IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "K" MUMBAI

BEFORE SHRI VIKAS AWASTHY (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)

ITA No. 2351/MUM/2018
Assessment Year: 2011-12

Hindustan Construction Co. Ltd.,Hincon House, L.B.S. Marg, Vikhroli (West), Mumbai-400083.	Vs.	Assistant Commissioner of Income Tax-14(2)(1), 4th floor, AayakarBhavan, New Marine Lines, Mumbai-400020.
PAN No. AAACH0968B		
Appellant		**Respondent**

ITA No. 2432/MUM/2018
Assessment Year: 2011-12

The D.C.I.T.-14(2)(1), 432, AayakarBhavan, 4th floor, M.K. Marg, Mumbai-400020.	Vs.	Hindustan Construction Co. Ltd.,Hincon House, 11th Floor,247 Park, L.B.S. Marg, Vikhroli (West), Mumbai-400083.
		PAN No. AAACH0968B
Appellant		**Respondent**

Assessee by : Mr. H.P. Mahajani / Ms. Shweta Mahadik, ARs

Revenue by : Mr. Anand Mohan, CIT-DR

Date of Hearing : 08/01/2020
Date of pronouncement: 13/01/2020

ORDER

PER N.K. PRADHAN, A.M.

The captioned cross appeals filed by the assessee and the Revenue are directed against the order of the Commissioner of Income Tax (Appeals)-56, Mumbai [in short 'CIT(A)'] and arise out of the assessment order passed u/s 143(3) of the Income Tax Act 1961, (the 'Act').

ITA No. 2351/MUM/2018
(A.Y.2011-12)

2. The 1st ground of appeal

1. On the facts and in the circumstances of the case and in law the learned CIT(A) erred in not accepting the contention of the appellant that, for the purposes of determining estimated total profit/loss from the project, unaccepted EOT Claim of Rs.200 Crores in respect of Bandra Worli Sea Link Project should be excluded from the estimated Contract value and estimated loss should be recomputed at Rs.434.24 Crores as against Rs.252.07 Crores, considered by the learned CIT(A).

3. The assessee is a public limited company and is engaged in the business of civil construction like Dams, Tunnels, Underground Structures, Barrages, Break Water Construction, Power Projects, Chimneys, etc. During the year under consideration, it claimed that Extension of Time (EoT) claim of Rs.200 crores should be excluded from estimated contract value for the purposes of recognizing revenue under Accounting Standard-7 (AS-7). The Assessing Officer (AO) rejected the contentions of the assessee on the basis of reasons recorded in AY 2008-09 to AY 2010-11. In appeal, the Ld. CIT(A) also rejected the claim of the assessee following earlier year's orders.

We find that similar issue arose before the ITAT 'H' Bench, Mumbai in assessee's own case for AYs 2008-09, 2009-10 and 2010-11. The Tribunal *vide* order dated 06.04.2016 held :

> "14. The next ground relates to the claim of exclusion of Rs.150 crores relating to EOT claims of BWSL project. The assessee has voluntarily included the same in the contract receipts, but requested the Ld CIT(A) to exclude the same as per the principles discussed in respect of the remaining amount added by the AO. The ld CIT(A) rejected the said claim on the reasoning that the assessee itself has included the same in the contract receipts and further the news paper report states that the Chief Minister is considering a proposal to constitute a committee to examine the claim of the assessee.
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> 15. We heard the parties on this issue. The undisputed fact is that the assessee itself has included a sum of Rs.150 crores as EOT claim on the basis of expected probable realisation of the claim. Though the addition made by the AO has been deleted by ld CIT(A), which has also been confirmed by us, on the basis of AS-7 and surrounding facts, yet the fact remains that the assessee has included a sum of Rs.150 crores with regard to the EOT claim on the basis of its past experience relating to the settlement of EOT claims. Hence, we are of the view that the principles adopted for deleting the enhancement made by the AO cannot be equally applied to the amount of Rs.150 crores included by the assessee in the contract receipts on the basis of accounting principles consistently followed by it. Accordingly we confirm the order of Ld CIT(A) on this issue."

4. Facts being identical, we follow the above order of the Co-ordinate Bench and dismiss the 1st ground of appeal.

5. The 2nd ground of appeal

2. On facts and in the circumstances of the case and in law the learned CIT(A) erred in disallowing the expenses incurred by the appellant on account of "Corporate Social Responsibility' alleging the same as not related to the business. The disallowance made by the learned CIT(A) be deleted.

6. The AO disallowed expenses of Rs.2.92 crores debited under the head Corporate Social Responsibility (CSR) on the ground that those expenses were not incurred for business purposes. In appeal, the Ld. CIT(A) confirmed the said disallowance on the basis of the order of the Tribunal in assessee's own case for AY 2008-09 to AY 2010-11.

7. Before us, the Ld. counsel for the assessee submits that though in AY 2008-09 to AY 2010-11, this issue was decided against the assessee, it involves fresh examination of facts - whether the expenditure has been incurred for the purposes of business.

On the other hand, the Ld. Departmental Representative (DR) explains that on similar facts, the Tribunal has decided the issue against the assessee in AY 2008-09 to AY 2010-11.

8. We have heard the rival submissions and perused the relevant materials on record. Similar issue arose before the Tribunal in assessee's own case for AY 2008-09 to AY 2010-11. The Tribunal held :

"11. The next issue contested by the revenue relates to the partial relief granted by the Ld CIT(A) in respect of disallowance relating to corporate social responsibility expenses. The AO disallowed the claim of Rs.1.29 crores made by the assessee under

the head 'Corporate Social Responsibility' (CSR) by holding that the same cannot be considered to be business expenditure. The Ld CIT(A) noticed that the said expenditure included a sum of Rs.80.99 lakhs incurred by the assessee through Clinton Foundation towards various health schemes. But the assessee could not provide any material to show that the said expenditure benefited its workers. Further a sum of Rs.5.80 lakhs relating to foreign tour expenses was also found included in CSR expenses. Hence the Ld CIT(A) confirmed the disallowance of both the above said expenses. With regard to the remaining expenses of Rs.40.10 lakhs, the Ld CIT(A) took the view that they have been incurred out of business exigencies and accordingly directed the AO to delete the disallowance.

12. We have heard the parties on this issue. We notice that the assessee has incurred various expenses aggregating to Rs.40.10 lakhs under various heads like Car hire, Salaries, Food, Medical, Printing etc. Though it is claimed that they have been incurred out of commercial expediency in the larger interest of workers, yet it was not shown as to how they related to the business carried on by the assessee. Further, we notice that the Finance Act, 2014 has inserted Explanation 2 to sec. 37(1) specifically prohibiting allowance of CSR expenses unless they fall in the category of expenses stated in sec. 30 to 36 of the Act. Even though the said provision has been inserted w.e.f. 1.4.2015, yet we are of the view that one can take a clue from the said provision to examine the admissibility of CSR expenses in this year also. In the absence of any material to show that these expenses have been incurred in connection with the business carried on by the assessee, we are of the view that the Ld CIT(A) was not justified in deleting the disallowance. Accordingly, we set aside the order of Ld CIT(A) on this issue and sustain the disallowance made by the AO."

8.1 We follow the above order of the Co-ordinate Bench. However, it is contention of the Ld. counsel that in the year under consideration, it is to be examined whether the above expenditure has been incurred for the purposes

of business. Considering the facts of the instant appeal, we set aside the order of the Ld. CIT(A) on the above ground of appeal and restore the matter to the file of the AO to pass an order afresh after (i) following the order of the Tribunal in assessee's own case for AY 2008-09 to AY 2010-11 and (ii) examining whether the expenditure has been incurred for the purposes of business. We direct the assessee to file the relevant documents/evidence before the AO. Needless to say, the AO would give reasonable opportunity of being heard to the assessee before finalizing the order. Thus the 2nd ground of appeal is partly allowed for statistical purposes.

9. <u>The 3rd ground of appeal</u>

3. a) On facts and in the circumstances of the case and in law, the learned CIT (A) has erred in not accepting the contention of the appellant that no amount (interest and other expenses) was disallowable u/s 14A of the Act in as much as no expenditure was in fact incurred during the year in relation to exempt Income. The learned CIT(A) also erred In confirming disallowance of other expenses u/r 8D(2)(iii) when no such disallowance was warranted.

b) Without prejudice to above, even if Rule 8D of the I.T. Rules need to be applied, then the same should be applied for only on those investments on which dividend has been earned and claimed exempt during the year. Accordingly, the disallowance be restricted to Rs.71,071/-

10. Before us, the Ld. counsel submits that the assessee would not press the above ground of appeal. Considering the facts of the case and the contentions of the Ld. counsel, the 3rd ground of appeal is dismissed as not pressed.

11 The 4th ground of appeal

4. On facts and in the circumstances of the case and in law, the learned CIT(A) erred in holding that the claim for set off of share of loss from AOP amounting to Rs.16,06,57,704/-, under the provisions of section 70 of the Income Tax Act, 1961 against business income the appellant is not allowable, thereby confirming the action of the assessing officer. The claim of the appellant be allowed.

12. The AO has followed the order of the Tribunal in assessee's own case for AY 2003-04 to AY 2007-08. The Ld. CIT(A) dismissed the appeal filed by the assessee on the basis of the order of the Tribunal in assessee's own case for AY 2008-09 to AY 2010-11.

13. We find that the Tribunal in assessee's own case for AY 2008-09 to AY 2010-11 has decided the above issue against the assessee by following ITAT order in assessee's own case for AY 2003-04, which is as under:

> "16. The next issue contested by the assessee relates to the claim of set off share of loss from AOP. The said claim was rejected by the Tribunal in the assessee's own case relating to AY 2003-04 in ITA Nos. 6438 to 6441/Mum/2008 dated 28-09-2012 by following the decision rendered by the jurisdictional Bombay High Court in the case of Lalitha M Bhat. The Hon'ble High Court considered the provisions of sec. 67A of the Act and held that the assessee cannot claim set off of share of loss from AOP. The co-ordinate bench has followed the said decision in the assessee's own case relating to AY 2007- 08 in ITA Nos.8261 & 8103/Mum/2010, vide its order dated 21.10.2014. Consistent with the view taken in the above said years, we uphold the order passed by Ld CIT(A) on this issue."

14. Facts being identical, we follow the above order of the Co-ordinate Bench, and dismiss the 4th ground of appeal.

15. <u>The 5th ground of appeal</u>

5. On facts and in circumstances of the case and in law, the learned CIT (A) erred in confirming disallowance of Appellant's claim for deduction u/s 80-IA(4) of the Income tax Act on the ground that the appellant was purely executing works contracts for payment and was not the 'developer' of the projects in question. The claim of the appellant be allowed.

16. The AO has followed the order of the Tribunal for earlier years and refused the claim of the assessee for deduction u/s 80IA of the Act. The Ld. CIT(A) dismissed the appeal filed by the assessee by following the order of the Tribunal in assessee's own case for AY 2008-09 to AY 2010-11.

17. We find that this ground of appeal is same as per assessee's appeal for AY 2008-09 to AY 2010-11. The Tribunal *vide* order dated 06.04.2016 held :

> "20. The next issue contested by the assessee relates to the rejection of claim for deduction u/s 80IA(4) of the Act. This issue was decided against the assessee by the co-ordinate bench of Tribunal in the assessee's own case relating to AY 2003-04 and 2007-08, referred above by holding that the assessee has acted as a "Contractor" in various projects and not as a developer. Consistent with the view taken in the above said years, we uphold the order of Ld CIT(A) on this issue."

18. Fact being identical, we follow the above order of the Co-ordinate Bench and dismiss the 5th ground of appeal.

19. <u>The 6th ground of appeal</u>

6. On facts and in circumstances of the case and in law, the learned CIT (A) erred in confirming the determination of Arm's Length Price by the Transfer Pricing Officer at LIBOR + 400 bps instead of LIBOR + 300 bps on loan given by the appellant to its

Associated Enterprise. The transfer pricing adjustment of Rs.1,14,19,186/- be deleted.

20. The Transfer Pricing Officer (TPO) noted that the assessee has issued a loan amounting to USD 43 million to its Associated Enterprise (AE) HMEL in order to finance the business activities of HMEL. The loan has tenure of 3 years and is repayable at any time before the maturity at the option of the borrower with a prior notice of 10 days. The facts regarding the loan are as under :

Particulars	Details
Name of the Borrower AE	HCC Mauritius Enterprises Ltd.
Country of the Borrower AE	Republic of Mauritius
Currency	USD
Amount in FC	43,000,000
Amount in INR	1,910,060,000
Date of Agreement	26.04.2010
Rate of Interest	LIBOR 3M + 300 bps
Tenor	3 Years
Due Date of Interest	After 3 years
Security from AE	Nil
Whether Hedging done	No

However, the TPO calculated the interest income on ICD with Mauritius by taking into account (i) period for which interest received, (ii) days, (iii) LIBOR + 400 int. rate, (iv) principal outstanding, (v) interest in FC. Thereby the TPO worked out the difference to be adjusted at Rs.11,419,186/- (Rs.50,191,341/- by adopting LIBOR + 400 int. rate *minus* Rs.38,772,155/- by adopting LIBOR + 300 int. rate). The AO followed the order of the TPO. In appeal, the Ld. CIT(A) upheld the ALP by the TPO which was as per alternative without prejudice submission by the assessee.

21. Before us, the Ld. counsel for the assessee submits that this is the first year of transfer pricing addition.It is further stated that in the TP proceedings,

the assessee was called upon to show cause why ALP of interest be not determined by the Prime Lending Rate Method using either Indian Corporate Bond Rates or SBI PLR. The assessee submitted before the TPO that the rate of interest charged by it is more than the prevailing market rate. However, as a defence against ALP by the PLR method, the assessee submitted that since the AE had borrowed Exim Bank at that rate of interest, LIBOR plus 400 bps may be considered as the comparable rate. The Ld. counsel further submits that the TPO has reproduced the submissions on the comparability of lending to the AE by Exim Bank and by the assessee; the comparable security of the two loans has been tabulated in the TP order. The Ld. counsel submits that without countering or contradicting any of the submissions, the TPO proceeded to calculate the ALP at LIBOR + 400 bp being the rate charged by Exim Bank. Thus it is explained by him that the discount to the commercial bank rate should be deemed to be reasonable and the LIBOR + 300 basis point rate should be said to be ALP.

On the other hand, the Ld. DR submits that as the assessee has not found any fault in the 'Computation of interest income on ICD with Mauritius', which is enclosed as Annexure A of the order of the TPO dated 27.01.2015, the same should be accepted.

22. We have heard the rival submissions and perused the relevant materials on record. In the Instant case we find that the assessee has advanced an unsecured loan amounting to USD 4,30,00,000 equivalent to INR 191,00,60,000 to its AE i.e. HCC Mauritius Enterprises Ltd. (HMEL) for the purpose of acquisition of shares of Karl Steiner AG, a Switzerland based total

service contractor operating in the European market. The tenure of loan was 3 years and interests were payable @ LIBOR + 300 bps on completion of tenure of the loan. The assessee submitted before the TPO that the rate of interest charged by it is more than the prevailing market rate. The TPO has reproduced the submissions of the assessee on comparability of lending to the AE by Exim Bank and by the assessee at page 22 and 23 of his order. The TPO has tabulated at page 23 the comparable security of the two loans. However, we find that the TPO has not examined the submission by the assessee that the security that the assessee had was better than the security obtained by Exim Bank. As the TPO has arrived at the ALP at LIBOR + 400 bps, without contradicting the submission of the assessee and the adoption of LIBOR + 400 bps is not based on any reasoning, we delete the transfer pricing adjustment of Rs.11,419,186/-. Thus the 6th ground of appeal is allowed.

23. In the result, the appeal filed by the assessee is partly allowed.

ITA No. 2432/MUM/2018
(AY: 2011-12)

24. The 1st to 8th ground of appeal filed by the Revenue relate to the issue of Corporate Guarantee Commission and are as under :

1. On the facts and circumstances of the case and in law, the Ld. CIT(A) was not justified in deciding that the corporate guarantee and deleting the adjustment ofRs.2,63,26,787/- treating it as not partaking the character of an international transaction.
2. On the facts and circumstances of the case and in law, the Ld. CIT(A) was not justified in deciding that the corporate guarantee provided by the assessee to EXIM Bank on behalf of its AE, HCC Mauritius Enterprises Limited, was not an

international transaction without appreciating the fact that the transaction was of nature of guarantee given and the AE got benefit from the corporate guarantee provided by the assessee, which was a facility/service provided to its AE.

3. (a) On the facts and circumstances of the case and in law, the Ld. CIT(A) was not justified in deciding that the Corporate guarantee provided by the assessee to EXIM Bank on behalf of its AE, HCC Mauritius Enterprises Limited, was not an international transaction without appreciating that the term 'guarantee' is clearly mentioned in Explanation (i)(c) below section 92B of IT Act 1961 as an International Transaction and that the explanation was applicable with retrospective effect from 01.04.2002.

   (b) That the Ld. CIT(A) failed to notice and consider a number of ITAT rulings existed before the decision in the case of Bharti Airtel (ITA No. 5816/Del/2012) dated 11.03.2014 that issuance of guarantee was an international transaction in terms of explanation (i)(c) below section 92B of the Act. Further there are number of rulings subsequent to the decision in the case of Bharti Airtel which hold that the issuance of guarantee was an international transaction under the provisions of section 92B of the Act.

4. (a) On the facts and circumstances of the case and in law, the Ld. CIT(A) was not justified in deleting the adjustment made on corporate guarantee for the reason that since no guarantee fee was actually charged by the assessee to its AE, HCC Mauritius Enterprises Limited, without appreciating the law which provides that any income arising from an international transaction shall be computed with regard to the arm's length price u/s 92(1) of the Act wherein actual charging of fees is not a precondition for determining the ALP, in this case the international transaction of corporate guarantee.

   (b) On the facts and circumstances of the case and in law, the Ld. CIT(A) was, not justified in deleting the adjustment made on corporate guarantee for the reason that since no guarantee fee was actually charged on the loans by the assessee to its AE, HCC Mauritius Enterprises Limited without considering that the transfer

pricing is applicable to transaction capable of generating income chargeable to tax and merely because assessee does not charge it from the related party, the basic nature of transaction will not undergo it change. Therefore, the decision of the ld.CIT(A) is contrary to the law explained by the coordinate bench decision in the case Tally solutions 160 ITD 465 (Bangalore Tribunal), which was considered jurisdictional High Court decision in the case of Vodafone 368 ITR 1 (Bombay).

5. On the facts and circumstances of the case and in law, the Ld. CIT(A) was not justified in deciding that the Corporate guarantee to EXIM Bank on behalf of HCC Mauritius Enterprises Limited, was not an international transaction without appreciating that the TPO has taken into consideration the benefits received by the AE and determined the ALP accordingly.
6. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in relying on the judgment of Hon'ble ITAT Mumbai in the case of Videocon Industries (ITA No. 6145/Mum/2012, ITA No. 1728/Mum/2014, ITA No. 1729/Mum/2014), ignoring the fact that the said decision was not followed by the Hon'ble ITAT in is subsequent judgments in the case of the same assessee i.e. Videocon Industries for AY 2011-12 (ITA No. 1310/M/2016 dated 24.02.2017) and AY 2012-13 (ITA No. 149/Mum/2017 dated 26.07.2017).
7. (a) On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in relying on the judgment of ITAT Delhi on Bharti Airtel (ITA No. 5816/Del/2012) , without considering that this decision has not been followed by the coordinate benches of the tribunal in subsequent decision including Prolific Corporation (ITA No. 237 of 2014 Hyd dated 31.12.2014), Foursoft Pvt. Ltd. (ITA No. 1903 of 2014 Hyd. dated 28.02.2014), Xchanging solutions (ITA No. 1294/Bang/2012 & 166/Bang/2014 dated 31.10.2016).

   (b) On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in relying on the judgement of ITAT Delhi on Bharti Airtel (ITA No 5816/Del/2012), without appreciating the fact that the Bharti judgement proceeded on misreading and misinterpretation of section 92B which used the

plural word enterprises (assessee and the AE) whereas, in the Bharti judgement, in number of paragraphs the singular word enterprise was used referring to the assessee.

8. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in relying on the decision in the case of Bharti Airtel (ITA No. 5816/Del/2012) holding that no guarantee fees is chargeable as the guarantees do not have any impact on income, profits, losses or assets of the assessee without appreciating the facts that the issuance of guarantee by the assessee enabled its AE to raise funds impacting the assets as also exposing the assessee to the risk. The decision of the ld. CIT(A) is contrary to a later judgement of the coordinate bench of the Bangalore Tribunal in the case of Xchanging Solutions ITANo. 1294/Bang/2012 &166/Bang/2014, the Hon'ble ITAT, Bangalore, in which it has been held that issuance of Corporate Guarantee is an international transaction and it impacts the assets of the enterprises.

   On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in applying the decision of Bharti Airtel (ITA No. 5816/Del/2012) which held that retrospective amendment by bringing an explanation below section 92 of the Act was applicable prospectively to the subsequent assessment years post amendment without considering the earlier decision of the tribunal to the contrary like Everest Kanto Cylinders Ltd. etc. and other decisions in the transfer pricing field upholding the retrospective amendments such as Sony Ericsson Mobile Communications 374 ITR 118 (Del), Marubeni India Pvt. Ltd. v. DIT 354 ITR 638 Delhi, IHG IT Services 23 ITR (Trib.) 608 (SB) Delhi, Everest Kanto Cylinders Ltd. 34 taxmann.com 19 (Mumbai Tribunal), Vodafone India Services Pvt. Ltd. (359 ITR 133) (Bom) and Patni Computers 215 taxman 108 (Bom).

25. Before us, the Ld. DR submits that the word ‘guarantee’ as the name suggests is one where one party provides a written assurance regarding the fulfilment of obligation of another party (AE). It is explained by him that

commercial expediency has no role in examination of a transaction from the perspective of transfer pricing, therefore, guarantee fee ought to be charged for the services being rendered. In support of his contentions, reliance is placed by him on the decision in the case of *Instrumentarium Corporation Ltd. v. ADIT* [2016] 71 taxmann.com 193 (Kolkata-Trib.) (SB), *Vodafone India Services (P.) Ltd. v. DCIT* [2018] 89 taxmann.com 299 (Ahd. – Trib.), *Aurionpro Solutions Ltd. v. Addl. CIT* [2013] 33 taxmann.com 187 (Mumbai-Trib.).

26. On the other hand, the Ld. counsel submits that the assessee has not considered the Corporate Guarantee as an international transaction and relied upon the decision of the order of the Tribunal in the case of *M/s Four Soft Ltd. v. DCIT* (ITA No. 1495/Hyd/2010). It is stated that the loan obtained by the AE was for the purpose of investment in Karl Steiner AG, Switzerland and hence the main purpose was to expand its own business activity. In this regard, reliance is placed by him on the decision in *Britannia Industries Ltd. v. DCIT* (107taxmann.com 138 Kolkata-Trib.), *IL & FS Technologies Ltd. v. ACIT* (105 taxmann.com 117 Mumbai-Trib.), *CIT v. Everest Kento Cylinders Ltd*. (58 taxmann.com 254 Bombay HC), *CIT v. Glenmark Pharmaceuticals Ltd.* (85 taxmann.com 349 Bombay HC), *CIT v. Glenmark Pharmaceuticals Ltd*. (Appeal 12632/2017).

Without prejudice to the above, it is submitted by the Ld. counsel that if commission to be charged, then it should be at 0.5%.

27. We have heard the rival submissions and perused the relevant materials on record. We are of the considered view that aptly in the case of Everest Kento, while commercial banks were stated to be charging 3% for guarantee,

the Hon'ble Bombay High Court upheld ALP at 0.5%. Following the same, we hold that the Corporate Guarantee Commission be charged at 0.5%. Thus the 1st to 8th grounds of appeal are partly allowed.

28. The 9th to 10th ground of appeal address a common issue and these are as under :

> 9. On the facts and in the circumstances of the case, the Ld. CIT(A) erred in directing to re-compute the disallowance u/s 14Ar.w.r. 8D stating that disallowance not to exceed exempt income without appreciating the fact that as per CBDT Circular even if there is no exempt income disallowance is to be made u/s 14A r.w.r. 8D.
> 10. On the facts and in the circumstances of the case, the Ld. CIT(A) erred in directing to re-compute the disallowance u/s 14Ar.w.r. 8D after eliminating strategic investment not earning dividend.

29. The Ld. CIT(A) has observed and held that :

> "The submission of the appellant states that (a) investment made out of free reserves (b) That application of rule 8D should confine to dividend income of Rs. 207,59,563/- (c) That disallowance be, without prejudice to other submissions, Rs.71,071/- only.
>
> 6. The above is to be viewed on background of disallowance of Rs.5,96,55,700/- made by appellant. Thus here the appellant seeks to reduce disallowance already made which was declined by assessing officer. The reason for some is that lot of clarity on disputed issues has emerged as a result of judicial decision that came later and claims were to be modified to bring in tune with legally settled principles.
>
> 7. The matter is examined. The claim was before Assessing officer to reduce disallowance under section 14A as clear from penultimate para in page 5 of also. Having made a claim the Assessing officer should have adjudicated the mater on

merits. On the facts and circumstances in the context of the case, I direct Assessing officer to re-compute disallowance under section 14A keeping in view the following judicially settled aspects:

a. Following decision in HDFC Bank, Mumbai vs DCIT-2(3), Mumbai & Ors dated 25.02.2016 r.w CIT vs HDFC Bank Ltd. (2014) 366 ITR 505(Bom.)(HC) regarding availability of own funds and its impact in computing disallowance under section 14A
b. Ensuring that disallowance not to exceed exempt income earned
c. Ensuring that Strategic investment not earning dividend, if any, to be eliminated before computing disallowance

A draft computation must be provided to assessee on extent of disallowance to be retained before passing order giving effect to this order and their views is to be taken before implementing this direction. No order prejudicial to assessee shall be passed without granting opportunity of being heard."

30. A perusal of the above order passed by the Ld. CIT(A) clearly indicates that he has directed the AO to re-compute the disallowance u/s 14A by following the judicial decisions. We agree with the order of the Ld. CIT(A) on the above issues. Only addition we make is to direct the AO to also follow *Maxopp Investment Ltd. v. CIT* [2018] 91 taxmann.com 154 (SC).

31. The 11th ground of appeal is as under :

11. On the facts and in the circumstances of the case, the Ld. CIT(A) erred in excluding the disallowance u/s 14A while computing Book Profit u/s 115JB.

32. We find that the Ld. CIT(A) has rightly directed the AO to follow the order of the Special Bench of the Tribunal in the case of *ACIT v. Vireet Investment Pvt. Ltd*. (ITA No. 503/Del/2012) dated 16.06.2017. Therefore, we dismiss the 11th ground of appeal.

33. In the result, the appeal filed by the Revenue is partly allowed.

34. To sum up, the appeals are partly allowed.

Order pronounced in the open Court on 13/01/2020.

Sd/-	Sd/-
(VIKAS AWASTHY)	(N.K. PRADHAN)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai;

Dated: 13/01/2020
Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

//True Copy//

(Dy.//Asst. Registrar)
ITAT, Mumbai