upon the decision of Hon'ble Bombay High Court in the case of Reliance Utilities & Power Ltd. (supra), wherein it has been held

that if the assessee is able to demonstrate availability of interest-free funds more than the investment made, then inference can be drawn that such investments were made out of interest free funds. A perusal of working of the AO would indicate that he has worked out disallowance more than the exempt income. Major portion of the disallowance represented interest expenses in all these three years. We therefore delete the disallowance of interest expenditure of these three years.

104. As far as disallowance at the rate of 0.5% of average investment for taking care of administrative expenses is concerned, we do not find any error in the finding of the AO. The finding of the ld.CIT(A) is being modified to the extent that against working of such disallowance a set off of the amount which the assessee has disallowed itself in all these three years. For example, in the Asstt.Year 2009-10, a disallowance on account of administrative expenses at 0.5% of average investment has been worked out by the AO at Rs.2,63,05,193/-. In principle, this disallowance is confirmed, but it be reduced by a sum of Rs.71,75,743/- disallowed by the assessee itself. The same exercise be carried out in rest of two years. This ground of appeal is partly allowed all three years.

105. No other ground in Asstt.Year 2009-10, hence, this appeal is treated as partly allowed. Similarly, no other ground remained in the Asstt.Year 2010-11. This also is treated as partly allowed.

106. Ground No.2 of this appeal is common in ITA No.2365/Ahd/2012, 116 and 117/Ahd/2016 (Asstt.Year 2009-10, 2010-11 and 2011-12) i.e. common issue involved all these three grounds is, whether the assessee

is entitled for deduction under section 80IA on the value of the captive power generated by it. If yes, than at what rate such deduction is to be admissible.

107. The AO has adopted the purchase rate of GUVNL at Rs.3.2 per unit as market value of the power produced by the assessee in the captive power, whereas the case of the assessee is that value of such power be calculated at the rate at which the assessee has been purchasing power from GUVNL.

108. We have dealt with this issue in earlier assessment years as well as Asstt.year 2012-13, 2013-14. These grounds of appeals are allowed in the same term and the AO is directed to follow order of the ITAT in the Asstt.Year 2012-13 and 2013-14.

109. In ground No.3 in the Asstt.Year 2009-10 (ITA No.2365/Ahd/2012) the issue agitated in this ground is, whether on sale of shares/ mutual fund capital is to be assessed as business income.

110. We have already decided this issue.

111. No other grounds have been pressed. Therefore, the appeal of the assessee is allowed partly.

112. In the remaining ground no.4 in ITA No.117/Ahd/2016 for the Asstt.Year 2011-12, the assessee has pleaded that receipt of proceeds on sale of carbon credit deserves to be treated as capital receipt and requires to be excluded from taxable income. This ground is common with additional ground of appeal taken by the assessee in the Asstt.Year

2007-08, 2008-09 and 2009-10. In the Asstt.Year 2007-08, 2008-09 and 2009-10, the assessee has moved an application for permission to raise additional ground of appeal. It has pleaded that "lower authorities treated income on account of sale of carbon-credit as revenue receipts exigible to tax, are erroneous and contrary to the provisions of the Act. The ld.AO/CIT(A) ought to have so held and excluded income on account of sale of carbon-credit as capital receipt and not leviable to tax. It be so held."

113. On the strength of Hon'ble Supreme Court decision in the case National Thermal Power Co. Ltd. vs Commissioner Of Income Tax 229 ITR 383 (SC), it has contended that if any issue going to affect taxability of an assessee, then it can be raised at any stage. When the application was confronted to the Revenue, then Revenue filed an objection vide letter dated 24.7.2015. It has contended that the assessee itself has treated such receipt as revenue receipt and included in taxable income. Now after five years, it cannot be permitted to take 'U' turn and plead that this is a capital receipt. Revenue has further pleaded that the assessee be not permitted to raise this ground of appeal because, it has recognized such receipts as revenue receipts.

114. The ld.counsel for the assessee at the very outset contended that as far as issue on merit is concerned, it is covered in favour of the assessee by the order of the ITAT in assessee's own case for the Asstt.Year 2012-13 and 2013-14. He further submitted that order of the ITAT in the Asstt.Years 2012-13 and 2013-14 has followed the decision of Hon'ble jurisdictional High Court in the case of Alembic Ltd. In that case, the assessee treated such receipts as revenue receipts in the return of income

but thereafter took a stand before the Tribunal that this receipt be excluded being capital in nature. The Tribunal has allowed the contentions of the assessee. The ld.counsel for the assessee took us through finding of the Tribunal on page no.169 to 170 of the paper book (order of the ITAT passed in ITA No.1912/Ahd/2012 and others (Page no.152 to 170). A reference to the following was made by the ld.counsel for the assessee:

> *"19.2 The Id. Departmental Representative, on the other hand, contends that the realization from carbon credits has been treated by the assessee itself as revenue income and offered to tax and in fact in actualities they are revenue receipt. However, no adverse judgment on this has been cited.*
>
> *20. We have heard the rival contentions, perused the material available on record and gone through the orders of the authorities below. The additional ground stands already admitted. The duty of the ITAT is to ensure that fair, just and proper assessment is made. Merely because the assessee was of the opinion that the receipt was Revenue in nature cannot act as an estoppels against it when the law as interpreted by Hon'ble High Courts takes a view at variance with the assessee. The law is settled that the Revenue cannot stand benefited from a tax which is not leviable in right earnest. We find merit in the contentions of the Id. Counsel for the assessee that the Hon'ble Karnataka High Court in the case of Subhash Kabini Power Corporation Ltd (supra) and the Hon'ble Andhra Pradesh High Court in the case of My Home Power Ltd (supra), have taken a view that the carbon credit realization is capital in nature. No contrary judgment is cited. Therefore, respectfully following these judgments, this additional ground of the assessee in respect of realization of carbon credit as capital receipt is allowed. Thus, this additional ground is accordingly allowed."*

115. Against this order, Revenue went in appeal before the Hon'ble jurisdictional High Court. Hon'ble High Court has decided this issue in favour of the assessee. According to the ld.counsel for the assessee, the issue in dispute is squarely covered by the decision of Hon'ble

jurisdictional High Court. This decision has been followed by the ITAT in the Asstt.Year 2012-13 and 2013-14. In view of the above, we admit this additional ground of appeal in all these three years.

116. Apart from additional ground, the assessee has taken ground no.4 in the Asstt.Year 2011-12 challenging this very issue. On merit the issue is squarely covered by the order of the ITAT in the Asstt.Year 2012-13 and 2013-14. The discussion made by the Tribunal on this issue is worth to note, which reads as under:

> *"34. We now take ground no.5 in the assessment year 2012-13 and ground no.8 in the assessment year 2013-14:*
>
> *35. In the assessment year 2012-13, the assessee has pleaded that the ld.DRP has erred in not adjudicating the claim made by the assessee company to consider revenue earned on sale of carbon credits, net of expenses as a capital receipts and not subject to tax. Similarly, in the assessment year 2013-14, the assessee has pleaded that the DRP has erred in rejecting claim made by the assessee that revenue earned from sale of carbon credits is to be held as capital receipts. In other words, common issue in both the years is, whether receipts received by the assessee on sale of carbon credits is to be assessed as a capital receipt or to be treated as revenue receipts.*
>
> *36. Facts in both the years are common. The assessee has filed a note explaining the alleged carbon credits and how it has received the receipts. The note has been reproduced by the DRP in both the assessment years in its order. The note and the discussion made by the DRP on this issue are as under:*
>
> > *"Claim of deduction in respect of income from Carbon Credit being Capital receipt -*
> >
> > *During the year, the Company has received income from Carbon Credit of Rs. 441.69 crores. The said revenue is credited to Profit & Loss account and is included in Revenue from Operations. Please refer to Schedule 23 of the Annual accounts.*

We are enclosing herewith a detail note on this Carbon Credit. In the said note we have explained as under:

GFL's Carbon Credit:

- *GFL operates a HCFC-22 plant at Village Ranjitnagar, District Panchmahals, Gujarat, India. During the production of HCFC-22, waste gas called HFC-23 is generated.*

- *For each ton of HCFC-22 produced, approximately 2.9% of HFC-23 is generated. HFC-23 is a greenhouse gas (GHG) which has Global Warming Potential of 11,700 of CO2 per ton of HFC-23.*

- *GFL's CDM project consists of incinerating HFC-23 instead of allowing it to be vented into the atmosphere, and thereby reducing GHG emissions*

- *CERs awarded = Tones of GHG reduced *GWP of GHG*

- *In the year 2005-2006, Gujrat Fluorochemicals Limited (GFL) has implemented a project for greenhouse gas emission reduction by thermal oxidation of the waste gas HFC-23 in India under Clean Development Mechanism of Kyoto Protocol.*
- *GFL has installed, and operates and maintains a HFC-23 collection and thermal oxidation system (TO Plant) to incinerate HFC-23. The thermal oxidation system enabled GFL to avoid HFC-23 emissions (GHG emissions), which, in the absence of the project activity, would have been vented into the atmosphere.*
- *Upon voluntary incineration of HFC-23, emission reduction is achieved and CERs are issued to GFL after complying with the specified monitoring plan approved by the UNFCCC. CERs are issued in electronic form. Once the CERs are generated through the project undertaken, they are credited to GFL's account in the CD Registry. From there, they are transferred to buyers. The same is reported as Sales in the Financial Accounts under the Chemical Segment. Unsold CERs are shown as Inventory at Cost.*
- *GFL has sold CERs mainly to multilateral institutions / international buyers and treated the same as business income since CERs are earned / generated from HCFC-22 plant which is the*

primary business of GFL and also offered the same for taxation at the normal rate of tax like any other sources of income. All the expenses incurred as stated above are claimed as deduction (including tax depreciation on TO plant).

In this note, we have given the background of the carbon credits and how the carbon credits are received in the case of our Company. We had also explained the procedure of generation of carbon credits and steps taken and involved in receipt of such carbon credits. Thus, the carbon credits are issued by the CDM Executive Board, which operates under the UNFCCC and those are sold to international buyers for cash. We have also explained that the CERs are not received or allocated by Government. It will also be observed that in our case carbon credits are not received for using alternative fuel like non-fossil fuel which may be specific to wind energy business or other fuel switch or energy efficiency projects.

The claim is made that the said revenue from Carbon Credit is not taxable as income but a capital receipt not liable to tax. Hence, while computing total income, the said receipt, net of expenses, may please be excluded as capital receipt. This claim is based on the ITAT order in the case of My Home Power Limited, Hyderabad Bench, which is now confirmed by the Hon'ble Andhra Pradesh High Court.

We may state that such claim, that Carbon Credit revenue is Capital receipt not liable to tax, and hence should be excluded from total income, was made during the course of assessment proceedings for A.Y. 2010-11 and 2011-12 also. In the Assessment order, the AO has not accepted the said claim. The Company, has filed appeals for both the years before CIT(A). One of the grounds of appeal is regarding such claim. During the course of appellate proceedings for A.Y. 2010-11, the CIT(A) has called for the remand report from Assessing officer on the issue. A copy of the said remand report was provided to us and we were asked to make our submissions on the said remand report. We have made our detailed submission dated 02-01-2015 to the CIT(A). The copy of the said submission is enclosed for ready reference in which we have provided our replies to the AOs observations in the remand report and the entire issue is discussed in detail. We rely on the same.

Therefore, in view of the above it is requested that at the time of assessment, carbon credit revenue of Rs. 441.69 crores credited in the profit and loss account, net of expenses, may please by excluded, being a capital receipt and not liable to tax on the basis of various ITAT orders and High Court decision in the case of My Home Power Limited.
Enclosures:

1. *Note on Carbon Credit.*
2. *Copy of the remand report dated 25.11.2014 for A.Y. 2010-11*
3. *Copy of the reply dated 02.01.2015 submitted to CIT(A) in response to above remand report during appellate proceedings for A.Y. 2010-11.*

24. Discussion and Direction of DRP; :

24.1 It is seen from draft order that issue is not discussed in the draft assessment order, since the claim was made by the assessee during the course of the proceedings itself, as per letter dated 28/01/2015. The DRP has noted that there is no variation of income on this issue in the draft assessment order, which is prejudicial to the interest of Revenue. Thus, in strictly legal terms, the said objection doesn't fall under the provisions of Section 144C of the I.T. Act 1961.

24.2 Also in the case of Goetze (India) Ltd. (284 ITR 323), the Hon'ble Supreme Court has held that the Assessing Officer cannot entertain any claim for allowing deduction resulting in a reduction in the total income returned, which is not claimed in the original return or a revised return.

24.3 On merits, the DRP has noted the CIT (A)'s order of earlier 2 years and concurs with the findings of the CIT (A), that such carbon credit receipts GFL are taxable. The relevant excerpts of the order of the CIT(A) for A.Y. 2011.12 A.Y. 2010-11 are reproduced hereunder:-

From CIT (A) order for AY 2011-12; /

"9. 1 This issue has .been decided in appellant 's own case for the A Y 2010-1 1 vide order dated 30-10.2015 in Appeal No. CAB-11321201415. In this order the revenue earned from the sale of carbon credits, net of expenses has been held to be taxable in the hands of the

appellant. Moreover, it is seen that in the current year such revenue also includes profit earned on account of trading of such carbon credits which are revenue in nature under all circumstances. Hence, following the decision of the earlier order and considering the fact that the appellant is also engaged in the trading of carbon credits, it is held that such revenue in the current year is also taxable in the hands of the appellant as income from business. Alternatively, this is also taxable as short term capital gain as has been held in the appellate order of AY 2010-11. Hence, this ground of appeal is dismissed"

From CIT(A)order for AY2010-11

"11.1 In the present case too, the appellant had profit motive in the establishment of the CDM project. Hence it is held that it is carrying on the business of generation of CERS through this CDM project and accordingly, the revenue on account of sale of such CER. is taxable as profits and gains of business being carried on by the appellant. 11.2 Without prejudice to the finding given above that revenue earned from sale of carbon credits is taxable as income from the business Hi the hands of the appellant, even if it is treated as a capital receipt then also it will be taxable in the hands of the appellant as income from capital gain on account of transfer ofCERs. This is due to the fact that in the case of the appellant, the cost of acquisition of CERS has already been determined. Thus, even if the appellant's contentions are accepted, it is to be held that these CERS are capital assets in the hands of the appellant and are having determined cost. Under such situation, the receipt received on account of transfer of such capital assets will be taxable in the hands of the appellant as short term or long term capital gain. Since, in the case of the appellant, all such CERS have been transferred within three years of date of acquisition of fire same, hence the entire sale consideration net of expenses is taxable as short term capital gain. Accordingly there will be no difference on the tax to be levied on the income of the appellant under such situation also. Thus in the alternate situation also, there shall be no change in the total income of the appellant.

11.3 On the basis of these discussions, it is held that the revenue earned by the appellant company on account of sale of CERs is its income taxable under the head income from business. Hence, this ground of appeal is dismissed."

24.4 In view of the above the claim Of the assessee that carbon credit receipt are not liable to tax is rejected and accordingly, no directions are issued to the AO on this ground of objection."

37. In the assessment year 2012-13, this claim was of Rs.876.14 crores. The ld.counsel for the assessee while impugning orders of the Revenue authorities below contended that the issue in dispute is squarely covered by decision of Hon'ble Gujarat High Court in the case of Alembic Ltd. (supra). He placed on record copy of the Hon'ble Gujarat High Court decision in Tax Appeal Nos.553 and 554 of 2017 decided on 28.8.2017. He also pointed out that this issue has been considered by the Hon'ble Karnataka High Court in the case of CIT Vs. Subhash Kabil Power Corporation Ltd., (2016) 287 CTR(Kar) 147; (2016) 69 taxmann.com 394 (Kar). The Hon'ble Karnataka High Court has also relied upon the decision of Hon'ble Andhra Pradesh High Court in the case of CIT Vs. My Home Power Ltd., (2014) 46 taxmann.com 314 (AP). Apart from the above, he further contended that w.e.f. 1-4-2018, a special provision has been enacted in the shape of section 115BBG which prescribe levy of tax at the rate of 10% on income from transfer of carbon credit. He took us through explanatory statement of Finance Act, 2017.

38. We have duly considered rival contentions and gone through the record carefully. Issue before us is, whether receipts received by the assessee on sale of alleged carbon credit is revenue in nature or capital in nature. An identical question was formulated by the Hon'ble Gujarat High Court in the case of CIT Vs. Alembic Ltd. (supra). The question framed is as under:

> *(4) Whether on facts and in the circumstances of the case and in law, the ITAT erred in treating the income from realisation of carbon credits as capital in nature, despite the fact that the realization from carbon credits has been treated by the assessee itself as revenue income and offered to tax?"*

39. The question has been replied by the Hon'ble High Court is as under:

> *"6. The last surviving question pertains to the treatment that the assessee's income from trading of carbon credits should be given. The Tribunal held that receipts should in the nature of capital receipts and therefore would not invite tax. This issue has*

been examined by two High Courts. The Karnataka High Court in the case of CIT Vs. Subhas Kabini Corporation Ltd., reported in (2016) 385 ITR 592 (Karn) and Andhra Pradesh High Court in the case of Commissioner of Income-tax Vs. My Home Power Limited reported in (2014) 365 ITR 82(A) have held that receipts of carbon credit are in the nature of revenue receipts. Following the decisions of said two High courts, this question is also not considered."

It is to be noted here that the Hon'ble Gujarat High Court has thereafter issued a corrigendum in the above order in OJMCA/1/2018 in Tax Appeal No.553 of 2017 wherein the applicant pointed out an advertent mistake in paragraph-6. The Hon'ble Court rectified the typographic/inadvertent mistake vide order dated 9.3.2018. It reads as under:

"Through this application, the assessee points out that in our judgment dated 28.08.2017, while dismissing Revenue's Tax Appeals, we had inadvertently recorded in Paragraph-6 that several High Courts have held "that receipts of carbon credit are in the nature of revenue receipts". This is clearly a typographical/ inadvertent error. The above quoted portion of paragraph-6 would, therefore, be corrected and read as under – "that receipts of carbon credit are in the nature of capital receipts". The applicant stands disposed of accordingly."

40. In view of the above, it is to observe that at the level of Tribunal, the order in the case of Subhash Kabini Power Corporation Ltd. (supra) which has been affirmed by the Hon'ble Karnataka High Court (was also authorized by the Judicial Member while posted at Bangalore). Apart from the above, we would like to make reference to the explanatory statement of Finance Act, 2017. It reads as under:

"Carbon credits is an incentive given to an industrial undertaking for reduction of the emission of GHGs (Green House gases), including carbon dioxide which is done through several ways such as by switching over to wind and solar energy, forest regeneration, installation of energy-efficient machinery, landfill methane capture, etc. The Kyoto Protocol commits certain developed countries to reduce their GHG emissions and for this, they will be given carbon credits. A reduction in emissions entitles the entity to

a credit in the form of a Certified Emission Reduction (CER) certificate. The CER is tradable and its holder can transfer it to an entity which needs Carbon Credits to overcome an unfavorable position on carbon credits.

Income-tax Department has been treating the income on transfer of carbon credits as business income which is subject to tax at the rate of 30%. However, divergent decisions have been given by the courts on the issue as to whether the income received or receivable on transfer of carbon credit is a revenue receipt or capital receipt.

In order to bring clarity on the issue of taxation of income from transfer of carbon credits and to encourage measures to protect the environment, it is proposed to insert a new section 115BBG to provide that where the total income of the assessee includes any income from transfer of carbon credit, such income shall be taxable at the concessional rate often per cent (plus applicable surcharge and cess) on the gross amount of such income. No expenditure or allowance in respect of such income shall be allowed under the Act.

This amendment will take effect from 1st April, 2018 and will, accordingly, apply in relation to the assessment year 2018-19 and subsequent years."

41. Thus, taking into consideration resolution of litigation on this issue by the Legislature itself, which had made provision for taxation of such receipts at the rate of 10% from the assessment year 2018-19 as well as authoritative pronouncements of Hon'ble jurisdictional High Court, we are of the view that receipts received by the assessee on sale of carbon credit are to be treated as capital receipts and not liable to tax. The ld.DRP has assigned one more reasons for not entertaining claim of the assessee particularly in the assessment year 2012-13 is that such claim was not in the return of income, rather it was made during the course of assessment proceedings. On the strength of Hon'ble Supreme Court judgment in the case of Goetez India Ltd.(supra), we are of the view that the AO cannot entertain any claim for allowing deduction resulting in a reduction of total income returned, which is not claimed in the original return or a revised return. To this reasoning of the DRP, we are of the view that we have considered this aspect while dealing with the issue regarded enhancement claim made under section 80IA of the Act. We have made reference to the decision of the ITAT, Mumbai and Bangalore

Benches as well as Hon'ble High Gujarat High Court in the case of Mitesh Impex (supra) and held that if a particular item is going to affect taxability of assessee, then a fresh claim can be entertained by the first appellate authority or by the DRP. Thus, we overrule this reasoning of the DRP and direct the AO to treat these receipts in both assessment years as capital receipt."

One of us (i.e. Judicial Member) is author of the order in the Asstt.Year 2012-13, 2013-14, as also author of the order in the case of CIT Vs. Subhas Kabil Power Corporation Ltd., at Bangalore which has been upheld by the Hon'ble Karnataka High Court. This decision has been followed by the Hon'ble jurisdictional High Court in the case of Alembic Ltd. Therefore, respectfully following the decision of jurisdictional High Court in the case of Alembic Ltd., (supra) and the order of the ITAT in assessee's own case for the Asstt.Year 2012-13 and 2013-14, this issue is decided in favour of the assessee. The ld.AO is directed to treat the sale proceeds from carbon credit as capital receipts in all these years.

ITA No.135/Ahd/2015:

117. Present appeal is directed at the instance of the assessee against order of the ld.CIT(A) dated 13.11.2014 passed for the Asstt.Year 2008-09. Solitary grievance of the assessee is that the ld.CIT(A) has erred in confirming penalty of Rs.1,13,00,000/- which was imposed by the AO under section 271(1)(c) of the Act.

118. Brief facts of the case are that the assessee has filed its return of income on 27.9.2008 declaring total income at Rs.289,33,41,010/-. The ld.AO has passed assessment order under section 143(3) on 31.12.2010 and determined taxable income at Rs.369,55,61,740/-. During the course of assessment proceedings the ld.AO found that the assessee has

capitalized a sum of Rs.5,10,17,289/- as pre-operative expenses paid to M/s.Mckinsey & Co. ("MC"). It is pertinent to observe that the assessee had appointed MC as a consultant for exploring supporting business opportunity for possible expansion. The ld.AO held that this report was obtained for the purpose of group and not relatable to assessee exclusively. In his second reasoning, he observed that this report was obtained for starting a new business venture, and therefore, it is not entitled for capitalization of expenditure. However, on appeal, the ld.CIT(A) has deleted 20% of the addition made by the AO on the ground that the assessee must have obtained benefit from this report to the extent of 20% and it was entitled to capitalize the expenditure to the extent of 20%. The assessee claimed depreciation on the capitalized amount of expenditure. That depreciation was disallowed to the assessee by the AO and penalty proceedings has been initiated. The ld.AO has imposed penalty on the ground for which depreciation has been disallowed and addition of Rs.1,63,25,533/- was made.

119. Since in the foregoing paragraphs, we have allowed the appeal of the assessee *qua* capitalization of Rs.5,10,17,289/-, we have held that this was expenditure incurred by the assessee for its business. It is a pre-operative expenditure, and the assessee is entitled to capitalize it. Once the assessee has been directed to capitalize, then it is entitled for deprecation.

120. We find that sub-clause (iii) of section 271(1)(c) provides mechanism for quantification of penalty. It contemplates that the assessee would be directed to pay a sum in addition to taxes, if any, payable him, which shall not be less than but which shall not exceed

three times the amount of tax sought to be evaded by reason of concealment of income and furnishing of inaccurate particulars of income. In other words, the quantification of the penalty is depended upon the addition made to the income of the assessee. Since addition has been deleted, no penalty imposable upon the assessee on this item.

121. Next item which has been added to the total income of the assessee is disallowance of capital loss in respect of share of IGSL of Rs.1,75,31,935/-. We have discussed the fact *qua* this issue in quantum order. It is pertinent to observe that the assessee had entered into an agreement for purchase/sale of shares of IGSL with Humsay Information Services P.Ltd. In other words, certain equity shares and preference shares were owned up by the assessee and the rest were to be purchased from others, which were to be sold to said Humsay Information Services. The assessee has claimed capital loss on this transaction. Its claim was rejected by the AO for two reasons viz. (a) the assessee has failed to demonstrate that it has physically delivered equity shares to the purchaser and since it was a transaction out of stock exchange, therefore, the transfer could be considered if physical delivery of shares were given. In his second reasoning, he observed that after the main agreement, there was an addendum and by virtue of that transaction has taken place in subsequent assessment year. According to the AO the assessee is not entitled for this capital loss. The ld.CIT(A) concurred with the AO. We have also upheld this finding and disallowed the claim of loss made by the assessee.

122. With the assistance of the ld.representatives, we have gone through the record. Section 271(1)(c) of the Income Tax Act, 1961 has

direct bearing on the controversy. Therefore, it is pertinent to take note of the section.

> *"271. Failure to furnish returns, comply with notices, concealment of income, etc.*
>
> *(1) The Assessing Officer or the Commissioner (Appeals) or the CIT in the course of any proceedings under this Act, is satisfied that any person*
> *(a) and (b)** ** **
> *(c) has concealed the particulars of his income or furnished inaccurate particulars of such income.He may direct that such person shall pay by way of penalty.*
> *(i)and (Income-tax Officer,)** ** **
> *(iii) in the cases referred to in Clause (c) or Clause (d), in addition to tax, if any, payable by him, a sum which shall not be less than, but which shall not exceed three times, the amount of tax sought to be evaded by reason of the concealment of particulars of his income or fringe benefit the furnishing of inaccurate particulars of such income or fringe benefits:*
>
> *Explanation 1- Where in respect of any facts material to the computation of the total income of any person under this Act,*
>
> *(A) Such person fails to offer an explanation or offers an explanation which is found by the Assessing Officer or the Commissioner (Appeals) or the CIT to be false, or*
>
> *(B) such person offers an explanation which he is not able to substantiate and fails to prove that such explanation is bona fide and that all the facts relating to the same and material to the computation of his total income have been disclosed by him, then, the amount added or disallowed in computing the total income or such person as a result thereof shall, for the purposes of Clause (c) of this sub-section, be deemed to represent the income in respect of which particulars have been concealed."*

123. A bare perusal of this section would reveal that for visiting any assessee with the penalty, the Assessing Officer or the Learned CIT(Appeals) during the course of any proceedings before them should be satisfied, that the assessee has; (i) concealed his income or furnished

inaccurate particulars of income. As far as the quantification of the penalty is concerned, the penalty imposed under this section can range in between 100% to 300% of the tax sought to be evaded by the assessee, as a result of such concealment of income or furnishing inaccurate particulars. The other most important features of this section is deeming provisions regarding concealment of income. The section not only covered the situation in which the assessee has concealed the income or furnished inaccurate particulars, in certain situation, even without there being anything to indicate so, statutory deeming fiction for concealment of income comes into play. This deeming fiction, by way of Explanation I to section 271(1)(c) postulates two situations; (a) first whether in respect of any facts material to the computation of the total income under the provisions of the Act, the assessee fails to offer an explanation or the explanation offered by the assessee is found to be false by the Assessing Officer or Learned CIT(Appeal); and, (b) where in respect of any fact, material to the computation of total income under the provisions of the Act, the assessee is not able to substantiate the explanation and the assessee fails, to prove that such explanation is bona fide and that the assessee had disclosed all the facts relating to the same and material to the computation of the total income. Under first situation, the deeming fiction would come to play if the assessee failed to give any explanation with respect to any fact material to the computation of total income or by action of the Assessing Officer or the Learned CIT(Appeals) by giving a categorical finding to the effect that explanation given by the assessee is false. In the second situation, the deeming fiction would come to play by the failure of the assessee to substantiate his explanation in respect of any fact material to the

computation of total income and in addition to this the assessee is not able to prove that such explanation was given bona fide and all the facts relating to the same and material to the computation of the total income have been disclosed by the assessee. These two situations provided in Explanation 1 appended to section 271(1)(c) makes it clear that that when this deeming fiction comes into play in the above two situations then the related addition or disallowance in computing the total income of the assessee for the purpose of section 271(1)(c) would be deemed to be representing the income in respect of which inaccurate particulars have been furnished.

124. In the light of the above, if we examine the facts of the present case, then it would reveal that the assessee has entered into transaction for transfer of such shares on 1.2.2008. It construed the transaction as taken place in the Asstt.Year 2008-09; whereas the AO disagreed with the assessee on the ground that physical delivery of shares as well as payment has taken place in subsequent assessment year i.e. in April, 2008. Therefore, the assessee is not entitled for claiming the loss in the Asstt.Year 2008-09. To our mind, the assessee has not withheld any information. It is a difference of opinion between the assessee as well as the AO about the allowability of loss in a particular year. It does not deserve to be visited with penalty on such aspect. Therefore, we allow the appeal of the assessee and delete penalty imposed on the assessee on both the issues.

125. In view of the above discussion, appeals of the Revenue are dismissed, whereas appeals of the assessee are partly allowed for statistical purpose.

Pronounced in the Open Court on 28th June, 2019.

Sd/-	**Sd/-**
(PRADIP KUMAR KEDIA)	**(RAJPAL YADAV)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**