

**IN THE INCOME TAX APPELLATE TRIBUNAL
“K” Bench, Mumbai**

**Before Shri S. Rifaur Rahman, Accountant Member
and Shri Ravish Sood, Judicial Member**

**ITA No. 4177/Mum/2018
(Assessment Year: 2012-13)**

IL & FS Transportation Networks
Limited, The IL & FS Financial
Center, Plot No.C-22, Room No.
460, 4th Floor, G Block, Bandra-
Kurla Complex, Bandra (E),
Mumbai – 400 051
PAN – AABCC5460A

(Appellant)

Vs.

Asstt. Commissioner of
Income-tax, Range -14(2)(1),
Aaykar Bhavan, Maharshi Karve
Road, Marine Lines,
Mumbai – 400 020

(Respondent)

**ITA No.3638/Mum/2018
(Assessment Year: 2012-13)**

DCIT -14(2)(1),
432, 4th Floor, Aayakar Bhavan,
Mumbai – 400 020

(Appellant)

Vs.

M/s IL & FS Transportation Network
Ltd., IL & FS Financial Centre, 8th
Floor, C-22, G Block, B.K.C.
Bandra (E), Mumbai – 400051
PAN – AABCC5460A

(Respondent)

Assessee by: Shri Sandeep Bhalla, A.R
Revenue by: Shri Sushil Kumar Mishra, D.R

Date of Hearing: 11.02.2021
Date of Pronouncement: 15.02.2021

ORDER

PER BENCH :

The captioned cross-appeals are directed against the order passed by the CIT(A)-56, Mumbai, dated 05.03.2018, which in turn arises from the assessment order passed by the A.O u/s 143(3) r.w.s 144C(3) of the Income-tax Act, 1961 (for short "Act"), dated 30.05.2016 for Assessment Year 2012-13. We shall first take up the appeal filed by the assessee wherein the impugned order has been assailed on the following grounds of appeal before us :

"The Appellant objects to the order dated 5 March 2018 (received on 02 May 2018) passed by the Learned ("Ld.") Commissioner of Income-tax (Appeals) - 56, Mumbai, on the following grounds:

1. On the facts and in the circumstances of the case and in law, the Ld. Commissioner of Income-tax (Appeals) has erred in setting aside the issue regarding disallowance u/s. 14A r.w.r 8D(2)(iii) regarding the disallowance of administrative expenses to the file of the Assessing Officer to examine the issue a fresh. The order passed by the Ld. Commissioner of Income-tax (Appeals) is bad in law.
2. On the facts and in the circumstances of the case and in law, the Appellant prays that disallowance U/S.14A r.w.r 8D(2)(iii) regarding the disallowance of administrative expenses amounting to INR 8,17,52,359 be deleted and the said disallowance be restricted INR 1,46,90,230.

Disallowance under Transfer pricing

3. On the facts and in the circumstances of the case and in law prevailing on the subject, the Appellant submits that the international transaction of providing corporate guarantee/counter guarantee to various banks and other corporate bodies for and on behalf of the associate enterprise is at arm's length and no adjustment was required to be made in respect thereof and the stand taken by the Assessing Officer/ Transfer Pricing Officer is incorrect and illegal and the Ld. Commissioner of Income-tax (Appeals) ought to have held as such.
4. On the facts and in the circumstances of the case and in law and without prejudice to the preceding grounds, the manner & methodology adopted by the Ld. Commissioner of Income-tax (Appeals) to ascertain the fees for corporate guarantee at 1.80% was unjustified, flawed & incorrect and therefore the upward adjustment of Rs. 4,90,49,5837- is liable to be deleted and/or reduced.

5. On the facts and in the circumstances of the case and in law, the Ld. Commissioner of Income-tax (Appeals) has erred in determining the arm's length rate in respect of the corporate guarantee / counter guarantee given/arrange by the Appellant, at 1.80% per annum after arbitrarily reducing 0.2% from the guarantee rate of 2% per annum determined by the Assessing officer / Transfer Pricing Officer. The Appellant submits that the said approach adopted by Ld. Commissioner of Income-tax (Appeals) and the Assessing Officer / Transfer Pricing Officer is arbitrary, ad-hoc, unjustified, solely based on assumptions not backed by scientific basis of computation and invalid.
6. The Ld. Commissioner of Income-tax (Appeals) while determining the rate at 1.80% per annum has contradicted its own view that corporate guarantee rates cannot be compared to bank guarantee rates. The Appellant prays that the scientific benchmarking conducted considering the various factors by the Appellant needs to be accepted.
7. On the facts and in the circumstances of the case and in law and without prejudice to the preceding grounds, the appellant submits that the average inter-bank guarantee rate adopted by the Assessing Officer/ Transfer Pricing Officer and accepted by the Ld. Commissioner of Income-tax (Appeals) as a bench mark for determination the ALP for giving a corporate guarantee, is not appropriate, as these rates are for fund based transaction whereas issuance of a corporate guarantee is a non-fund based transaction. The Appellant submits that the average rate adopted by the Assessing Officer/ Transfer Pricing Officer and accepted by the Ld. Commissioner of Income-tax (Appeals) is incorrect approach and unjustified.
8. On the facts and in the circumstances of the case and in law, the Ld. Commissioner of Income-tax (Appeals) has erred in setting aside the issue of considering the bank commission recovered By the Appellant from the AE while computation of adjustment in respect of international transaction of providing corporate guarantee / counter guarantee to the associate enterprise to the file of the Ld. Assessing Officer to examine the issue a fresh. The order passed by the Ld. Commissioner of Income-tax (Appeals) in this regard is bad in law.
9. On a without prejudice basis, the Appellant submit that guarantee fee charged by the banks from the Appellant has also been recovered from the Associated Enterprises. The Appellant has recovered these charges from the Associated Enterprise over and above the guarantee fee and same should be reduced from the Guarantee fees computed by the Ld. Assessing Officer.”

Further, the assessee has raised before us the following effective additional grounds of appeal:

- “1. Without prejudice to Ground No.1 and Ground No.2, on the facts and circumstances of the case, the Appellant prays that the disallowance under

Sec. 14A of the Act should be restricted to the extent of exempt income earned during the year.

2. Whether on the facts and in the circumstances of the case and in law, the Education Cess and the Secondary and Higher Education Cess on the total income computed of the Appellant can be allowed as a deduction under the provision of Sec. 37 of the Act.”

On the other hand the revenue has challenged the impugned order by raising the following grounds of appeal before us :

- “1. On the facts and circumstances of the case and in law, the Ld CIT(A) erred in advising the AO to follow the decision in the case of HDFC Bank, Mumbai vs DCIT-2(3), Mumbai & Ors Dt. 25.02.2016 r.w. CIT vs HDFC Bank Ltd. (2014) 366 ITR 505 (Bom.)(HC) while calculating the disallowance u/s 14A r.w.r 8D, without considering the fact that the order of HDFC Bank did not address the aspect of determination of disallowance u/s 14A as per rule 8D which was applicable from A.Y. 2008-09 onward.
2. On the facts and circumstances of the case and in law, the Ld CIT(A) erred in advising the AO to consider only those Investment made in the Non-subsidiary company which have yielded dividend income for the purpose of the disallowance u/s 14A r.w.r. 8D(2)(iii) without appreciating that the CBDT Circular No. 5 of 2014 dt. 11.02.2014 clearly states that an amount equal to one-half percent of the average of the value of investment, income from which does not or shall not form part of the total income, as appearing in the balance-sheet of the assessee, on the first day and "till last day of the previous year" needs to be disallowed.
3. On the facts and circumstances of the case and in law, the Ld CIT(A) erred in not appreciating that the CBDT circular does not differentiate between investment which have yielded dividend income during the year and investment which may yield divided income.
4. The appellant prays that the order of CIT(A) on the above ground be reversed and that of the assessing be restored.
5. The appellant craves leave to amend or alter any grounds which may be necessary.”

On a perusal of the aforesaid additional grounds of appeal, we find that the assessee had sought an adjudication of the respective issues therein involved based on the facts available on record. As no new facts would be required to be looked into for the purpose of adjudicating the aforesaid issues, therefore, we admit the same in light of the judgment of the **Hon'ble Supreme Court in National Thermal Power Company Ltd. Vs. CIT (1998) 229 ITR 383 (SC).**

2. Briefly stated, the assessee company which is an established ISO 9000:2001 surface transportation infrastructure company had e-filed its return of income for A.Y 2012-13 on 29.11.2012, declaring a total income of Rs. 418,28,93,299/-. Subsequently, the assessee filed a revised return of income on 28.03.2014, declaring a total income of Rs. 418,28,93,299/-. The return of income filed by the assessee was initially processed as such under Sec. 143(1) of the Act. Thereafter, the case of the assessee was selected for scrutiny assessment under Sec. 143(2) of the Act.

3. Observing that the assessee had during the year under consideration entered into international transactions with its Associate Enterprises (for short 'AEs'), a reference under Sec. 92CA(1) was made by the A.O to the DCIT (Transfer Pricing)-2(3)(2), Mumbai (for short 'TPO') for benchmarking the said transactions. As per order passed under Sec. 92CA(3), dated 18.01.2016 the TPO made an upward transfer pricing adjustment of Rs. 6,19,73,996/- as regards the international transaction of providing corporate guarantee by the assessee to its Associated Enterprises (for short "AEs), viz. (i). Elsamex S.A., Spain; and (ii). ITNL International Pte Ltd., Singapore.

4. After receiving the order passed by the TPO under Sec. 92CA(3), dated 18.01.2016 the A.O passed a draft assessment order under Sec. 143(3) r.w.s 144C(1), dated 31.03.2016, wherein the income of the assessee was proposed to be assessed at Rs. 431,19,29,420/-. As the assessee did not opt for filing of objections before the Dispute Resolution Panel (for short 'DRP'), the A.O, thus, framed the assessment vide his order passed under Sec. 143(3) r.w.s. 144C(3), dated 30.05.2016 and assessed the income under the normal provisions at Rs. 431,19,29,420/- and determined the 'book profit' under Sec. 115JB at Rs. 413,64,82,161/-.

5. Aggrieved, the assessee assailed the order passed by the A.O under Sec. 143(3) r.w.s 144C(3), dated 30.05.2016 in appeal before the CIT(A). It was stated by the assessee that no disallowance u/s 14A r.w Rule 8D was called for in its case. It was submitted by the assessee that its disallowance of

Rs. 67,32,57,565/- made in its original return filed on November 29, 2012 was thereafter on the basis of a valid revised return of income filed on March 28, 2014 restricted to an amount of Rs. 1,46,90,230/-. Further, it was submitted by the assessee that no direct expenditure was incurred for earning the exempt dividend income. As regards the investments made by the assessee towards exempt income yielding shares, it was submitted by the assessee that out of the total value of shares of domestic companies of Rs. 1775,26,37,570/-, investments in shares amounting to Rs. 1494,85,27,160/- were made in the earlier assessment years. It was, thus, the claim of the assessee that the investment in the shares of domestic companies were made over the years and not out of the interest bearing borrowed funds for the year in question. Apart from that, it was the claim of the assessee that the investments in the aforesaid shares of domestic companies was not backed with an intent or purpose to earn exempt dividend income but was in order to effect compliance to the business conditions wherein the assessee was compelled by the authorities granting projects to it to make the necessary investments in shares. However, the A.O was not inclined to accept the aforesaid claim of the assessee. As regards the claim of the assessee that no disallowance was called for u/s 14A in case no exempt income was earned by it during the year, the A.O drawing support from the CBDT Circular No. 05/2014, dated 11.02.2014 and certain judicial pronouncements rejected the same. Accordingly, the A.O worked out the disallowance u/s 14A r.w Rule 8D at Rs. 8,17,52,539/-, as under:

| Sr. No. | Particulars | Amount |
|---------|-------------------|-------------------|
| 1. | U/rule 8D(2)(i) | Nil |
| 2. | U/rule 8D(2)(ii) | Nil |
| 3. | U/rule 8D(2)(iii) | Rs. 8,17,52,359/- |
| | Total | Rs. 8,17,52,359/- |

Observing that the assessee had suo motto offered a disallowance u/s 14A of Rs. 1,46,90,230/- in its revised return of income, the A.O restricted the additional disallowance to an amount of Rs. 6,70,62,129/- [Rs. 8,17,52,359/- (-) Rs. 1,46,90,230/-]. Further, the A.O for computing the 'book profit' of the

assessee u/s 115JB of the Act added the aforesaid disallowance of Rs. 8,17,52,359/- that was worked out u/s 14A r.w Rule 8D.

6. Aggrieved, the assessee assailed the further disallowance that was worked out by the A.O u/s 14A r.w Rule 8D at Rs. 8,17,52,359/- before the CIT(A). It was observed by the CIT(A) that the issue pertaining to disallowance u/s 14A for the year in question was more or less the same as was there before him in the case of the assessee for the last two preceding years, viz. A.Y 2010-11 and A.Y 2011-12. It was noticed by the CIT(A) that a material difference in context of the issue in question was that unlike in the preceding years the assessee during the year in question had reduced the disallowance u/s 14A that was suo motto offered in its original return of income, on the basis of a valid revised return of income. Also, it was observed by the CIT(A) that unlike the preceding years the A.O in the case of the assessee for the year in question had not worked out any disallowance u/s 14A r.w Rule 8D(2)(ii). In the backdrop of the aforesaid facts, the CIT(A) directed the A.O to follow the directions that were given in context of the aforesaid issue while disposing off the appeal of the assessee for A.Y 2010-11, while computing the disallowance u/s 14A for the year in question. As regards the grievance of the assessee that the A.O had erred in adding the disallowance worked out u/s 14A r.w Rule 8D for computing the 'book profit' u/s 115JB of the Act, the CIT(A) relying on the order of the 'Special bench' of the Tribunal in the case of ACIT, Circle 1(7), New Delhi Vs. Vireet Investment Pvt. Ltd. (ITA No. 503/Del/2012, dated 16.06.2017), therein observed that computation as contemplated in clause (f) of Explanation 1 to Sec. 115JB(2) was to be made without resorting to the machinery proviso provided in Sec. 14A r.w Rule 8D of the Income tax Rules, 1962.

7. Before us, it was admitted by the authorised representatives for both the parties that the issue pertaining to the disallowance u/s 14A r.w 8D was squarely covered by the recent order passed by the Tribunal while disposing

off the cross-appeals of the assessee/revenue in the assessee's own case for A.Y 2010-11.

8. We have perused the order passed by the Tribunal while disposing off the cross-appeals of the assessee and the revenue for A.Y 2010-11 in ITA No. 2927/Mum/2018, dated 28.01.2021. Insofar the issue pertaining to the disallowance u/s 14A was concerned, the Tribunal while disposing off the aforesaid cross-appeals had observed as under:

"7. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record, as well as the judicial pronouncements that have been pressed into service by them to drive home their respective contentions. We shall first deal with the observation of the CIT(A), wherein, he had directed the A.O to consider the assessee's claim for reduction of the disallowance u/s 14A r.w Rule 8D to an amount of Rs. 88,26,166/-, as against that suo motto offered by it in its return of income at Rs. 12,21,33,326/-. As noticed by us hereinabove, the A.O was of the view that in light of the judgment of the Hon'ble Supreme Court in the case of Goetze (India) Ltd. Vs. CIT (2006) 204 CTR 182 (SC), in the absence of a revised return of income, the seeking of reduction of the disallowance that was suo motto offered by the assessee in its return of income was not tenable. In fact, the A.O was of the view that in case the assessee wanted to raise the aforesaid claim, then, it was obligated to do so by filing a revised return of income. On the contrary, the CIT(A) relying on the judgement of the Hon'ble High Court of Bombay in the case of CIT Vs. Pruthvi Brokers and Shareholders (2012) 23 taxman.com 23 (Bom), had observed, that as there was no embargo on considering of the aforesaid claim of the assessee in the course of the appellate proceedings, thus, the contention of the assessee did merit acceptance. Accordingly, the CIT(A) restored the issue to the file of the A.O, with a direction to examine the assessee's claim for reduction of the disallowance u/s 14A r.w Rule 8D to an amount of Rs. 88,26,166/-, as against that was suo motto offered by it in its return of income at Rs. 12,21,33,326/-. As is discernible from the order of the CIT(A), we find that he had while restoring the aforesaid issue directed the A.O to follow certain directions, viz. :

- "(a) Follow decision in the case of HDFV 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)
- (b) Investments made in the non-subsidiary company which have yielded dividend income can only be considered for the purpose of the disallowance under Sec. 14A r.w. rule 8D(2)(iii)
- (c) Investment earning interest income is to be eliminated in computation of disallowance under Sec. 8D(2)(ii).

8. As both the assessee and the revenue are aggrieved with the observations of the CIT(A) w.r.t the issue of disallowance u/s 14A r.w Rule 8D, we shall, therefore, deal with the same. On a perusal of the respective grounds of appeal raised by both the parties, we find, that the assessee is inter alia aggrieved with the order of the CIT(A) on the issue of disallowance u/s 14A, for the reason, that instead of accepting its claim for restricting the disallowance u/s 14A r.w Rule 8D to an amount of Rs. 88,26,166/- as against that which was suo motto offered in the return of income at Rs. 12,21,33,326/-, the CIT(A) had restored the matter to the file of the A.O for reconsideration. As is discernible from the records, the assessee in the course of the assessment proceedings had sought reduction of the disallowance u/s 14A on two counts, viz. (a). that the disallowance of interest expenditure offered by the assessee in its return of income U/rule 8D(2)(ii) of Rs.9,52,55,812/- be reduced to Nil; AND (b). that the disallowance of administrative expenditure offered by the assessee in its return of income U/rule 8D(2)(iii) of Rs.2,68,77,514/- be restricted to Rs.88,26,166/-. As observed by the CIT(A), the assessee had sought for reduction of the disallowance u/s 14A on the basis of exhaustive reasons. On a perusal of the assessment order, we find that the assessee vide its letter dated 13.03.2014 filed with the A.O had given multiple reasons for reduction of the aforesaid disallowance u/s 14A, viz. (i) that as per the terms of NHA1 the assessee on being awarded a project was compelled to incorporate a separate "Special Purpose Vehicle" (SPV) for executing the project and being a promoter had to invest as equity holder as per the terms of the concessionaire agreement; (ii) that the investments made by the assessee company to the extent of its net worth were out of its own funds, internal accruals or opening balances of internal accruals; (iii). that the borrowings were not utilised for equity investments of domestic companies; (iv). that the capital gains from the equity investments were taxable etc. In our considered view, the exhaustive contentions that were raised by the assessee to buttress its aforesaid claim for reduction of the disallowance under Sec. 14A were required to be verified and could not have been accepted by the CIT(A) on the very face of it. Insofar support drawn by the Id. A.R on the order passed by the Tribunal in the assessee's own case for the immediately preceding year i.e A.Y 2009-10, ITA No. 2393/Mum/2015 is concerned, the same being distinguishable on facts would not assist the case of the assessee in context of the issue under consideration. Accordingly, finding no infirmity in the restoring of the issue pertaining to the assessee's claim for reducing the disallowance under Sec. 14A r.w. Rule 8D by the CIT(A), we uphold his order to the said extent. However, before parting, we may herein observe that the claim of the assessee that the disallowance under Sec. 14A is liable to be restricted to the extent of the exempt income received or receivable by the assessee during the year in question, the same, merits acceptance. Our aforesaid view is fortified by the judgement of the **Hon'ble High Court of Delhi in Joint Investments Pvt. Ltd. Vs. CIT (2015) 372 ITR 694 (Del)**. We, thus, in terms of our aforesaid observations uphold the restoration of the aforesaid issue by the CIT(A) to the file of the A.O, with a rider that the disallowance be restricted to the extent of the exempt income received or receivable by the assessee during the year under consideration.

9. We shall now deal with the claim of the revenue that the CIT(A) while directing the A.O to reconsider the assessee's claim for reduction of disallowance u/s 14A, had erred, in directing the A.O to follow the decisions of the Hon'ble High Court of Bombay in the case of **HDFC Bank, Mumbai Vs. DCIT -2(3), Mumbai and Others**, dated 25.02.2016 r.w. **CIT Vs. HDFC Bank Ltd, (2014) 366 ITR SOT (Bom)**, for the reason, that the said judicial pronouncements did not address the aspect of determination of disallowance under Sec. 14A as per Rule 8D that was applicable only w.e.f A.Y. 2008-09. We are afraid that the aforesaid claim of the revenue does not find favour with us. At the outset, we may herein observe that the judgment of the Hon'ble High Court in the case of **HDFC Bank Ltd. Vs. DCIT (2016) 383 ITR 529 (Bom)** pertains to A.Y 2008-09, and the issue before the Hon'ble High Court was the disallowance made by the A.O in the case of the assessee before them u/s 14A r.w Rule 8D vide his order passed u/s 143(3), dated 22.12.2010. Be that as it may, the principle laid down by the Hon'ble High Court in its aforesaid judgments was that in a case where the assessee's capital, profit reserves, surplus and current account deposits were higher than the investment in tax-free securities, it was to be presumed that investment made by the assessee was out of the interest-free funds available with it and no disallowance was warranted u/s 14A. In our considered view, the CIT(A) had rightly directed the A.O to consider the aforesaid judicial pronouncements in the course of the 'set aside' proceedings. As regards the claim of the revenue that the CIT(A) was in error in directing the A.O to consider only those investments made in non-subsiary company which had yielded dividend income for the purpose of disallowance under Sec. 14A r.w. Rule 8D(2)(iii), as the same was contrary to the CBDT Circular No. 5 of 2014, dated 11.02.2014, we are unable to persuade ourselves to accept the same. Similar reliance placed by the revenue on the aforesaid CBDT Circular No. 5 of 2014, dated 11.02.2014 was rejected by the **Hon'ble High Court of Madras in Redington India Ltd. Vs. Addl. CIT (2016) 97 CCH 219 (Mad)** and by the **Hon'ble High Court of Delhi in PCIT Vs. IL & FS Development Company Ltd. (2017) 399 ITR 483 (Del)**. At the same time, we in light of the judgment of the **Hon'ble Supreme Court in Maxopp Investment Ltd. Vs. CIT (2018) 402 ITR 640 (SC)** are unable to subscribe to the observation of the CIT(A), wherein he had inter alia directed the A.O to consider only those investments made in non-subsiary companies which had yielded dividend income for the purpose of disallowance under Sec. 14A r.w Rule 8D(2)(ii). Accordingly, the aforesaid observation/direction of the CIT(A) is expunged and the latter's order is modified to the said extent. In terms of our aforesaid observations the **Grounds of appeal Nos. 1 to 4** raised by the assessee company are dismissed, while for the **additional ground of appeal No. 12** raised by the assessee is allowed. The **Grounds of appeal Nos. 1 to 3** raised by the revenue are partly allowed in terms of our aforesaid observations."

We have deliberated on the aforesaid issue under consideration for the year in question and find, that the assessee is aggrieved with the disallowance u/s 14A r.w Rule 8D(2)(iii) worked out by the A.O at Rs. 8,17,52,359/- as against Rs. 1,46,90,230/- that was suo motto offered by it in its revised return of

income. Before adverting any further, we may herein observe that the additional ground of appeal raised by the assessee wherein it had sought restriction of the disallowance u/s 14A to the extent of the dividend income received during the year under consideration merits acceptance. Accordingly, following our view taken while disposing off the cross-appeals of the assessee and the revenue for A.Y 2010-11 and A.Y 2011-12 vide our consolidated order passed in ITA No. 2927/Mum/2018 and ITA No. 3145/Mum/2018, dated 28.01.2021, we herein direct the A.O to restrict the disallowance u/s 14A to the extent of the exempt dividend income received by the assessee during the year in question. Accordingly, the **additional ground of appeal no. 1** raised by the assessee is allowed in terms of our aforesaid observations.

9. As regards the claim of the assessee that no disallowance u/s 14A r.w Rule 8D was called for in its case, we are afraid the same does not find favour with us. As the method for computing the disallowance u/s 14A had been prescribed in Rule 8D vide the IT(Fifth Amendment) Rules 2008, w.e.f 24.03.2008 thus, no infirmity arises from the disallowance worked out by the A.O by following the said prescribed method. The **Ground of appeal No. 1** raised by the assessee is dismissed.

10. Further, following our view taken as regards computation of disallowance u/s 14A r.w Rule 8D(2)(iii) while disposing off the assessee's appeal for A.Y 2010-11 in ITA No. 2927/Mum/2018 and ITA No. 3145/Mum/2018, we herein direct the A.O to consider only those investments which had yielded dividend income for the purpose of computing the 'average value of investments' for computing the disallowance under Sec. 14A r.w. Rule 8D(2)(iii). The **Ground of appeal No. 2** is partly allowed for statistical purposes.

11. We shall now deal with the appeal filed by the revenue wherein it has assailed the observations of the CIT(A) as regards the disallowance made by the A.O u/s 14A r.w Rule 8D. As is discernible from the ground of appeal no. 1, we find that the revenue is aggrieved with the order of the CIT(A) wherein it

is stated that the appellate authority had wrongly directed the A.O to follow the decision in the case of 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). However, we find that no such direction/observation is discernible from the order of the CIT(A). In fact, as the A.O had not made any disallowance of any interest expenditure u/s 14A r.w Rule 8D(2)(ii) during the year in question thus, there was no occasion on the part of the CIT(A) to have relied upon the aforesaid judgments of the Hon'ble High Court of Bombay which are in context of the issue of disallowance of interest expenditure u/s 14A r.w Rule 8D(2)(ii) in the backdrop of availability of sufficient interest free funds with the assessee. Accordingly, as the aforesaid **Ground of appeal No. 1** raised by the revenue does not arise from the impugned order, the same, thus, is dismissed as infructuous.

12. We shall now deal with the grievance of the revenue that the CIT(A) has erred in advising the A.O to consider only those investments made in the non-subsidiary companies which had yielded dividend income for the purpose of disallowance u/s 14A r.w Rule 8D(2)(iii), which as claimed by the revenue is contrary to the CBDT Circular No. 5 of 2014, dated 11.02.2014. We find that the aforesaid grievance of the revenue had been addressed by the Tribunal while disposing off the revenue's appeal in the case of the assessee for A.Y 2010-11 in ITA No. 3145/Mum/2018, dated 28.01.2021. It was observed by the Tribunal that it was the claim of the revenue that the CIT(A) was in error in directing the A.O to consider only those investments made in non-subsidiary company which had yielded dividend income for the purpose of disallowance under Sec. 14A r.w. Rule 8D(2)(iii) could not be accepted as the same was contrary to the CBDT Circular No. 5 of 2014, dated 11.02.2014. Observing that a similar reliance placed by the revenue on the aforesaid CBDT Circular No. 5 of 2014, dated 11.02.2014 was rejected by the **Hon'ble High Court of Madras in Redington India Ltd. Vs. Addl. CIT (2016) 97 CCH 219 (Mad)** and by the **Hon'ble High Court of Delhi in PCIT Vs. IL&FS Development Company Ltd. (2017) 399 ITR 483 (Del)**, the tribunal declined to accept the

aforesaid claim of the revenue in toto. But then, the Tribunal by drawing support from the judgment of the **Hon'ble Supreme Court in Maxopp Investment Ltd. Vs. CIT (2018) 402 ITR 640 (SC)** had also not found favour with the observation of the CIT(A), wherein he had inter alia directed the A.O to consider only those investments made in non-subsidiary companies which had yielded dividend income for the purpose of disallowance under Sec. 14A r.w Rule 8D(2)(iii), and had expunged the aforesaid qualification provided by the CIT(A). Accordingly, the Tribunal had directed the A.O to consider only those investments which had yielded dividend income during the year for the purpose of working out the disallowance under Sec. 14A r.w Rule 8D(2)(iii). We, thus, respectfully following the view taken by the Tribunal while disposing off the revenue's appeal for A.Y 2010-11 in ITA No. 3145/Mum/2018, though approve the view taken by the CIT(A) that only those investments which had yielded exempt income during the year are to be considered for computing the 'average value of investments' while working out the disallowance u/s 14A r.w Rule 8D(2)(iii), but then considering the judgment of the Hon'ble Apex Court in the case of **Maxopp Investment Ltd. Vs. CIT (2018) 402 ITR 640 (SC)** are not persuaded to further confine the same only to the extent of such investments which were made by the assessee in non-subsidiary companies. The **Grounds of appeal No. 2 & 3** raised by the revenue are partly allowed in terms of our aforesaid observations.

13. The **Grounds of appeal Nos. 4 & 5** raised by the revenue being general in nature are dismissed as not pressed.

14. We shall now deal with the grievance of the assessee that the A.O/TPO had erred in the failing to appreciate that the international transaction of providing corporate guarantee/counter guarantee by the assessee to various banks and other corporate bodies for and on behalf of its AEs, viz. (i). Elsamex S.A., Spain; and (ii). ITNL International Pte Ltd., Singapore was at arm's length and thus, no adjustment as regards the same was liable to be made.

15. As is discernible from the records, the assessee had given Corporate guarantee and provided Letter of Comfort and Stand By Letter of Credit to the foreign banks in respect of the credit facilities that were provided by them to its AEs, viz. (i). Elsamex S.A., Spain; and (ii). ITNL International Pte Ltd., Singapore. On a perusal of the records, we find that the assessee had provided corporate guarantee to its AEs, viz. (i). corporate guarantee to its AE i.e Elsamex S.A., Spain on EURO 37.5 million which was to remain in force till the said amount of credit facility was not repaid in full by the borrower or the guarantor; (ii). corporate guarantee to its AE i.e ITNL International Pte Ltd., Singapore on USD 125 million (with an option to increase further by USD 25 million) out of which the AE had used only USD 140 million; and (iii). Stand by Letter of Comfort/Guarantee issued in favour of its AE i.e Elsamex S.A., Spain. The assessee company had during the year charged guarantee fees of 1% p.a of the value of guarantee facility provided to its AEs. As regards the stand by letter of credit the assessee company had only recovered the actual bank charges from the AEs. The guarantee fee charged and the bank charges recovered by the assessee from its AEs during the year are tabulated as under:

| Sr. No. | Particulars | Amount | Amount |
|---------|---|-------------------|--------------------------|
| 1. | Guarantee fee charged on ITNL @1% | Rs. 6,08,27,901/- | |
| 2. | Guarantee fee charged on ITNL @0.5%% | Rs. 33,67,892/- | |
| | NET Guarantee Fee Income as reported in Form 3CEB | | Rs. 6,41,95,793/- |
| 3. | Guarantee Fee charged @ 0.5% being payable to IL&FS | Rs. 23,73,491/- | |
| 4. | Bank Commission recovered from AEs | Rs. 2,36,84,033/- | Rs. 2,60,57,524/- |
| | Gross Income from AES | | Rs. 9,02,53,317/- |

It was the claim of the assessee before the lower authorities that as the entire equity of its AE, viz. Elsamex SA was taken over by it and its other associate concerns, it was, thus, in their best interest to ensure that the aforesaid AE had the requisite funds for carrying out its business activities. The assessee had benchmarked the aforesaid transaction using external Comparable

Uncontrolled Price (for short "CUP") method as the most appropriate method. However, the TPO on the basis of his observation recorded in his order passed u/s 92CA(3), dated 18.01.2016 observed that as per the information gathered the charges for the service of giving a foreign guarantee by State Bank of India (SBI) varied between 1.305% - 2.025% per annum. Another indicator which as per the TPO could be considered as a yard stick for the rate of guarantee fee prescribed in the Safe Harbour Rules was 1.75% for a highly adequate creditor and 2% otherwise. Observing that the rates prescribed by SBI were more conservative and more representative, the A.O adopted the same for benchmarking the transaction of providing of corporate guarantee by the assessee to its AEs. At the same time, it was observed by the TPO that the Hon'ble High Court of Bombay in its order passed in the case of CIT Vs. Everest Kento Cylinders Ltd. (2015) 378 ITR 57 (Bom) had observed that though the bank guarantees were the contracts of guarantee but the same were required to be reasonably adjusted for the reason that the corporate guarantees were not as liquid as the banker's guarantee, and hence, a discounting over the bank guarantee would be required. After considering the various factors, viz. risk profile and final status of applicant; period/amount /terms/securities of the guarantee; and difference between the bank guarantee and the corporate guarantee, the TPO adopted the average of the bankers rate of 2% per annum for charging the guarantee fees and made an upward transfer pricing adjustment of Rs. 6,19,73,996/- as regards the international transaction of provision of corporate guarantee by the assessee to its AEs.

16. After receiving the order of the TPO u/s 92CA(3), the A.O passed a draft assessment order u/s 143(3) r.w.s 144C(1), dated 31.03.2016, wherein he inter alia proposed to make an upward transfer pricing adjustment of Rs. 6,19,73,996/-. However, the assessee vide its letter dated 25.04.2016 requested that a final assessment order be passed. Accordingly, the A.O framed the assessment vide his order passed u/s 143(3) r.w.s 144C(3), dated

30.05.2016, wherein he inter alia made a transfer pricing adjustment of Rs. 6,19,73,996/-.

17. On appeal, the CIT(A), vide his order dated 05.03.2018 observed that the TPO had carried out necessary adjustments while adopting the SBI rates for benchmarking the international transaction of providing the facility of corporate guarantee by the assessee to its AEs. At the same time, the CIT(A) being of the view that the rate of 2% adopted by the TPO for benchmarking the aforesaid international transaction was close to the SBI rates and required to be discounted thus, substituted the same by a rate of 1.80%.

18. Aggrieved, the assessee has assailed before us the transfer pricing adjustment as regards the provision of corporate guarantee by the assessee for and on behalf of its AEs. It was submitted by the Id. A.R that the issue herein involved was more or less the same as was there before the tribunal in the assessee's own case for A.Y 2010-11 and A.Y 2011-12 in ITA No. 2927/Mum/2018 and ITA No. 3145/Mum/2018. However, distinguishing the facts involved in the appeal of the assessee for the year in question as against those for the preceding years, it was submitted by the Id. A.R that in the appeal in question the CIT(A) had directed the A.O to consider the assessee's claim for set off of the amount of bank charges Rs. 2,60,57,524/- that were recovered by the assessee from its AEs, while determining the guarantee fees that was received by the assessee from its AEs. It was submitted by the Id. A.R that the Hon'ble High Court of Bombay in the case of CIT Vs. Everest Kento Cylinders Ltd. (2015) 378 ITR 57 (Bom) had after observing that corporate guarantee provide by a bank for and on behalf of its subsidiary AE cannot be compared with guarantees issued by commercial banks, had approved the corporate guarantee @0.5% that was charged by the assessee from its AE. It was, thus, the claim of the Id. A.R that as the assessee in the present case had charged guarantee fee @1% p.a of the value of the facility thus, said international transaction was at arm's length and no adjustment was called for in the hands of the assessee.

19. Per contra, the Id. D.R relied on the orders of the lower authorities.

20. We have deliberated at length on the issue under consideration in the backdrop of the contentions advanced by the authorised representatives for both the parties, perused the orders of the lower authorities and the material available on record, and also considered the judicial pronouncements pressed into service by them in order to drive home their respective contentions in context of the aforesaid issue in question. As observed by us hereinabove, the assessee had charged guarantee fees of 1% p.a of the value of corporate guarantee facility provided to its AEs. However, the A.O after ostensibly considering certain factors, viz. risk profile and final status of applicant; period/amount /terms/securities of the guarantee; and difference between the bank guarantee and the corporate guarantee, had adopted the average of the bankers rate of 2% per annum for charging the guarantee fees and made an upward transfer pricing adjustment of Rs. 6,19,73,996/- w.r.t the international transaction of providing of corporate guarantee by the assessee to its AEs. On appeal, the CIT(A) holding a conviction that the rate of 2% adopted by the TPO for benchmarking the aforesaid international transaction was close to the SBI rates and required to be further discounted thus, substituted the same by a rate of 1.80%. In our considered view the very basis adopted by the TPO for benchmarking the international transaction of providing of corporate guarantee by the assessee for and on behalf of its AEs i.e by considering the average of the bankers rate of 2% per annum, though ostensibly is stated to have been subjected to necessary adjustments, however, does not inspire much of confidence. As observed by us hereinabove, the **Hon'ble High Court of Bombay** in the case of **CIT Vs. Everest Kento Cylinders Ltd. (2015) 378 ITR 57 (Bom)**, had observed, that considerations which applied for issuance of a Corporate guarantee are distinct and separate from that of bank guarantee and thus, no feasible comparison could be made between the guarantees issued by the commercial banks as against a corporate guarantee issued by a holding company for the benefit of its AE, a subsidiary company. After so observing, the Hon'ble High Court had approved the guarantee fees

of 0.5% charged by the assessee before them from its AE, as against that of 3% that was adopted by the TPO by referring to the bank guarantee rate. In our considered view the guarantee fee of 1% p.a of the value of the international transaction charged by the assessee before us from its AEs for providing corporate guarantee for and on their behalf, which was been benchmarked by it by applying external CUP method was at arm's length and no adjustment as regards the same was liable to be made. Accordingly, we herein direct the A.O/TPO to vacate the upward transfer pricing adjustment of Rs. 6,19,73,996/- made as regards the international transaction of providing of corporate guarantee by the assessee to its AEs. The **Grounds of appeal nos. 3 to 9** raised by the assessee are allowed in terms of our aforesaid observations.

21. We shall now deal with the additional ground of appeal raised by the assessee wherein it had claimed that the levy of Education Cess and the Secondary and Higher Education Cess on the total income of the assessee is allowable as deduction u/s 37 of the Act.

22. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record, and also the judicial pronouncements relied upon by them in context of the aforesaid additional ground of appeal. Insofar the claim of the Ld. A.R that unlike "rates" and "taxes" the amount paid by an assessee towards "Education Cess" or any "other cess" viz. the Secondary and Higher Education Cess is not a disallowable expenditure u/s 40(a)(ii) of the Income-tax Act, 1961, we find that the said issue is squarely covered by the recent order of the **Hon'ble High Court of Bombay** in the case of **Sesa Goa Limited vs. Joint Commissioner of Income-tax (2020) 107 CCH 375 (Bom)**. In the case before the Hon'ble High Court the following substantial question of law was inter alia raised :

- “iii. Whether on the facts and in the circumstances of the case and in law, the Education Cess and Higher and Secondary Education Cess is allowable as a deduction in the year of payment.”

After exhaustive deliberations, the Hon'ble High Court had observed that the legislature in Sec. 40(a)(ii) had though provided that "any rate or tax levied" on "profits and gains of business or profession" shall not be deducted in computing the income chargeable under the head "profits and gains of business or profession", but then there was no reference to any "cess". Also, the High Court observed that there was no scope to accept that "cess" being in the nature of a "tax" was equally not deductible in computing the income chargeable under the head "profits and gains of business or profession". It was further observed that if the legislature would had intended to prohibit the deduction of amounts paid by an assessee towards say, "education cess" or any other "cess", then, it could have easily included a reference to "cess" in clause (ii) of Section 40(a). On the basis of its aforesaid observations, the Hon'ble High Court had concluded that now when the legislature had not provided for any prohibition on the deduction of any amount paid towards "cess" in clause (ii) of Sec. 40(a), therefore, holding to the contrary would amount to reading something which is not to be found in the text of the provision of Sec. 40(a)(ii). Accordingly, the Hon'ble High Court had concluded that there was no prohibition on the deduction of any amount paid towards "cess" in Sec. 40(a)(ii), while computing the income chargeable under the head "profits and gains of business or profession", observing as under :

"16. The aforesaid question arises in the context of provisions of Section 40(a)(ii) which inter alia provides that notwithstanding anything to the contrary in sections 30 to 38 of the IT Act, the following amounts shall not be deducted in computing the income chargeable under the head "Profits and gains of business or profession", -

(a) in the case of any assessee –

(ia).....

(ib).....

(ic)

(ii) any sum paid on account of any rate or tax levied on the profits or gains of any business or profession or assessed at a proportion of, or otherwise on the basis of, any such profits or gains.

[Explanation 1.—For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, any sum paid on account of any rate or tax levied includes and shall be

deemed always to have included any sum eligible for relief of tax under section 90 or, as the case may be, deduction from the Indian income-tax payable under section 91.]

[Explanation 2.—For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, any 9 TXA17&18-13 dt.28.02.2020 sum paid on account of any rate or tax levied includes any sum eligible for relief of tax under section 90A;]

17. Therefore, the question which arises for determination is whether the expression “any rate or tax levied” as it appears in Section 40(a)(ii) of the IT Act includes “cess”. The Appellant – Assessee contends that the expression does not include “cess” and therefore, the amounts paid towards “cess” are liable to be deducted in computing the income chargeable under the head “profits and gains of business or profession”.

However, the Respondent – Revenue contends that “cess” is also included in the scope and import of the expression “any rate or tax levied” and consequently, the amounts paid towards the “cess” are not liable for deduction in computing the income chargeable under the head “profits and gains of business or profession”.

18. In relation to taxing statute, certain principles of interpretation are quite well settled. In *New Shorrock Spinning and Manufacturing Co. Ltd. Vs Raval*, 37 ITR 41 (Bom.), it is held that one safe and infallible principle, which is of guidance in these matters, is to read the words through and see if the rule is clearly stated. If the language employed gives the rule in words of sufficient clarity and precision, nothing more requires to be done. Indeed, in such a case the task of interpretation can hardly be said to arise : *Absoluta sententia expositore non indiget*. The language used by the Legislature best declares its intention and must be accepted as decisive of it.

19. Besides, when it comes to interpretation of the IT Act, it is well established that no tax can be imposed on the subject without words in the Act clearly showing an intention to lay a burden on him. The subject cannot be taxed unless he comes within the letter of the law and the argument that he falls within the spirit of the law cannot be availed of by the department. [See *CIT vs Motors & General Stores* 66 ITR 692 (SC)].

20. In a taxing Act one has to look merely at what is clearly said.

There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied, into the provisions which has not been provided by the legislature [See *CIT Vs Radhe Developers* 341 ITR 403]. One can only look fairly at the language used. No tax can be imposed by inference or analogy. It is also not permissible to construe a taxing statute by making assumptions and presumptions [See *Goodyear Vs State of Haryana* 188 ITR 402(SC)].

21. There are several decisions which lay down rule that the provision for deduction, exemption or relief should be interpreted liberally, reasonably and in favour of the assessee and it should be so construed as to effectuate the object of the legislature and not to defeat it. Further, the interpretation cannot go to the extent of reading something that is not stated in the provision [See *AGS Tiber Vs CIT* 233 ITR 207].

22. Applying the aforesaid principles, we find that the legislature, in Section 40(a)(ii) has provided that “any rate or tax levied” on “profits and gains of business or profession” shall

not be deducted in computing the income chargeable under the head “profits and gains of business or profession”. There is no reference to any “cess”. Obviously therefore, there is no scope to accept Ms. Linhares's contention that “cess” being in the nature of a “Tax” is equally not deductible in computing the income chargeable under the head “profits and gains of business or profession”. Acceptance of such a contention will amount to reading something in the text of the provision which is not to be found in the text of the provision in Section 40(a)(ii) of the IT Act.

23. If the legislature intended to prohibit the deduction of amounts paid by a Assessee towards say, “education cess” or any other “cess”, then, the legislature could have easily included reference to “cess” in clause (ii) of Section 40(a) of the IT Act. The fact that the legislature has not done so means that the legislature did not intend to prevent the deduction of amounts paid by a Assessee towards the “cess”, when it comes to computing income chargeable under the head “profits and gains of business or profession”.

24. The legislative history bears out that the Income Tax Bill, 1961, as introduced in the Parliament, had Section 40(a)(ii) which read as follows :

“(ii) any sum paid on account of any cess, rate or tax levied on the profits or gains of any business or profession or assessed at a proportion of, or otherwise on the basis of, any such profits or gains”

25. However, when the matter came up before the Select Committee of the Parliament, it was decided to omit the word “cess” from the aforesaid clause from the Income Tax Bill, 1961. The effect of the omission of the word “cess” is that only any rate or tax levied on the profits or gains of any business or profession are to be deducted in computing the income chargeable under the head “ profits and gains of business or profession”. Since the deletion of expression “cess” from the Income Tax Bill, 1961, was deliberate, there is no question of reintroducing this expression in Section 40(a)(ii) of IT Act and that too, under the guise of interpretation of taxing statute.

26. In fact, in the aforesaid precise regard, reference can usefully be made to the Circular No. F. No.91/58/66-ITJ(19), dated 18th May, 1967 issued by the CBDT which reads as follows :-

“Interpretation of provision of Section 40(a)(ii) of IT Act, 1961–Clarification regarding. “Recently a case has come to the notice of the Board where the Income Tax Officer has disallowed the ‘cess’ paid by the assessee on the ground that there has been no material change in the provisions of section 10(4) of the Old Act and Section 40(a)(ii) of the new Act.

2. The view of the Income Tax Officer is not correct. Clause 40(a)(ii) of the Income Tax Bill, 1961 as introduced in the Parliament stood as under:-

“(ii) any sum paid on account of any cess, rate or tax levied on the profits or gains of any business or profession or assessed at a proportion of, or otherwise on the basis of, any such profits or gains”.

When the matter came up before the Select Committee, it was decided to omit the word ‘cess’ from the clause. The effect of the omission of the word ‘cess’ is that only

taxes paid are to be disallowed in the assessments for the years 1962-63 and onwards.

3. The Board desire that the changed position may please be brought to the notice of all the Income Tax Officers so that further litigation on this account may be avoided.[Board's F. No.91/58/66-ITJ(19), dated 18-5-1967.]”

27. The CBDT Circular, is binding upon the authorities under the IT Act like Assessing Officer and the Appellate Authority. The CBDT Circular is quite consistent with the principles of interpretation of taxing statute. This, according to us, is an additional reason as to why the expression “cess” ought not to be read or included in the expression “any rate or tax levied” as appearing in Section 40(a)(ii) of the IT Act.

28. In the Income Tax Act, 1922, Section 10(4) had banned allowance of any sum paid on account of 'any cess, rate or tax levied on the profits or gains of any business or profession'. In the corresponding Section 40(a)(ii) of the IT Act, 1961 the expression “cess” is quite conspicuous by its absence. In fact, legislative history bears out that this expression was in fact to be found in the Income Tax Bill, 1961 which was introduced in the Parliament. However, the Select Committee recommended the omission of expression “cess” and consequently, this expression finds no place in the final text of the provision in Section 40(a)(ii) of the IT Act, 1961. The effect of such omission is that the provision in Section 40(a)(ii) does not include, “cess” and consequently, “cess” whenever paid in relation to business, is allowable as deductible expenditure.

29. In Kanga and Palkhivala's “The Law and Practice of Income Tax” (Tenth Edition), several decisions have been analyzed in the context of provisions of Section 40(a)(ii) of the IT Act, 1961. There is reference to the decision of Privy Council in CIT Vs Gurupada Dutta 14 ITR 100, where a union rate was imposed under a Village Self Government 15 TXA17&18-13 dt.28.02.2020 Act upon the assessee as the owner or occupier of business premises, and the quantum of the rate was fixed after consideration of the 'circumstances' of the assessee, including his business income. The Privy Council held that the rate was not 'assessed on the basis of profits' and was allowable as a business expense. Following this decision, the Supreme Court held in Jaipuria Samla Amalgamated Collieries Ltd Vs CIT [82 ITR 580] that the expression 'profits or gains of any business or profession' has reference only to profits and gains as determined in accordance with Section 29 of this Act and that any rate or tax levied upon profits calculated in a manner other than that provided by that section could not be disallowed under this sub-clause. Similarly, this sub-clause is inapplicable, and a deduction should be allowed, where a tax is imposed by a district board on business with reference to 'estimated income' or by a municipality with reference to 'gross income'. Besides, unlike Section 10(4) of the 1922 Act, this sub-clause does not refer to 'cess' and therefore, a 'cess' even if levied upon or calculated on the basis of business profits may be allowed in computing such profits under this Act.

30. The Division Bench of the Rajasthan High Court (Jaipur Bench) in Income Tax Appeal No.52/2018 decided on 31st July, 2018 (Chambal Fertilisers and Chemicals Ltd. Vs CIT Range-2, Kota), by reference to the aforesaid CBDT Circular dated 18th May, 1967 has held 16 TXA17&18-13 dt. 28.02.2020 that the ITAT erred in holding that the “education cess” is a disallowable expenditure under Section 40(a)(ii) of the IT Act. Ms. Linhares was unable to state whether the Revenue has appealed this decision. Mr. Ramani, learned Senior Advocate submitted that his research did not suggest that any appeal was instituted by the Revenue against this decision, which is directly on the point and favours the Assessee.

31. Mr. Ramani, in fact pointed out three decisions of ITAT, in which, the decision of the Rajasthan High Court in Chambal Fertilisers and Chemicals Ltd.(supra) was followed and it was held that the amounts paid by the Assessee towards the 'education cess' were liable for deduction in computing the income chargeable under the head of "profits and gains of business or profession". They are as follows :- (i) DCIT Vs Peerless General Finance and Investment and Co. Ltd. (ITA No.1469 and 1470/Kol/2019 decided on 5th December, 2019 by the ITAT, Calcutta; (ii) DCIT Vs Graphite India Ltd. (ITA No.472 and 474 Co. No.64 and 66/Kol/2018 decided on 22nd November, 2019)by the ITAT, Calcutta; (iii) DCIT Vs Bajaj Allianz General Insurance (ITA No.1111 and 1112/PUN/2017 decided on 25th July, 2019) by the ITAT, Pune.

32. Again, Ms. Linhares, learned Standing Counsel for the Revenue was unable to say whether the Revenue had instituted the appeals in the aforesaid matters. Mr. Ramani, learned Senior Advocate for the Appellant submitted that to the best of his research, no appeals were instituted by the Revenue against the aforesaid decisions of the ITAT.

33. The ITAT, in the impugned judgment and order, has reasoned that since "cess" is collected as a part of the income tax and fringe benefit tax, therefore, such "cess" is to be construed as "tax". According to us, there is no scope for such implications, when construing a taxing statute. Even, though, "cess" may be collected as a part of income tax, that does not render such "cess", either rate or tax, which cannot be deducted in terms of the provisions in Section 40(a)(ii) of the IT Act. The mode of collection, is really not determinative in such matters.

34. Ms. Linhares, has relied upon M/s Unicorn Industries Vs Union of India and others, 2019 SCC Online SC 1567 in support of her contention that "cess" is nothing but "tax" and therefore, there is no question of deduction of amounts paid towards "cess" when it comes to computation of income chargeable under the head profits or gains of any business or profession.

35. The issue involved in Unicorn Industries (supra) was not in the context of provisions in Section 40(a)(ii) of the IT Act. Rather, the issue involved was whether the 'education cess, higher education cess and National Calamity Contingent Duty (NCCD)' on it could be construed as "duty of excise" which was exempted in terms of Notification dated 9th September, 2003 in respect of goods specified in the Notification and cleared from a unit located in the Industrial Growth Centre or other specified areas with the State of Sikkim. The High Court had held that the levy of education cess, higher education cess and NCCD could not be included in the expression "duty of excise" and consequently, the amounts paid towards such cess or NCCD did not qualify for exemption under the exemption Notification. This view of the High Court was upheld by the Apex Court in Unicorn Industries (supra).

36. The aforesaid means that the Supreme Court refused to regard the levy of education cess, higher education cess and NCCD as "duty of excise" when it came to construing exemption Notification. Based upon this, Mr. Ramani contends that similarly amounts paid by the Appellant – Assessee towards the "cess" can never be regarded as the amounts paid towards the "tax" so as to attract provisions of Section 40(a)(ii) of the IT Act. All that we may observe is that the issue involved in Unicorn Industries (supra) was not at all the issue involved in the present matters and therefore, the decision in Unicorn Industries (supra) can be of no assistance to the Respondent – Revenue in the present matters.

37. Ms. Linhares, learned Standing Counsel for the Revenue however submitted that the Appellant – Assessee, in its original return, had never claimed deduction towards the amounts paid by it as “cess”. She submits that neither was any such claim made by filing any revised return before the Assessing Officer. She therefore relied upon the decision of the Supreme Court in Goetze (India) Ltd. Vs Commissioner of Income Tax (2006) 284 ITR 323 (SC) to submit that the Assessing Officer, was not only quite right in denying such a deduction, but further the Assessing Officer had no power or jurisdiction to grant such a deduction to the Appellant – Assessee. She submits that this is what precisely held by the ITAT in its impugned judgments and orders and therefore, the same, warrants no interference.

38. Although, it is true that the Appellant – Assessee did not claim any deduction in respect of amounts paid by it towards “cess” in their original return of income nor did the Appellant – Assessee file any revised return of income, according to us, this was no bar to the Commissioner (Appeals) or the ITAT to consider and allow such deductions to the Appellant – Assessee in the facts and circumstances of the present case. The record bears out that such deduction was clearly claimed by the Appellant – Assessee, both before the Commissioner (Appeals) as well as the ITAT.

39. In CIT Vs Pruthvi Brokers & Shareholders Pvt. Ltd. 349 ITR 336, one of the questions of law which came to be framed was whether on the facts and circumstances of the case, the ITAT, in law, was right in holding that the claim of deduction not made in the original returns and not supported by revised return, was admissible. The Revenue had relied upon Goetze (supra) and urged that the ITAT had no power to allow the claim for deduction. However, the Division Bench, whilst proceeding on the assumption that the Assessing Officer in terms of law laid down in Goetze (supra) had no power, proceeded to hold that the Appellate Authority under the IT Act had sufficient powers to permit such a deduction. In taking this view, the Division Bench relied upon the Full Bench decision of this Court in Ahmedabad Electricity Co. Ltd Vs CIT (199 ITR 351) to hold that the Appellate Authorities under the IT Act have very wide powers while considering an appeal which may be filed by the Assessee. The Appellate Authorities may confirm, reduce, enhance or annul the assessment or remand the case to the Assessing Officer. This is because, unlike an ordinary appeal, the basic purpose of a tax appeal is to ascertain the correct tax liability of the Assessee in accordance with law.

40. The decision in Goetze (supra) upon which reliance is placed by the ITAT also makes it clear that the issue involved in the said case was limited to the power of the assessing authority and does not impinge on the powers of the ITAT under section 254 of the said Act. This means that in Goetze (supra), the Hon'ble Apex Court was not dealing with the extent of the powers of the appellate authorities but the observations were in relation to the powers of the assessing authority. This is the distinction drawn by the division Bench in Pruthvi Brokers (supra) as well and this is the distinction which the ITAT failed to note in the impugned order.

41. Besides, we note that in the present case, though the claim for deduction was not raised in the original return or by filing revised return, the Appellant – Assessee had indeed addressed a letter claiming such deduction before the assessment could be completed. However, even if we proceed on the basis that there was no obligation on the Assessing Officer to consider the claim for deduction in such letter, the Commissioner (Appeals) or the ITAT, before whom such deduction was specifically claimed was duty bound to consider such claim. Accordingly, we are unable to agree with Ms. Linhare's contention based upon the decision in Goetze (supra).

42. For all the aforesaid reasons, we hold that the substantial question of law No.(iii) in Tax Appeal No.17 of 2013 and the sole substantial question of law in Tax Appeal No.18 of 2013 is also required to be answered in favour of the Appellant – Assessee and against the Respondent-Revenue. To that extent therefore, the impugned judgments and orders made by the ITAT warrant interference and modification.

43. Thus, we answer all the three substantial questions of law framed in Tax Appeal No.17 of 2013 in favour of the Appellant – Assessee and against the Respondent -Revenue. Similarly, we answer the sole substantial question of law framed in Tax Appeal No.18 of 2013, in favour of the Appellant – Assessee and against the Respondent – Revenue.”

Accordingly, respectfully following the aforesaid order of the Hon'ble High Court of Bombay, we herein direct the A.O to allow the assessee's claim for deduction of education cess and secondary and higher education cess u/s 37 of the Act. The **additional ground of appeal no. 2** is allowed.

24. The appeal of the assessee in ITA No. 4177/Mum/2018 and that of the revenue in ITA No. 3638/Mum/2018 are both partly allowed in terms of our aforesaid observations.

Sd/-
S. Rifaur Rahman
(ACCOUNTANT MEMBER)

Sd/-
Ravish Sood
(JUDICIAL MEMBER)

Mumbai, Date: 15.02.2021
PS: Rohit

Copy of the Order forwarded to :

1. Assessee
2. Respondent
3. The concerned CIT(A)
4. The concerned CIT
5. DR “K” Bench, ITAT, Mumbai
6. Guard File

BY ORDER,

Dy./Asst. Registrar
ITAT, Mumbai