IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "J", MUMBAI
BEFORE SHRI PRAMOD KUMAR, VICE PRESIDENT
AND SHRI PAWAN SINGH, JUDICIAL MEMBER
ITA No.4866/Mum/2013 (Assessment year: 2008-09)

M/s Wockhardt Ltd, Wockhardt Towers, Bandra Kurla Complex Bandra(E), Mumbai-400051 **PAN:AAACW2472M**	Vs	Additional Commissioner of income tax Range -10(1), Aayakar Bhawan, M.K. Road, Mumbai -20
APPELLANT		**RESPONDEDNT**

ITA No.5378/Mum/2013(Assessment year: 2008-09

Additional Commissioner of income tax, Range -10(1), Aayakar Bhawan, M.K. Road, Mumbai -20	Vs	M/s Wockhardt Ltd, Wockhardt Towers, Bandra Kurla Complex Bandra(E), Mumbai-400051 **PAN:AAACW2472M**
APPELLANT		**RESPONDEDNT**

Assessee by	Shri Ronak Doshi & Hardik Nirmal (ARs)
Revenue by	Mrs Abha Kala Chanda CIT-DR
Date of hearing	17-12-2019
Date of pronouncement	09-03-2020

O R D E R

PER PAWAN SINGH, JUDICIAL MEMEBR :

1. These Cross Appeals are directed against the order of ld CIT(A)-15 Mumbai dated 27.05.2013 for assessment year 2008-09.
2. Brief facts of the case are that the assessee is company engaged in the business of pharmaceuticals product filed its return of income for this

assessment year 29.09.2008. The assessee while filing report reported international transactions with its associated enterprises in its transfer pricing study report (TPSR). Consequent on reporting the international transaction by assessee, the assessing officer made reference to the Transfer Pricing officer (TPO) for computation of arm's length price (ALP). The TPO suggested various adjustments in its report. On receipt of the report of TPO the assessing officer passed draft assessment order and served on the assessee. The assessee exercised its option to file appeal before the ld CIT (A). On appeal the ld. CIT (A) granted partial relief to the assessee. Thus, aggrieved by the order of ld. CIT (A) both the parties have filed their respective appeal by raised the following grounds of appeal. The assessee has raised following grounds of appeal;

ITA No. 4866/Mum/2013 by assessee.

GROUNDS OF APPEAL BEFORE THE HON'BLE INCOME TAX APPELLATE TRIBUNAL, MUMBAI

GROUND NO. I: ADDITION ON ACCOUNT OF ARM'S LENGTH ADJUSTMENT TO INCOME FROM INTEREST ON LOANS ADVANCED TO SUBSIDIARIES:

1. On the facts and in the circumstances of the case and in law, the Hon'ble Commissioner of Income Tax (Appeal) -15, Mumbai ("CIT(A)") erred in directing the Additional Commissioner of Income Tax - 10(1), Mumbai ("the AO") and the Additional Commissioner of Income Tax (TP) -11(2) ("the TPO") to recompute the addition u/s. 92C of the Income-tax Act, 1961 ("the Act") on

account of loans given to Associate Enterprise ("AEs") by adopting 6 months benchmarking at LIBOR + 150 basis points for loans having maturity between three to five years and 6 months LIBOR + 250 basis points for loans having maturity period beyond more than five years.

2. The Appellant prays that it be held that the transaction of loan given to the AEs are at arm's length and no further addition is warranted u/s. 92C of the Act.

GROUND NO. II: WANT OF NATURAL JUSTICE AS REGARDS TREATING EQUITY INVESTMENT IN OVERSEAS SUBSIDIARY AS AN INTERNATIONAL TRANSACTION:

1. On the facts and in the circumstances of the case and in law, the Hon'ble CIT (A) erred in upholding the action of the learned TPO/AO in passing an order u/s 92CA(3) of the Act treating equity investment in existing overseas subsidiary as an 'international transaction' u/s. 92B(l)of the Act.

WITHOUT PREJUDICE TO GROUND II:

GROUND NO. Ill: RECLASSIFICATION OF SHARE APPLICATION MONEY AS *'LOAN'* FOR THE PERIOD BETWEEN DATE OF REMITTANCE TILL THE DATE OF ALLOTMENT OF EQUITY SHARES:

1. On the facts and in the circumstances of the case and in law, the Hon'ble CIT(A) erred in reclassifying the investment in equity shares as a loan, for the time period from remitting the money till the date of allotment of shares and directing the AO to calculate interest at 6 months LIBOR plus 150 basis points for the aforesaid period.

2. The Appellant prays that the action of the Hon'ble CIT(A) to reclassify equity infusion in the Wholly Owned Subsidiary into loan be held as ab-initio void and bad-in-law and consequently direction given to the AO to make addition be withdrawn.

GROUND NO. IV: DISALLOWANCE OF WEIGHTED DEDUCTION UNDER SECTION 35f2AB) OF THE ACT ON EXPENSES OF RS. 18.81.14.518/-:

1. On the facts and in the circumstances of the case and in law, the Hon'ble CIT(A) erred in upholding the action of the AO in disallowing weighted deduction u/s 35(2AB) of the Act on expenses of Rs. 18,81,14,518/- on the alleged ground that these expenses were not incurred for the in-house research by the Appellant.

2. The Appellant prays that the Appellant be granted weighted deduction u/s 35(2AB) on expenses of Rs. 18,81,14,518/-.

GROUND NO. V: DISALLOWANCE UNDER SECTION 14A OF THE ACT AMOUNTING TO RS. 22.81.641/-:

1. On the facts and in the circumstances of the case and in law, the Hon'ble CIT(A) erred in upholding the action of the AO in disallowing a sum of Rs. 22,81,641/- u/s 14A of the Act r.w.r. 8D of the Income Tax Rules, 1962 ('the Rules') as expenses incurred towards earning exempt dividend income u/s 10(35) of the Act of Rs. 80,000/-.

2. The Appellant humbly prays that disallowance of Rs. 22,81,641/- should be deleted or be appropriately reduced.

ITA No. 5378/Mum/2013 by revenue.

1. " erred in deleting the addition of Rs. 1,71,04,416/- representing upward adjustments on account of Guarnatee fee income received in relation to guarantee provided on loans to its AE in UK to ALP recommended by the Transfer Pricing Officer (TPO) without appreciating the fact that the Guarantee Commission is charged at the rate of 0.75% of loan amount by HSBC, Mumbai, India."

2. " erred in holding that the benchmarking of interest rates on foreign currency loans would be LIBOR based and not rupee loan based thereby overlooking the high opportunity cost lost by the assessee company through foreign AE lending as against other competitive domestic lending."

2.1 " erred in directing the AO to adopt the External Commercial Borrowing guidelines of the RBI as a benchmark ignoring that the ECB guidelines are for

inward borrowing whereas the case facts pertain to outward lending to assessee's AEs."

3. " erred in deleting the imputation of notional interest of Rs. 17,82,00,000/- on infusion of additional funds to the wholly owned subsidiary of the assessee."

3.1 " erred in admitting and not remanding the additional evidence furnished by the assessee to the AO and thereby violated the provisions of Rule 46A of I.T. Rules."

4. " erred in holding that the deduction u/s 80IB & 80IC of the Act amounting to Rs. 7,30,78,956/- should be granted without allocating R & D Expenses and interest expenses to units eligible for grant of deduction in spite of the fact that the assessee has allocated interest cost to units on the basis of turnover."

5. " erred in allowing the assessee's claim of weighted deduction u/s 35(2AB) amounting to Rs. 65,30,88,285/- which was not allowed by the AO for want of form 3CL from the appropriate authority DSIR for the current year under reference."

6. " erred in deleting the addition made by the AO u/s 40(a)(i) amounting to Rs. 6,94,82,067/-without appreciating the fact that the payments were made by the assessee to non-residents on account of pilot bio-study, clinical research, whereas per section 195 of the Act, the assessee is liable to withhold tax on such payments which the assessee did not do so."

7. " erred in deleting addition of Rs. 51,00,00,000/- representing provision for market to market (MTMs) losses for calculation of book profit u/s 115JB."

8. " erred in deleting addition of Rs. 45,39,118/- representing provision for gratuity for calculation of book profit u/s 115JB of the Act."

9. " erred in deleting addition of Rs. 22,81,641/- representing disallowance u/s 14A for calculation of book profit u/s 115JB of the Act."

3. We have heard the submissions of the learned departmental representative (ld. DR) for the revenue and the learned authorised representative (ldAR) for the assessee and gone through the orders of the lower authorities. First we shall take revenue’s appeal.

4. Ground No. 1 relates to deleting the upward adjustment on account of corporate guarantee commission. The ld. DR for the revenue supported the order of TPO/AO.

5. On the other hand the ld. AR for the assessee submits that the assessee benchmarked the transaction at .75% and this ground of appeal is covered in favour of the assessee in assessee's own case for AY 2006-07 and there are no variations in the facts for the year under consideration.

6. We have considered the submissions of the parties and perused the order of the lower authorities. We have seen that the assessee in its transfer pricing study report (TPSR) reported that they have charged guarantee commissions @.75%. The Transfer Pricing officer (TPO) worked out at 2.15% and suggested upward adjustment of Rs. 1,71,04,416/-. On appeal the ld CIT(A), the order of TPO in suggesting the upward adjustment was deleted by following his own order for AY 2006-07 and 2007-08. We have seen that on similar grounds of on similar set of facts in assessee's own case for AY 2006-07 in ITA No. 1875/Mum/2011 dated 12.06.2019, the Tribunal while following its order for AY 2007-08 passed the following order;

> "13. We have considered rival submissions and perused the material on record. Undisputedly, the assessee itself has charged guarantee commission on the corporate guarantee provided to the AE @ 0.75%. The guarantee fee charged has been benchmarked by the assessee by obtaining a quotation from HSBC India which has been used as an external CUP. In our view, the

method adopted by the assessee to benchmark the guarantee commission cannot be faulted with. It is necessary to observe, while deciding the appeal of the Revenue in assessee's own case in assessment year 2007-08, vide ITA no. 5557/Mum./2012, dated 5th January 2018, the Co-ordinate Bench has held that guarantee fee charged @ 0.75% is at arm's length. It is relevant to observe, in various other cases involving similar nature of dispute not only the Tribunal but the Hon'ble Jurisdictional High Court has held that arm's length price of guarantee fee can reasonably be fixed @ 0.5%. In view of the aforesaid, we uphold the decision of learned Commissioner (Appeals). This ground is dismissed."

7. Considering the decision of Tribunal in assessee's own case for AY 2006-07 and when no variations in the facts is brought in our notice for the year under consideration, thus we uphold the order of ld CIT(A). in the result this ground of appeal is dismissed.

8. Ground No. 2 in revenues appeal and Ground No. I in assessee's appeal are interconnected, which relates to Arms Length Price adjustment to income from interest loan advances to subsidiaries. The ld DR for the revenue supported the order of TPO in revenues appeal and ld CIT(A) in assessee's appeal. On the hand the ld. AR for the assessee submits that interest shold be charged on the basis of the rate prevalent in the country in which loan is received. In support of his submissions the ld AR for the assessee relied on the decisions of Bombay High Court in CIT Vs Tata Autocomp System Ltd (374 ITR 516 Bom), Delhi High Court in CIT Vs Cotton Naturals (I) Pvt Ltd (231 Taxman 401 Delhi High Court). In alternative submissions the ld AR

for the assessee submits that interest should be charged on the basis of LIBOR.

9. We have considered the rival submissions of the ld. representatives of the parties and perused the order of the lower authorities. During the relevant period for the assessment year under consideration the assessee in its TPSR reported receipt of interest of Rs. 6,25,23,143/- received against loan given to its overseas subsidiaries. The assessee charged interest @ LIBOR + margin rates. The TPO worked out interest income @ 12.5% and works out interest of Rs. 10,56,96,252/- and accordingly suggested upward adjustment of Rs. 4,31,73,109/- (Rs. 10,56,96,252/- minus Rs. 6,25,23,143/-) . On appeal before ld CIT (A), it was directed that if the loan period is three years and up to five years then the rated of interest be adopted as 6 month LIBOR plus 150 basis points and in case of average period of loan is more than five years, the rate is 6 month LIBOR plus 250 basis points may be adopted. The Hon'ble jurisdictional High Court in CIT Vs Tata Autocomp (supra) held that where the assessee advances loans to its associated enterprises (AE's) situated in Germany, rate of interest was to be determined on the basis of rate prevailing in Germany where loan has been consumed.

10. Considering the decision of jurisdictional High Court the AO/TPO is directed to recompute the interest on the basis of rate prevalent in the countries where

loan was received. In the result the ground of appeal raised by the assessee is allowed and resultantly the ground of appeal raised by the revenue has become infructuous.

11. Ground No. 3 in revenues appeal and Ground No. II & III in assessee's appeal relates to notional interest income on infusion of additional funds in wholly owned subsidiary. The ld AR for the assessee submits that the assessee made investment in its overseas subsidiary in the form of equity in Wockhardt EU of Rs. 142, 57,00,000/-. It was further submitted that there was delay in allotment of shares. The TPO reclassified the investment in equity share as loan and suggested addition of Rs. 17,82,00,000/-. The ld. AR for the assessee submits that no income arises on account of making application for shares and subscribing to the capital. To support his submissions the ld AR for the assessee relied on the decision of Bombay High Court in Vodafone India Services (P) Ltd Vs ACIT (368 ITR 1Bom). In alternative submissions the ld. AR submits that share application money cannot be classified as loan. In support of his submissions the ld AR for the assessee relied on the decision of Tribunal in ITO Vs Sterling Oil Resources (P) Ltd [2016] (67 taxmann.com 2 Mum Trib), Aditya Birla Minacs Worldwide Ltd Vs JCIT (2016) 75 taxmann.com 79 (Mumbai Trib) and Sun Pharmaceutical Industries Ltd Vs ACIT (2017) 84 taxmann.com 217

(Ahmedabad Trib). In other alternative submissions the ld. AR for the assessee submits that there was delay in allotment of shares, if the share application money is classified as 'loan' the notional interest could not exceed LIBOR. In support of his submissions he relied on decision of Bombay High Court in CIT Vs Tata Autocomp System (supra), Delhi High Court in CIT Vs Cotton Naturals India Pvt Ltd (supra).

12. On the other hand the ld. DR for the revenue supported the order of TPO.

13. We have considered the submissions of the parties and perused the order of the tax authorities below. During the relevant period under assessment year the assessee paid share application money to its AE's. The assessee not included this transaction in its TPSR. The TPO after giving show cause notice to the assessee treated the said share application money as loan to its subsidiary and charged interest @ 12.5% and worked out the adjustment of Rs. 17,82,00,000/-. Before, ld CIT(A) the assessee placed detailed submissions including the submissions that there is no international transaction on subscribing the share of AEs. The assessee also placed various alternative submissions which have been recorded by ld. CIT(A) in para 6 of his order. The ld CIT(A) after considering the submissions of concluded that the delay in receipt of share is short and as per Circular of Reserve Bank of India, the interest would be LIBOR plus 150 and directed

the TPO/AO to charge interest for 6 month at LIBOR plus 150 basis point for the period between the date of remittance and by adding 15 days and the date of allotment of shares.

14. The coordinate bench of this Tribunal in ITO Vs Sterling Oil Resources (P) ltd (supra) (authored by the same combination) held that adjustment on account of notional interest on share application money, which had been recharacterised as loan, merely because there was delay in allotment of share, was not sustainable in law. Further, this Tribunal in Aditya Birla Minacs Worldwide Ltd (supra) also took the same view that share application money cannot be treated as loan amount; merely there is delay in issuance of shares by subsidiary. Considering the consistent view of the Tribunal, we are of the view that share application money cannot be treated as loan amount only because of delay in issuance of shares by its subsidiary.

15. In the result the grounds No. II& III of the assessee's appeal are allowed and resultantly the ground of appeal by revenue is dismissed. Since, we have accepted the second contention of the ld. AR for the assessee; hence, discussions on other submissions of the assessee have become academic.

16. Ground No. 4 in revenue's appeal relates to allocation of R & D expenses to the 80IB and 80IC units. The ld. DR for the revenue relied on the order of the assessing officer.

17. On the other hand the ld. AR for the assessee submits that this ground of appeal is covered in favour of the assessee and against the revenue in assessee's own case for AY 2001-02 to 2007-08 by the decisions of the Tribunal. The ld. AR for the assessee furnished the copies of the order of the Tribunal for all the years.

18. We have considered the submissions of the parties and perused the order of the tax authorities below. During the relevant period under assessment year the assessee the assessee claimed deduction under section 80IB of Rs. 23,36,103/ and under section 80IC of Rs. 141,65,46,365/- respectively. On show cause notice on the issue, the assessee contended that similar deduction is allowed in the earlier years by Tribunal and furnished the copy of the orders for earlier years. The assessing officer took his view that R&D expenditure to the industrial undertaking on which deductions under section 80IB & 80IC are claimed, on which the expenditure is not contributed to the earning of the income for which deduction is claimed. The assessing officer allocated interest cost to the units on turnover basis. The ld CIT(A) granted relief to the assessee by following the order of the Tribunal for various earlier years. We have noted that on similar ground of appeal the Tribunal in assessee's own case for AY 2007-07 passed the following order;

> "17. We have considered rival submissions and perused the material on record. The learned Counsels appearing for the parties have agreed that the issue has been decided in favour of the assessee by the Tribunal in the preceding assessment years. It is noticed, identical dispute arose in assessee's own case for the assessment years 2001- 02, 2002-03, 2003-04, 2004-05 and 2005-06. In the latest order passed for the assessment year 2007-08, in ITA no.5557/ Mum./2012, dated 5th January 2018, the Tribunal, following its own decision for the earlier assessment years, has upheld the decision of learned Commissioner (Appeals) by dismissing the ground raised by the Revenue. Facts being identical, respectfully following the consistent view of the Tribunal in the preceding assessment years in assessee's own case, we uphold the decision of learned Commissioner (Appeals) by dismissing the ground."

19. Considering the consistent view of the Tribunal on identical set of facts and respectfully following the view of the Tribunal in the preceding assessment years in assessee's own case, we uphold the decision of ld. CIT(A). in the result the Ground of appeal is dismissed.

20. Ground No. 5 in revenues appeal and Ground No. IV in assessee's appeal relates to weighted deduction under section 35(2AB). The ld. DR for the revenue relied on the order of the assessing officer.

21. On the other hand the ld. AR for the assessee submits that this ground of appeal is also covered in favour of the assessee and against the revenue in assessee's own case for AY 2006-07 by the decisions of the Tribunal.

22. We have considered the submissions of the parties and perused the order of the tax authorities below. During the relevant period under assessment year

the assessee the assessee claimed weighted deduction under section 35(2AB). The assessing officer after issuing show cause and receiving reply concluded that all the clinical trial are got conducted by assessee through third parties and the payment made to third parties are not qualified for weighted deduction. The ld CIT(A) followed the order of Tribunal in AY 2004-05 and dismissed the appeal of the assessee. However, we have noted that in AY 2006-07, the Tribunal by following the order for AY 2007-08 restore the issue to the file of assessing officer by passing the following order;

> "6. We have considered rival submissions and perused the material on record. On a perusal of the impugned order of learned Commissioner (Appeals) and, more particularly, his finding in Para-8 to 8.4 of the impugned order, it is very much clear that he has fully allowed the claim of the assessee under section 35(2AB) of the Act. Therefore, we fail to understand how the assessee can be aggrieved with the decision of learned Commissioner (Appeals). Be that as it may, the Revenue has also challenged the decision of learned Commissioner (Appeals) on the issue of deduction claimed under section 35(2AB) of the Act. Undisputedly, the research and development activity in respect of which the assessee has claimed deduction under section 35(2AB) of the Act were not carried out in assessee's own in-house research and development facility. Therefore, the issue which arises for consideration is, whether the expenditure incurred for carrying out research and development activity outside by way of out sourcing or otherwise can be eligible for deduction under section 35(2AB) of the Act? As per the provision contained

under section 35(2AB) of the Act, weighted deduction can be allowed in respect of expenditure on scientific research carried out in the in- house research and development activity as approved by the prescribed authority. Therefore, going by the plain meaning of the words used in section 35(2AB) of the Act, only those expenditures which are incurred in the in-house research and development facility are eligible for deduction. In fact, while dealing with identical issue in assessee's own case in the assessment years 2002-03 to 2004-05 in ITA no.2522 to 2524/Mum./ 2009, dated 13th April 2012, the Tribunal decided the issue against the assessee. However, while deciding the same issue in assessee's own case in assessment year 2007-08, in ITA no.5557/Mum./ 2012, dated 5th January 2018, the Tribunal has restored the issue to the Assessing Officer for fresh adjudication keeping in view various decisions cited by the assessee including the decision of the Hon'ble Gujarat High Court in Cadila Healthcare Ltd. (supra). Therefore, following the decision of the Tribunal in assessment year 2007-08, we are inclined to restore the issue to the Assessing Officer for de novo adjudication keeping in view the ratio laid down in the decisions to be cited by the assessee including the decision of the Hon'ble Gujarat High Court in Cadila Healthcare Ltd. (supra). While doing so, the Assessing Officer is also directed to examine the ratio laid down by the Hon'ble Supreme Court in Commissioner of Customs v/s Dilip Kumar & Co. & Ors., vide judgment dated 30th July 2018, in Civil Appeal no.3327 of 2007. Needless to mention, the Assessing Officer must afford reasonable opportunity of being heard to the assessee before deciding the issue. These grounds are allowed for statistical purposes."

23. Considering the decision of the Tribunal in assessment year 2006-07, we respectfully following the same we are inclined to restore the issue to the Assessing Officer for adjudication afresh as per the direction date 12.06.2019 in ITA No. 1967/Mum/2011. In the result the ground of appeal raised by both the parties are allowed for statistical purpose.

24. Ground No. 6 in revenue's appeal relates to disallowance under section 40(a)(ia) for want of TDS for payments made to non-residents on account for pilot bio study, clinical research . The ld. DR for the revenue relied on the order of the assessing officer.

25. On the other hand the ld. AR for the assessee submits that this ground of appeal is also covered in favour of the assessee and against the revenue in assessee's own case for AY 2006-07 by the decisions of the Tribunal.

26. We have considered the submissions of the parties and perused the order of the tax authorities below. During the assessment the assessing officer noted that the assessee claimed expenses of Rs. 6,94,82,607/- on payment to non-resident on account of bio study, clinical research without deducting tax at source. The assessing officer after issuing show cause notice disallowed the expenditure by taking view that similar expenditure was disallowed in earlier years as the assessee is liable to deduct tax under section 195. The ld CIT(A) deleted the additions by following the order of Tribunal in AY 2007-08,

wherein it was payment to non-resident for conducting bio equivalence study are not taxable in India and not subject to withholding tax under section 195 of the Act. We have seen that similar view was taken by Tribunal in AY 2006-07 by following the order of Tribunal in AY 2007-08. Therefore, we affirm the order of ld CIT(A). In the result we do not find any merit in the ground of appeal raised by the revenue and the same is dismissed.

27. Ground No. 7 relates to deleting the addition of Marked to Market loss for calculation of book profit under section 115JB. The ld DR for the revenue supported the order of the assessing officer.

28. On the other hand the ld AR for the assessee submits that the additions/ reduction for the purpose of computing book profit under section 115JB shall only be as per Explanation 1 to section 115JB(2) and relied on the decision of Apollo Tyres Ltd Vs CIT (255 ITR 273 SC). In alternative submissions the ld. AR submits that increase in liability on account of fluctuation in foreign exchange rate cannot be disallowed. And relied on the decision of CIT Vs Woodward Governor India (P) ltd. (312 ITR 254 SC). And in third alternative submissions submits that ascertained liability are allowable in computing income and in support of his submissions relied on Bharat Earthmovers Ltd Vs CIT (245 ITR 428 SC).

29. We have considered the submissions of the parties and perused the order of the tax authorities below. The assessing officer while computing book profit added back provision of Rs, 51 Crore for marked to market loss without discussion or issuing show cause notice to the assessee. During the first appellate stage the assessee filed its detail submissions and relied on the decisions in CIT Vs Woodward Governor India (P) ltd. (supra) and Apollo Tyres Ltd Vs CIT (supra). The ld CIT(A) after considering the submissions of the assessee observed that marked to market loss are on account of restatement of trading asset and liability and its ascertainment and computation is not disputed by assessing officer. The ld CIT(A) also held that after the decision in CIT Vs Woodward Governor India (P) ltd. (supra) marked to market loss is allowable deduction. And it cannot be termed as unascertained liability as has been provided in clause (c) of Explanation-1 to section 115JB(2). Accordingly cannot be added back to the book profit. No contrary fact or law is brought to our notice to arrive on other finding. Therefore, we affirm the action of ld CIT(A) and dismiss the ground of appeal raised by the revenue.

30. Ground No. 8 relates to deleting the addition on account of provision of gratuity for calculation of book profit under section 115JB. The ld DR for the revenue supported the order of the assessing officer.

31. On the other hand the ld AR for the assessee submits that the additions/ reduction for the purpose of computing book profit under section 115JB shall only be as per Explanation 1 to section 115JB(2) and relied on the decision of Apollo Tyres Ltd Vs CIT (supra). In other alternative submissions the ld AR submits that liability ascertained by actuary cannot be considered as unascertained liability for the purpose of book profit under section 115JB and relied on decision of Rotork Controls India (P) ltd (314 ITR 62 SC) and CIT Vs Jet Airways [2016 (2016 Taxman 572 Bombay)]

32. We have considered the submissions of the parties and perused the order of the tax authorities below. The assessing officer while computing book profit added back provision of gratuity of Rs. 45,39,118/- without discussion or issuing show cause notice to the assessee. During the first appellate stage the assessee filed its detail submissions and relied on the decisions Apollo Tyres Ltd Vs CIT (supra). The ld CIT(A) after considering the submissions of the assessee observed provisions of gratuity is based on the actuarial valuation and therefore ascertained liability. The assessing officer has not disputed actuarial valuation and cannot be treated unascertained liability as has been provided in clause (c) of Explanation-1 to section 115JB(2). No contrary fact or law is brought to our notice to arrive on other finding. Therefore, we

affirm the action of ld CIT(A) and dismiss the ground of appeal raised by the revenue.

33. Ground No. 9 relates to deleting the addition of disallowance under section14A from calculation of book profit under section115JB. At the outset the ld AR for the assessee submits that as per decision of Special Bench of Delhi Tribunal in ACIT Vs Vireet Investment (P) ltd (ITA No. 502/Del/2012) the computation under clause (f) of Explanation 1 to section 115JB(2), is to be made without resorting to computation as contemplated under section 14A read with rule 8D.

34. The ld. DR for the revenue not disputed the decision of special bench, however he relied on the order of the assessing officer.

35. We have considered the submissions of the parties and perused the order of the tax authorities below. The assessing officer while computing book profit added back the disallowance of section 14A without discussion or issuing show cause notice to the assessee. During the first appellate stage the assessee filed its detail submissions and relied on various decisions including in Apollo Tyres (supra) and Goetze India Ltd Vs CIT(32 SOT 101). The ld CIT(A) after considering the submissions of the assessee observed the provision of section 14A cannot be imported to clause (f) of Explanation 1 to section 115JA. The Special bench of Delhi Tribunal recently in ACIT vs.

Vireet Investment (P) Ltd (supra) held the computation under clause (f) of Explanation 1 to section 115JB(2), is to be made without resorting to computation as contemplated under section 14A read with rule 8D. Thus, considering the recent decision of the Special Bench of Tribunal we uphold the order of the ld CIT(A). In the result this ground of appeal is dismissed.

36. In the result the appeal of the revenue is partly allowed.

ITA No. 4866/Mum/2013 by assessee.

37. We have already discussed and decided the Ground No. I to IV of assessee's appeal, while discussing the various grounds of appeal in Revenue's appeal.

38. Ground No. V relates to disallowance under section 14A. the ld AR for the assessee submits that during the year under consideration the assessee earned exempt income of Rs. 80,000/-. The assessing officer invoked the provisions of Rule 8D and disallowed Rs. 15,86,540/- under Rule 8D(2)(ii) and Rs. 6,95,100/- under Rule 8D(2)(iii), thus total of Rs. 22,81,641/-. The ld. AR for the assessee made alternative submission, however, ultimately confined to the submissions that the disallowance under section 14A should not exceed exempt income. In support of his submissions relied on decision of Bombay High Court in Nirvad Trader Pvt Ltd Vs DCIT [ITA No. 149 of 2017] and PCIT Vs HSBC Invest Direct (India) [ITA 1672 of 2016 Bombay]

39. On the other hand the ld. DR for the revenue supported the order of the tax authority below.

40. We have considered the submissions of the parties and perused the order of the tax authorities below. The assessing officer noted that the assessee has shown exempt income of Rs. 80,000/-. The assessee has not disallowed any expenditure in relation to earning of exempt income. On show cause notice the assessee submitted that no direct expenditure was incurred as there is no separate department for making such investment and that they have sufficient own funds. The contention of the assessee was not accepted by assessing officer invoked the provisions of Rule 8D and disallowed Rs. 15,86,540/- under Rule 8D(2)(ii) and Rs. 6,95,100/- under Rule 8D(2)(iii), thus total of Rs. 22,81,641/-. The ld CIT(A) upheld the action of the assessing officer by taking view that as per the decision of Bombay High Court in Godjej & Boycee Mfg Co Ltd (ITA No. 626 of 2010) the assessing officer is duty bound to work out disallowance under section14A.

41. The Hon'ble Bombay High Court in Nirved Traders Pvt Ltd (supra) held that the disallowance under section 14A be restrict to the exempt income. Thus, respectfully following the order of the Jurisdictional High Court referred above, we direct the assessing officer to restrict the disallowance to

the extent of exempt income earned by the assessee. In the result this ground of appeal is partly allowed.

42. In the result the appeal of the assessee is partly allowed.

Order pronounced in the open court on 09.03.2020.

Sd/-	**Sd/-**
(Pramod Kumar)	(Pawan Singh)
VICE PRESIDENT	JUDICIALMEMBER

Mumbai, Dt : 9th March, 2020
Sk/-
Copy to :
1. Appellant
2. Respondent
3. CIT(A)
4. CIT
5. DR

By order

Asstt. Registrar, ITAT, Mumbai