

IN THE INCOME TAX APPELLATE TRIBUNAL, BENCH “C”, MUMBAI
BEFORE SHRI R.C. SHARMA, ACCOUNTANT MEMBER AND
SHRI PAWAN SINGH, JUDICIAL MEMBER

ITA No. 3423/Mum/2018-(Assessment year: 2008-09)

ITA No. 3424/Mum/2018-(Assessment year: 2011-12)

ITA No. 3425/Mum/2018-(Assessment year: 2012-13)

ITA No. 3426/Mum/2018-(Assessment year: 2013-14)

IDBI Bank Ltd., IDBI Tower, WTC Complex, 22 nd Floor, Taxation Cell, Cuffe Parade, Mumbai-400 005 PAN : AABCI 18842G	Vs	DCIT-Cent. Large Tax Unit, 29 th Floor, Centre -1, WTC Complex, Cuffe Parade, Mumbai-400 005
APPELLANT		RESPONDEDNT

ITA No. 4041/Mum/2018-(Assessment year: 2011-12)

ITA No. 4042/Mum/2018-(Assessment year: 2012-13)

ITA No. 4043/Mum/2018-(Assessment year: 2013-14)

DCIT-Cent. Large Tax Unit, 29 th Floor, Centre -1, WTC Complex, Cuffe Parade, Mumbai-400 005	Vs	IDBI Bank Ltd., IDBI Tower, WTC Complex, 22 nd Floor, Taxation Cell, Cuffe Parade, Mumbai-400 005 PAN : AABCI 18842G
APPELLANT		RESPONDEDNT

Assessee by	Shri C. Naresh CA
Revenue by	Shri Awungshi CIT-DR
Date of hearing	29 .08.2019
Date of pronouncement	03 .09.2019

Order under section 254(1) of Income tax Act
PER PAWAN SINGH, JUDICIAL MEMBER:

1. This group of seven appeals are directed against the separate order of Commissioner of income tax (Appeals)-2, Mumbai, hereinafter called, learned CIT(A) for assessment years (AYs) 2008-09, 2011-12 to 2013-14, out of which three set of Cross Appeals 2011-12 to 2013-14 and seventh appeal by assessee for AY 2008-09. In all appeals the parties have raised certain common grounds of appeals, therefore, all the appeals were clubbed, heard together and are decided by common order for the sake of brevity and to avoid the conflicting decision. The assessee in its appeal for AY 2008-09 in ITA No. 3423/M/2018 has raised following grounds of appeal:

- (1) Validity of the reopening under section 147 of the assessment completed under section 143(3).
- (2) Reopening under section 147 based on the retrospective amendment.
- (3) Applicability of provisions of section 115JB of the Act.
- (4) Addition to the books profit loss on revaluation of securities and provision made for bad debt and doubtful debts which is reduced from the respective asset.

2. At the outset of hearing the learned authorised representative (AR) for the assessee submits that the grounds of the appeal raised by the assessee are covered in favour of the assessee and against the revenue. On the validity of the reopening the ld AR for the assessee submits that notice was issued on the ground that the amount of Rs.603.65 Crore debited to the profit and loss account as “provisions and contingences” are unascertained liabilities

not allowable as per Explanation 1(c) to Section 115JB (2). The learned AR of the assessee submits that the reasons for reopening itself is not correct, the above amounts represents provision made for bad and doubtful debts, loss on revaluation of investments and other assets etc.,. The said amount was provided in respect of assets and not for any liability much less an unascertained liability. The issue whether a provision made for assets will be covered under Explanation 1(c) was decided by Hon'ble Apex Court in case of HCL Comnet System and Services Limited (305 ITR 409 SC) on 23 September 2008. The ld. AR assessee, therefore, submits that reopening based on an issue which has already been settled by Hon'ble Supreme Court, was without jurisdiction. The learned AR further submits that when no addition was made in the reassessment order passed under section 147/143(3), on the basis of reasons given in notice under section 148, the entire reopening fails. In support of his submission the learned AR of the assessee relied upon the decision of Bombay High Court in case of Jet Airways (I) Limited (331 ITR 236 Bom).

3. On merits the learned AR for the assessee submits that on the applicability of provisions of section 115JB, similar issue was decided by Hon'ble Bombay High Court in case of Union Bank of India in ITA No. 1196 of 2013 dated 16th April 2019 and by Mumbai Tribunal in assessee's own

case for AY 2004-5 in ITA No. 2193/Mum/2013. On the other addition on account of book profits/ loss on revaluation of securities and provision made for bad and doubtful debts which is reduced from the respective assets, the learned AR submits that this issue is also covered in favour of assessee by decision of Gujarat High Court in case of Vodafone Essar (Gujarat) Ltd (397 ITR 55). Accordingly, the ld. AR for the assessee submits that neither the reassessment order is valid nor the additions made by the assessing officer are in the reassessment order is sustainable and the assessee is liable to succeed on the validity of reassessment and on merit as well.

4. On the other hand the learned Departmental representative (DR) for the revenue after going through the chart furnish by learned AR of the assessee on various grounds of appeal and the submission made, which we have recorded hereinabove, submits that he relied upon the order of lower authorities.
5. We have considered the rival submission of both the parties and gone through the orders of authorities below, as well as through various decisions relied by learned AR of the assessee. First addition as raised in Ground No.3 relates to the applicability of provision of section 115JB. The Hon'ble Bombay High Court in CIT Vs Union Bank of India (supra)

held that provisions of section 115JB as it stood prior to its amendment by virtue of Finance Act, 2012, would not be applicable to a banking company governed by provisions of Banking Regulation Act, 1949. Further, this bench of Tribunal in assessee's own case for AY 2004-05 in ITA No. 2193/Mum/2013 took the same view. Therefore, following the principle of consistency this ground of appeal is allowed in favour of assessee.

6. The other/ second addition as assailed in Ground No.4 relates to book profits loss on revaluation of securities and provision made for bad and doubtful debts which are reduced from the respective assets. We have noted that this ground of appeal is also covered by the decision of Hon'ble Gujarat High Court in CIT Vs Vodafone Essar (Gujarat) Ltd (supra) wherein it is held that prior to the introduction of clause (i) to the *Explanation* to section 115JB, as held by the Supreme Court in case of *HCL Comnet Systems & Services Ltd.* (305 ITR 409 SC), the then existing clause (c) did not cover a case where the assessee made a provision for bad or doubtful debt. With insertion of clause (i) to the *Explanation* with retrospective effect, any amount or amounts set aside for provision for diminution in the value of the asset made by the assessee, would be added back for computation of book profit under section 115JB. However, if this

was not a mere provision made by the assessee by merely debiting the Profit and Loss Account and crediting the provision for bad and doubtful debt, but by simultaneously obliterating such provision from its accounts by reducing the corresponding amount from the loans and advances on the asset side of the balance sheet and consequently, at the end of the year showing the loans and advances on the asset side of the balance sheet as net of the provision for bad debt, it would amount to a write off and such actual write off would not be hit by clause (i) of the *Explanation* to section 115JB. Considering the decision of Gujarat High Court in Vodafone Essar, which is based on the decision of the Hon'ble Supreme Court in HCL Comet system and services limited (supra), this ground of appeal is also allowed in favour of assessee.

7. Keeping in view fact that we have allowed the grounds of appeal on merit related to the additions made in the reassessment order under section 143 (3) rws 147 dated 29 November 2013, therefore, the discussion on the grounds related to the validity of reassessment order passed under section 147/143(3) have become academic.
8. In the result the appeal of the assessee is allowed.

ITA No. 3424/Mum/2018 by assessee (AY 2011-12).

9. The assessee has raised following grounds of appeals:-

(1) **Disallowance of expenditure under section 14A:**

- 1.1 The learned CIT(A) erred in law and facts in justifying the action of AO to disallow the expenses invoking the provisions of section 14A for computation of income under normal provisions as well as under section 115 JB of the Act.
- 1.2 The learned CIT(A) was not justified in confirming the disallowance worked out under Rule 8(2)(ii) on his observation that all investments in the bank makes in earning exempt income has to be thoroughly justified that these investments were made out of interest free funds, is contrary to law being in total disregard to the decision of the jurisdictional High Court in Reliance Utilities and Power versus CIT and HDFC Bank Ltd versus DCIT, as per which the investments are presume to have been made out of interest free funds, if such funds existed at the time of investment.
- 1.3 The learned CIT(A) was grossly in error in going by the understanding that all the funds of the banks are interest-bearing, coming from the deposits or sale of Bonds. The observation totally ignored by the submission made by the assessee that an amount of ₹ 14567.58 Crore was existing with the assessee is interest free funds representing the share capital and reserves which are appearing in the published balance sheet.

(2) **Expenses for increase in paid up capital:**

- 2.1 The Id CIT(A) erred in law and on facts in confirming the disallowances of ₹ 3,12,85,258/- made by AO and also rejecting the claim of amortization in total disregard to the amendment to section 35D brought by the Finance Act, 2008 extending the provision of section 35D of the Act, 1961 to the service sector and also ignoring the fact that sectors like bank also implies increased business activity in the form of increase in advance and to deposits, apart from the physical extension of Branch network etc.

(3) **Provision for diminution in value of investment-direction for relief subject to verification:**

- 3.1 Having accepted that provision for diminution in value of investment is a requirement as per RBI direction, the investments are the stock in trade of

the bank, the profit/loss on sale thereof is accounted for as business income and accordingly the disallowance is not called for, the learned CIT(A) was not justified to direct investigation to be carried out before granting relief in the case of the bank, whose accounts are audited at different levels including by the Statutory Auditors to ensure that the RBI directions have been complied with.

3.2 The investigation is to be carried out as directed by learned CIT(A) are not directly relevant to the issue of allowability of the provision and concern the profit/loss when these securities are sold. The learned CIT(A) has failed to take into consideration the practical problem involved in digging records of the period of decades back.

(4) **Application of MAT provisions to Banks**

4.1 The learned CIT(A) erred in law and on facts in confirming that provisions of MAT are applicable to IDBI bank Ltd for AY 2011-12.

4.2 The learned CIT(A) was not legally justified in disagreeing with the decisions of the tribunals, including the jurisdictional ITAT Mumbai in assessee's own case, holding that MAT provisions were not applicable to banks and thereby ignoring the legal sanctity of the system of hierarchical jurisdiction of the country.

(5) **Addition to book profit for provision of diminution in the value of investment:**

5.1 The learned CIT(A) was not legally justified in confirming addition of ₹190,39,69,186/- to the book profit computed under the provisions of section 115 JB without appreciating the real nature of the entry which represented loss in value of securities held at the stock in trade arising out of mark to market valuation which is an accepted method of valuation of stock in banking.

5.2 The learned CIT(A) erred in treating it as the amount set aside and thereby within the scope of clause (i) of explanation to section 115 JB(2) ignoring the fact that this is a present loss and not a provision for meeting future losses.

5.3 In confirming the addition, the learned CIT(A) ignored his own finding given while considering its allowability on computation of taxable income under the normal provisions of law wherein they accepted the provision as a method of representing accounts as per RBI guideline. It was accepted that whenever sale of such securities take place, the appellant is reflecting the same as business income/loss.

(6) **Addition to book profit of the amount disallowed under section 14A:**

6.1 The learned CIT(A) erred in law and facts in confirming the addition of ₹102,44,25,790/-, being the amount of disallowance under section 14A towards the book profit computed for the purpose of section 115 JB ignoring the legal position that the addition prescribed under explanation to section 115JB(2) is of actual amount debited to P&L account, whereas the disallowance under Rule 8D is a notional amount to be disallowed irrespective of actual expenses incurred in earning exempt income.

6.2 While confirming the addition, the learned CIT(A) ignored the decision of Special Bench of ITAT Delhi in case of ACIT versus Vireet investment Private Limited ITA No. 502/Delhi/2012 and CO No. 68/Delhi/2014 wherein Hon'ble Tribunal follow the decision of Delhi High Court in CIT Vs Bhusan Steel Limited (IT No. 593 and 494 of 2015) holding that computation under MAT provisions is to be made without resorting to the computation as contemplated under section 14A read with Rule 8D. The learned CIT(A) also failed to consider the decision of the jurisdictional High Court in CIT Versus JSW Engineering Ltd (60 taxmann.com 303) in deciding the issue.

(7) **Initiation of penalty** proceedings under section 271 of the Act 1961 as mandatory provision which is likely to give a wrong message on finalization of penalty proceedings.

10. At the outset of hearing the learned AR of the assessee submits that all grounds of appeal raised by assessee are covered in favour of assessee by the decisions of various High Courts or by tribunal, either in assessee's

own case or cases of other assessee's / banks. The learned AR of the assessee furnished the details chart are showing the narrations of grounds of appeal and the submission in respect thereof along with the citations of various decisions of Superior Courts and tribunal.

11. Ground No. 1 relates to disallowance under section 14A. The learned AR of the assessee submits that the ld. CIT-(A) confirmed the disallowance made by assessing officer under Rule 8(2)(ii) and (iii) but restricted the disallowance made to exempt income earned. The ld AR for the assessee submits that this issue is now covered by the decision of Hon'ble Supreme court in Maxopp Investment P Ltd Vs CIT (91 taxmann.com 154 SC), wherein it is held that investments made by a banking concern are part of the business or banking. Therefore, the income arising from such investments is attributable to business of banking falling under the head 'profits and gains of business and profession'. The learned AR of the assessee further submits that no disallowance is warranted under section 14A as held by Kolkata tribunal in UCO Bank (ITA No. 1615 /Kol/2016), Delhi tribunal in case of Punjab National Bank (ITA No. 5481 /Del/2014 and Nice Bombay Transport (P) Ltd reported vide (175 ITD 684).

12. In without prejudice submission, the learned AR submitted that no disallowance under Rule 8D(2)(ii) is warranted in assessee's cases as the interest free funds of ₹14567.58 Crore are far exceed the securities from which tax free income was earned of ₹ 1598.60 Crore. In support of his submission the learned AR relied upon the decision of Bombay High Court in case of HDFC Bank (383 ITR 529) and Gujarat High Court in Syntax Industries Ltd (82 taxmann.com 171). It was submitted that the SLP filed against the order of Gujarat High Court has been dismissed by Hon'ble Supreme Court.

13. On the other head the learned DR for the revenue after going through digital furnished in the chart and decision relied by learned AR of the assessee, submits that he relied upon the order of lower authorities.

14. We have considered the rival submission of the parties and I want through the orders of lower authorities. During the assessment the assessing officer noted that the assessee claimed exempt income of ₹ 94,50,57,908/- under section 10 of the Act. The assessee apportioned 1% of dividend income towards administrative expenses incurred for earning this exempt income. The working provided by assessee was not accepted by assessing officer. The assessing officer asked to furnish the details of dividend income earned and expenses incurred as per Rule 8D. The assessee

furnished its reply dated 9th of December 2013. The assessee in its reply stated that the own funds of the assessee are in far excess for making investment for earning exempt income, no borrowing are attributed to exempt income, section 14A and Rule 8D are not applicable in case of assessee. The submission of assessee was not accepted by assessing officer. The assessing officer after invoking the provisions of section 14A read with Rule 8D made a disallowance of ₹ 102,44,25,790/- and enhanced the total income computed under the normal provisions as well as income computed under section 115JB. The assessing officer worked out disallowance under Rule 8D(2)(i) and computed disallowance of ₹ 95,46,039/- @ 1% of exempt income, Rule 8D(2)(ii) of ₹ 94,44,95,944/-, and Rule 8D(2)(iii) ₹7,99,29,846/-. On appeal before CIT(A) the disallowance under Rule 8D(2)(i) was deleted, however, other disallowance under Rule 8D(2)(ii) &(iii) was sustained.

15. The Hon'ble Supreme Court in Maxopp Investment P Ltd (supra) in para 36 of its decision observed that there is yet another aspect which still needs to be looked into. What happens when the shares are held as 'stock-in-trade' and not as 'investment', particularly, by the banks? On this specific aspect, CBDT has issued circular No. 18/2015 dated November 02, 2015. Further in para 37 the Hon'ble Court further held that this

Circular takes note of the judgment of this Court in *Nawanshahar* case wherein it is held that investments made by a banking concern are part of the business or banking. Therefore, the income arises from such investments is attributable to business of banking falling under the head 'profits and gains of business and profession'. On that basis, the Circular contains the decision of the Board that no appeal would be filed on this ground by the officers of the Department and if the appeals are already filed, they should be withdrawn. A reading of this circular would make it clear that the issue was as to whether income by way of interest on securities shall be chargeable to income tax under the head 'income from other sources' or it is to fall under the head 'profits and gains of business and profession'. The Board, going by the decision of this Court in *Nawanshahar* case, clarified that it has to be treated as income falling under the head 'profits and gains of business and profession'.

16. The coordinate bench of Kolkata Tribunal in UCO bank (supra) after following the decision of Maxopp Investment P Ltd (supra) on similar set of facts passed the following order:

“11. Having considered the submissions of the parties, we find that the issue involved in the Revenue's appeal is squarely covered in assessee's favour by the judgment of the Hon'ble Bombay High Court in the case of CIT Vs HDFC Bank Ltd (383 ITR 529). In that case also the issue before the

Hon'ble Bombay High Court was whether any part of the interest paid by the Bank could be disallowed u/s 14A read with Rule 8D(2)(ii). On appeal this Tribunal and thereafter the Hon'ble Bombay High Court held that since the Bank's own funds were substantially more than the cost of investments yielding tax free income, no part of the interest paid was liable for disallowance. The view of the Hon'ble Bombay High Court was followed with approval by the jurisdictional Calcutta High Court in the case of CIT Vs Rasoi Ltd (ITA No. 109 of 2016).

12. We also find merit in the assessee's alternate contention that no disallowance out of interest paid was warranted because after netting off interest paid against interest received, the assessee had made net interest gain of Rs.3902.10 crores. The Hon'ble Gujarat High Court in its recent judgment in the case of Pr. CIT Vs Nirma Credit & Capital Pvt Ltd (supra) has held that the expression used in Rule 8D(2)(ii) is "interest expenditure" and not "interest paid" and accordingly the expenditure in this context must mean interest paid minus taxable interest earned. Applying the ratio laid down in this judgment to the facts of the present case, we find no infirmity in the order of the Ld. CIT(Appeals) deleting the interest disallowance made under Rule 8D(2)(ii).

13. In so far as disallowance of Rs.2,90,37,490/- under Rule 8D(2)(iii) is concerned, we find that before the lower authorities the assessee had raised the plea that no disallowance u/s 14A was warranted since the assessee was a dealer in shares although in its Balance Sheet, shares were disclosed under the head "Investments". We find that the Hon'ble Supreme Court in its recent judgment dated 12.02.2018 in the case of Maxopp Investment Ltd Vs CIT (supra) did not uphold this line of argument and held that even in the case of a dealer in shares, earning dividend income from its stock-in-trade, may expose his to the rigors of [Section 14A](#) of the Act. We however find merit in the Ld. AR's submissions that in the said judgment, the Hon'ble Supreme Court also extensively dealt with the Revenue's appeal in the case

of State Bank of Patiala arising from the decision of the Hon'ble Punjab & Haryana High Court reported in 391 ITR 218. In the said judgment the Hon'ble Punjab & Haryana High Court had taken note of the fact that the banking companies in the course of carrying on their banking business were required to hold shares & securities and the expenses were incurred in connection with such banking business and the income therefrom was assessable under the head "Profits & Gains of Business". The Hon'ble High Court had taken note of the Board's Circular No. 18 dated 02.11.2015 wherein the Board had directed the AOs to assess the income derived from securities held in the course of carrying on banking business under the head "Profits & Gains of Business" and not under the head "Other Sources". The High Court had also taken note of the judgment of the Hon'ble Supreme Court in the case of CIT Vs Nawanshahar Central Co-operative Bank Ltd (289 ITR 6). Applying the ratio in the said decision the Hon'ble Punjab & Haryana High Court held that the investments held by the assessee Bank was part of its banking business and income arising from trading in securities was attributable to banking business of the assessee. The Hon'ble Punjab & Haryana High Court therefore held that in assessing the income of the assessee engaged in banking business, no disallowance u/s 14A was warranted because in such cases the expenditure was incurred in relation to its banking business and not in relation to earning any tax free income. The Revenue's appeal against the judgment of Hon'ble Punjab & Haryana High Court was dismissed by the Hon'ble Supreme Court. We therefore find that qua the assessee is engaged in the banking business, the Hon'ble Supreme Court upheld the judgment of the Hon'ble Punjab & Haryana High Court in the case of Pr. CIT Vs State Bank of Patiala (supra) as per which no disallowance u/s 14A is permissible in terms of Rule 8D in case of assessee engaged in banking business. Respectfully following the judgment of the Supreme Court in case of State Bank of Patiala (supra), we direct the Ld. AO to delete the disallowance of Rs.2,90,37,490/- made under Rule 8D(2)(iii).

17. In view of the aforesaid discussion we are of the view that no disallowance under 14A is permissible in terms of Rule 8D in case of assessee is engaged in banking business. Therefore, respectfully following the judgment of the Supreme Court in case of Maxopp investment Ltd we direct the Ld. AO to delete the disallowance of Rule 8D(2)(iii). Similarly, no disallowance under rule 8D((2)(ii) is permissible as the reserve and surplus of assessee which is a banking company, is more than the investment made for earning exempt income. Therefore, the assessing officer is also directed to delete the disallowance of Rule 8D(ii).

18. In the result ground No. 1 of the appeal is allowed.

19. Ground No. 2 relates to expenses incurred for increase in capital allowable under section 35D. The learned AR of the assessee submits that claim of assessee was not allowable the reasons that assessee had not established that there was extension of undertaking or setting up of new unit. The assessee submits that as evident from Annual Report, additions were made to branches, ATM and Retail Asset Centers which proves that there was extension of undertaking/setting up of new units and accordingly, deduction claimed should have been allowed. The learned AR of the assessee also furnished a copy of relevant pages of Annual Report showing the additions of 107 branches during the financial year

2010-11 including Specialized Corporate Branches, thereby total No. of domestic branches increased up to 815 as on 31 March 2011. Further, 169 ATM's at key locations to improve the growing client is added thereby making total ATMs to 1370 as on 31 March 2011. Further, 9 new Retail Asset Centre's during the year were added. Accordingly, the learned AR of the assessee would submit that the expenses incurred by assessee in setting up of new units (branches/ ATM's and Retail asses) are allowable under section 35D of the Act.

20. On the other hand the learned AR for the revenue supported the finding of lower authorities.

21. We have considered the submissions of the parties and perused the orders of the lower authorities. In the return of income the assessee claimed expenses of Rs.3,12,85,258/- incurred in connection with increase in paid up capital. The assessee claimed the expenditure as revenue in nature. The assessee furnished the following breakup of the expenses:

SI No.	Particulars	Expenses in Rs.
1	Processing fees to CSDL	11,030/-
2	Stamp duty	3,11,90,400/-
3	Processing fees to NSE	27,575/-
4	Processing fees to BSE	55,150/-
5	Corporate action fees	1,103/-
	Total	3,12,85,258/-

22. In without prejudice and alternative submission, the assessee claimed that if expenditure incurred is proposed to be disallowed, then the proportionate deduction under section 35D may be allowed. The submission of assessee was not accepted by assessing officer. The assessing officer held that claim of amortization is not acceptable as there is no extension of undertaking or setting up a new unit which is necessary condition for amortization of such expenses. An alternative and without prejudice claim of assessing under section 35D, the assessing officer concluded that there must be extension of undertaking or setting up of a new unit. The assessee has not furnished supported documentary evidence to show that increase in paid a share capital were for extension of undertaking or setting up of new units. Before learned CIT(A) the assessee furnished the details of setting up of new units with factual data. The assessee also stated that they have added 107 new branches, 169 ATMs and 9 Retail Asset Centers. The learned CIT(A) confirmed the action of assessing officer holding that to avail the benefit of amortization, the assessee has to substantiate with the factual data that new units were established, cost incurred towards that and if the infused share capital have been diverted for such setting up of new units. The assessee has not brought out any such information either at the time of assessment or

during the hearing before him. Before us the learned AR of the assessee vehemently submitted that all the expenses incurred by assessee as evident from the Annual Reports, which clearly establishes the facts that expenses were incurred for setting up of new branch, ATMs and asset management centers. We have noted that the lower authorities have not disputed the addition of new ATMs, new branches and Retail Asset Centre. The lower authorities denied the expenditure on the ground that no documentary evidences furnished. Considering the fact that all details of new assets which consist of ATMs, no branches and retail asset Centre are part of Annual Report. The annual report is prepared by statutory auditors. Hence, we are of the view that the assessee has added new unit, however for limited purpose, we deem it appropriate to restore this issue to the file of assessing officer to verify the facts and allow necessary relief to the assessee in accordance with law. Needless to say that before passing the order the assessing officer shall grant opportunity to the assessee to further substantiate its claim and to allow filing further details along with documentary evidence to prove its claim.

23. In the result this ground of appeal is allowed for statistical purpose.

24. Ground No. 3 relates to allowability of diminution in value of securities.

The learned AR of the assessee submits that this ground of appeal is

covered in favour of assessee by various decision of superior courts including the decision of Supreme Court in case of UCO Bank (240 ITR 355), Bombay High Court in case of Bank of Baroda (262 ITR 334 Bom), HDFC Bank (366 ITR 505 Bom) and also by the decision of tribunal in Bank of India Vs ACIT in ITA No. 1013/Mum/2013 dated 27.08.2018. The learned AR further submits that the learned CIT(A) should have deleted the disallowance instead of directing assessing officer to verify and allow.

25. On the other hand the learned AR for the revenue submits that learned CIT(A) have already granted relief to the assessee, therefore the assessee should not have any grievances in verification of fact at the end of assessing officer.

26. We have considered the submission of both the parties and have perused the record. In the return of income the assessee claimed deduction of ₹190,39,69,109/- towards diminution in value of business assets. The assessing officer issued show cause notice to the assessee to explain the allowability of diminution in value of business assets. The assessee filed its reply dated 6th February 2014. In the reply the assessee stated that for the purpose of income tax, consistently the bank has been treating investment in equity and preference shares as 'capital assets' and other

investments as 'business assets'. The account from sale of equity and preferential shares has been offered to tax under the head 'capital gains'. Similarly, income from sales of other investments has been offered to tax under the head 'profit and gains of business and profession'. This has been accepted in the assessment of the bank. In the return of income the assessee claimed deduction in respect of diminution in value of business assets of ₹ 190,39,69,106/-. The assessee also furnished the details of breakups. The assessee claimed that diminution had arisen on account of marking to market the closing balance of business assets. The income from sale of these business assets has been offered to tax as 'business income'. Accordingly, diminution of value of business assets of ₹ 190,39,69,106/- recognised in the books of account be allowed as business expenditure. The reply of assessee was not accepted by the assessing officer. The assessing officer took his view that assessee has made provision for diminution in value of assets which is not allowable expenditure as per Income tax Act. The detailed furnished by assessee shows that it is provision for diminution in value of business assets primarily comprises of marked to market losses. Marked to market in substance a methodology of assessing value to apportion held in a financial instrument based on its market price on the closing day of

accounting or reporting record. This is a concept under which financial instrument are valued at market rate so as to report their actual value on the reporting date. The learned assessing officer conclude that since the loss to marked to market basis has resulted in reduction of book profit of the assessee, such notional loss is contingent in nature and cannot be allowed to be set off against the taxable income and thereby added to the total income of the assessee. The learned CIT(A) after considering the submission of the assessee concluded that the assessee bank are statutorily bound to maintain certain part of their asset in government securities to meet with the statutory requirement of Banking Regulation and RBI guidelines. The banks continues to trade in government security for investment purpose and to maximize their profit from time to time, they are required to classify them as investment and disclose profit on sales/interest as business income and provide for the diminution in value of securities which accrues due to declaration of interest on securities, as on the last day of financial year in the books of account to arrive at a true picture of financial state of affair of the bank. The learned CIT (A) accepted that bank provide for diminution of value as on last day of financial year by making a provision in books as these are held as investment in books and reverse the entries next year or the sale of the

government securities from time to time and accordingly book profit on sale and interest on securities as its business income, this methodology is followed from year to year in all banks as per RBI guidelines. The learned CIT(A) also accepted this provision for diminution in value securities as on last day of financial year represents the difference between the purchase price of the stock of securities on the date of purchase and market value of these securities on the last day of financial year, which would have been reflected at lower value if normal system of accounting of the stock at market price in the profit and loss account for the guidelines issued by Reserve Bank of India under Banking Regulation Act. The learned CIT(A) after accepting legal position concluded that basic information provided by assessee required thorough examination of fact and directed the assessing officer to examine the assessee's claim on merit.

27. The Hon'ble Bombay High Court in CIT Vs Bank of Baroda (supra) while relying on the decision of Supreme Court in case of UCO Bank v. CIT [1999] 240 ITR 355/106 Taxman 601, held that where the market value of shares and securities had fallen below the cost before the date of valuation and where on the date of valuation, the market value is less than the actual cost, then the assessee was entitled to value the articles at

market price and the assessee was entitled to claim the loss which the assessee would probably incur at the time of sale of shares and securities. That, whichever method the assessee adopts, it should disclose the true picture of profits and gains. That, for determining the real income, the entries in the balance sheet was required to be maintained in the statutory form. However, such entries in the balance sheet were not decisive or conclusive. In such cases it was open to the ITO and the assessee to ascertain true and proper income, while submitting income-tax returns. For valuing the closing stock, it was open to the assessee to value the stock at cost or market price, whichever is lower. We have noted that similar view was taken by Mumbai Tribunal in Bank of India Vs ACT (supra).

28. In view of the aforesaid legal position we are of the view that this issue is covered in favour of the assessee, hence, direct the assessing officer to delete the disallowance. In the result this ground of appeal is allowed.

29. Ground No. 5 relates to applicability of provision of section 115 JB. The learned AR of the assessee submits that this ground of appeal is covered in favour of assessee by the decision of Bombay High Court in case of Union Bank of India (ITA No. 1196 of 2013) dated 16 April 2019 and by

the decision of tribunal in assessee's own case for AY 2004-05 (ITA No. 2193/Mum/2013).

30. On the other hand the learned AR for the revenue supported the order of lower authorities.

31. We have considered the rival submission of the parties and gone through the orders of authorities below and the various decision relied by learned AR of the assessee. We have noted that this ground is identical to the ground No. 3 of appeal raised by assessee in appeal for AY 2008-09, which we have allowed, therefore following the principle of consistency this ground of appeal legal also allowed with similar directions.

32. Ground No. 5 relates to addition of book profit on revaluation of securities and ground No. 6 relates to addition to book profit of disallowance made under section 14A. Considering the fact that we have allowed the relief to the assessee on diminution/revaluation of securities and on disallowance under section 14A, therefore the discussion on these grounds of appeal have become academic.

33. Ground No. 7 relates to initiation of penalty. This ground of appeal is premature and therefore, resultantly dismissed.

34. In the result appeal of the assessee is allowed.

ITA No. 3425/Mum/2018 by assessee for AY 2012-13.

35. We have noted that the assessee has raised identical grounds of appeal, as raised in appeal for AY 2011 -12, the facts of the year under consideration is also similar, therefore considering the principle of consistency all the grounds of appeal raised by assessee for the year under consideration are also allowed with similar direction.

ITA No. 3426/Mum/2018 by assessee for AY 2013-14

36. We have noted that the ground No. 1 and 2 of the appeal for this year is identical to the ground No.1 & 2 as raised in appeal for AY 2011-12 and 2012-13, which we have allowed, therefore following the principle of consistency on same set of fact these grounds of appeal are allowed with similar directions.

37. Ground No. 3 relates to addition to book profit of tax on non-monetary perquisites. The learned AR of the assessee submits that the assessing officer and the learned CIT-A consider the amount of tax paid on behalf of employees on non-monetary perquisites as amount of income tax paid or payable and provision therefore following under Explanation 1(a) to section 115 JB(2) without appreciating the it is a part of employee cost for the assessee and cannot be treated as falling under the above Explanation. In support of his submission the learned AR of the assessee relied upon

the decision of Mumbai tribunal in case of Rashtriya Chemical and Fertilizer Ltd (91 taxmann.com 104).

38. On the other hand the learned DR for the revenue relied upon the order of lower authorities.

39. We have considered the submission of both the parties and perused the orders of lower authorities. During the assessment, from the assessing officer found that assessee while computing income under normal provision added back ₹ 8,21,24,338/- being taxes on nonmonetary perquisites to employees under section 40 (a)(v), however while computing income under section 115 JB the same has not been added back to the book profit. The assessee was asked to show cause as to why this amount should not be added back in the MAT income computed under section 115 JB. On which no tax was deducted. The assessee was asked to give details of the year end provision and also justify its allowability. The assessee filed its reply wide reply dated 20.10. 2016. The assessing officer has extracted the contents of reply in para 9.2 of the assessment order. The assessee in its reply besides the other contention contended that the perquisites should not be disallowed under the MAT computation, as per section 40 (a) (v), the amount of tax paid by employers on perquisites is not allowed as business expenses under

normal provisions. The said the time of computation of income under normal provision this amount is bedded back in the profits. The assessee also explained the provision of explanation 1 to subsection 2 of section 115 JB. The contention of assessee was not accepted by assessing officer. The assessing officer concluded that Explanation to section 115 JB specifically provides for increased in book profit by the amount of income tax paid, payable or provision made thereof. Further, section 40(a)(v) of the Act clearly provides that the tax paid by the employer on perquisites to the employee is not deductible from the income of the employer. The assessing officer also had that tax on perquisite is also not taxable in the hand of employees as per section 10 (10 CC) of the act and hence the same cannot be construed as akin to TDS/ fringe benefits tax and accordingly added back to the MAT income of assessee. The learned CIT(A) confirmed the action of assessing officer holding that the provision of section 40(a)(v) clearly provides that the taxes paid by the employer on perquisite to the employees is not deductible from the income of an employer. The alternative action under section 10(10 CC) was also upheld.

40. The learned AR of the assessee vehemently relied upon the decision of coordinate bench of tribunal in Rashtriya Chemical and Fertilizers Ltd.

(supra) wherein on similar ground of appeal the coordinate bench held the taxes borne by the assessee on non-monetary perquisites provided to employees forms part of *Employee Benefit* cost and akin to *Fringe Benefit Tax* since they are certainly not 'below the line' items since the same are expressively disallowed under section 40(a)(v), the same do not constitute *Income Tax* for the assessee in terms of *Explanation-2*. Therefore, without there being any corresponding amendment in the definition of *Income Tax* as provided in *Explanation-2* to Section 115JB, *Fringe Benefit Tax* was not required to be added back while arriving at *Book Profits* u/s. 115JB. In our view the ratio of the decision is squarely applicable on the facts of the present case.

41. In the result this ground of appeal is allowed.

42. Ground No. 5 relates to addition to book profits the disallowance made under section 14A. We are noted that this ground of appeal is identical to the ground No. 6 in appeal for AY 2011- 12, which we have allowed therefore considering our decision on similar set of fact this ground of appeal is allowed with similar direction.

43. Ground No. 6 relates to initiation of penalty. This ground of appeal is premature and needs no adjudication, resultantly dismissed.

44. In the result appeal of the assessee is allowed.

ITA No. 4041/Mum/2018 by revenue for AY 2011-12.

45. The revenue has raised following grounds of appeal:

- (1) (i) On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in deleting the suo moto disallowance made by assessee, when Rule 8D(2)(i) of the Income tax Rules 1962, clearly warrants the disallowance of such direct expenses while computing the disallowance under section 14A read with Rule 8D.
- (ii) On the facts and in the circumstances of the case and in law, the learned CIT-A erred in restricting the disallowance made under section 14A rwr Rule 8D to the extent of exempt income, when no such provision exist in Rule 8D of the Income tax Rules 1962.
- (2) (i) on the facts and in the circumstances of the case and in law, learned CIT-A erred in deleting the suo moto disallowance made by assessee, when Rule 8D(2)(i) of the Income tax Rules 1962 and clearly warrants the disallowance of such direct expenses while computing the disallowance under section 14A read with rule 8D under MAT provision.
- (ii) On the facts and in the circumstances of the case the learned CIT-A erred in restricting the disallowance made under section 14A r.w. Rule 8D(2) to the extent of exempt income, when no such provision of just in Rule 8D of income tax Rule, 1962 under MAT provisions.
3. The appellant prays that the order of the Id CIT(A) on the above grounds be set aside and that of assessing officer restored.

46. We have noted that the assessee has challenged the deletion of disallowance under clause (i) of Rule 8D(2) and also in restricting the disallowance under clause (iii) of Rule 8D(2) to the extent of exempt income. While discussing the corresponding grounds of appeal in cross appeal of the assessee we have noted that no disallowance u/s 14A was

warranted in case of assessee being engaged in banking business. We have further noted the Hon'ble Supreme Court in Maxopp Investment P Ltd (supra) upheld the judgment of the Hon'ble Punjab & Haryana High Court in the case of Pr. CIT Vs State Bank of Patiala (supra), wherein it was held that no disallowance u/s 14A is permissible in terms of Rule 8D in case of assessee is engaged in banking business. Similar view was taken by the coordinate bench of the Kolkata Tribunal in UCO Bank (supra). Therefore in view of aforesaid legal discussion, we do not find any merit in the ground of appeal raised by revenue.

47. In the result the appeal of the revenue is dismissed.

ITA No. 4042/Mum/2018 by revenue for AY 2012-13.

48. The revenue has raised identical ground of appeal as raised in appeal for assessment year 2011-12, which we are dismissed. No various in the facts for the year under consideration are brought to our notice. Therefore, following the principle of consistency the grounds of appeal raised by revenue in the year under consideration are also dismissed with similar directions.

ITA No. 4043/Mum/2018 by revenue for AY 2013-14.

49. The revenue has raised following grounds of appeal:—

(1) Deleting the *suo moto* disallowance under section 14A and further restricting the disallowance under section 14A r.w. Rule 8D to the extent of exempt income.

(2) Deleting the disallowance of ₹ 65,77,57,062/- on account of provisions for expenses on which TDS was not deducted under section 40(a)(ia).

50. We have noted that ground No. 1 of the appeal is identical to the ground No. 1 & 2 in the appeal for AY 2012 -13, which we have already dismissed. No variation of fact for the year under consideration is brought to notice, therefore, this ground of appeal is also dismissed with similar directions.

51. Ground No. 2 relates to deleting the disallowance under section 40(a)(ia).

The ld. AR for the assessee submits that the assessee is a banking company and following mercantile system of accounting on due basis. The assessee made estimate of such liability for expenses not on adhoc basis but on realistic basis evaluation taking into account the pending and the past liability. Such outstanding expenses were reverse in the subsequent years upon receipt of bills and deducting tax when the liability crystallized on receipt of invoices. On the question of TDS, the ld AR submits that accounting entry was made by creating a provision for such expenses, the fact remain that creditor was not known and in most of the cases receiver is not identifiable.

52. On the other hand the ld. DR for the revenue relied on the order of the lower authorities.

53. We have considered the rival submissions of the parties and gone through the orders of the authorities below. During the assessment the assessing officer from the tax Audit report noted that the assessee has made provision for expenses on which no tax was deducted. The assessee was asked to justify its allowability. The assessee filed its reply dated 08.12.2016 and again on 22.12.2016. In the reply the assessee states that the assessee has made a provision of expenses of Rs. 65,77,57,062/-. The provisions were made for those bills which were not received and which are subject to reversal in the subsequent year upon final bills and therefore no TDS was made. The provisions were made only for the purpose preparation of annual financial statement in accordance with accounting standards. The reply of the assessee is extracted in verbatim by assessing officer in para 4 of his order. The reply of the assessee was not accepted by the assessing officer. The assessing officer concluded that as per section 40(a)(ia), any expenses on which tax is deductible at source under the relevant provision of the Act, and as such said tax is not deducted or after deduction not paid, no deduction can be allowed for such expenses.

54. Before, Id CIT(A) the assessee made similar submissions as made before us and also furnished the submissions in writing. The Id CIT(A) after appreciating the submissions of the assessee concluded that the expenses were relatable to the previous year and therefore, to be provided under mercantile system of accounting on due basis, which is the requirement of this system of accounting to take in to account of expenses which has become due but could not be paid by reasons of non receipt of bills. It was further concluded that the TDS provisions are applicable to the payees who are clearly identifiable by the assessee. The TDS made has to be linked with PAN of the payee's. Further the payer has to issue a certificate to that effect. The payee's were not identifiable at that time. No contrary material that the assessee made such liability not on adhoc basis but a realistic evaluation based on the pending past liability. It was further concluded that outstanding expenses were reversed in the subsequent year upon receipt of bill and deducted tax when the liability was crystallized on receipt of bill. There is no loss of revenue in such cases. On the basis of the above conclusion the Id CIT(A) directed to delete the disallowances. No contrary facts or material or law is brought to our notice to take other view. In the result this ground of appeal is dismissed.

55.In the result appeal of the revenue is dismissed

Order pronounced in the open court on 03.09.2019.

Sd/-	Sd/-
(R.C.Sharma)	(Pawan Singh)
Accountant Member	Judicial Member

Mumbai, Date : 03 September, 2019

PS:Sk

Copy to :

1. Appellant
2. Respondent
3. CIT(A)
4. CIT
5. DR

By order

Asstt. Registrar, ITAT, Mumbai