IN THE INCOME TAX APPELLATE TRIBUNAL
"D" BENCH, AHMEDABAD
(CONDUCTING THROUGH VIRTUAL COURT)

BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER &
Ms. MADHUMITA ROY, JUDICIAL MEMBER

ITA Nos.381&382/Ahd/2019
(Assessment Years: 2012-13 & 2013-14)

DCIT Gandhinagar Circle, Gandhinagar 4th Floor, Block No. 14, Udhyog Bhavan Sector-11, Gandhinagar Gujarat-382011	Vs.	M/s.Gujarat State Petronet Ltd. E-18, GIDC Electronic Estate, Nr. K-7 Circle, Sector-26, Gandhinagar, Gujarat-380026
[PAN No. AABCG1812E]		
(**Appellant**)	..	(**Respondent**)

Appellant by :	Shri Shyam Prasad, Sr. DR
Respondent by:	Shri S. N. Soparkar Sr. Adv. & Shri Parin Shah, AR

Date of Hearing:	13/07/2021
Date of Pronouncement:	02/08/2021

ORDER

PER Ms. MADHUMITA ROY - JM:

Both the appeals filed by the Revenue are directed against the separate orders dated 07.12.2018 & 27.12.2018 passed by the Ld. CIT(A)-Gandhinagar, Ahmedabad arising out of the separate orders dated 31.03.2015 & 28.03.2016 passed by the ITO, Ward-2, Gandhinagar & DCIT, Gandhinagar Circle, Gandhinagar under Section 143(3) of the Income Tax Act, 1961 for A.Ys. 2012-13 and 2013-14 respectively.

ITA No. 381/Ahd/2019 (A.Y. 2012-13):-

2. **Ground No. 1:-** The appellant has suo-moto, on a conservative basis worked out certain expenses (including interest) towards Section 14A disallowance amounting to Rs. 2,42,61,665/- in the Tax Computation. According to the assessee all the expenditures which can even conservatively disallowed under Section 14A has already been done, therefore, no further disallowance can be made under Section 14A. However, the

contention made by the assessee was not accepted by the Ld. AO and he ultimately applied Rule 8D and disallowed further Rs. 1,51,46,813/-.

3. At the time of hearing of the instant appeal the Ld. DR relied upon the order passed by the Ld. AO.

4. The Ld. Senior Counsel appearing for the assessee submitted before us that while applying Rule 8D the Ld. AO has not recorded any dissatisfaction as regards suo-moto disallowance made by the appellant which is sine qua non and therefore, further disallowance of Rs. 33,10,539/- made by the Ld. AO by applying Rule 8D is liable to be deleted. It further submitted by the Ld. AR that the Ld. CIT(A) has followed the order passed by the Hon'ble ITAT Bench in assessee's own case for A.Y. 2009-10 where it was observed that Rule 8D cannot be resorted to unless it is proved by the Ld. AO that he is dissatisfied with the amount of disallowance computed by the appellant. It was further submitted by the Ld. Senior Counsel that the said order was subsequently confirmed by the Hon'ble High Court in the appeal preferred by the Revenue. He, therefore, relied upon the order passed by the Ld. CIT(A).

5. We have heard both the respective parties, we have also perused the relevant materials available on record.

6. The Ld. DR, however, has not been able to controvert the contention made by the Ld. AR as regards the order passed by the Hon'ble ITAT further been confirmed by the Jurisdictional High Court in favour of the assessee on the ratio that Rule 8D cannot be resorted to by the Ld. AO without recording any dissatisfaction as regards suo-moto disallowance made by the appellant.

7. It appears that while allowing the appeal in favour of the assessee the First Appellate Authority observed as follows:-

> *"5.2 I have considered the facts of the case, assessment order and submission made by the appellant. The AO made the impugned disallowance by holding that the claim of the appellant*

was not correct as per the provisions of Rule 8D and he accordingly computed the disallowance at Rs.33,10,539/- u/s 14A rw Rule 8D. I find from the submissions made by the appellant that the Hon'ble Gujarat High Court in the appellant's own case on the same issue vide its order dated 07/1/2016 has held that in absence of recording any satisfaction by the AO, Rule 8D cannot be invoked and has decided the issue in the appellant's favour.

It is seen from the assessment order that the AO has simply stated that the disallowance computed by the appellant is not computed as per the provisions of Rules 8D of the I.T. Rules. However, Rule 8D is to be invoked by the AO only when he is satisfied that expenditure claimed to be incurred by an assessee is incorrect having regard to the accounts of the said assessee.

The Hon. ITAT, Ahmedabad, in the appellant's own case for AY 2009-10 has observed that Rule 8D cannot be resorted to unless it is proved by the AO that he is dissatisfied with the amount of disallowance computed by the appellant. The relevant part of the said order is reproduced hereunder:

> *"... as the AO has not recorded as to how the expenditure as claimed by the assessee is not satisfactory, which is a condition precedent before applying the Rule 8D of the Income Tax Rules, 1962, Under these facts, we hereby delete the disallowance as were made by the AO. Thus, this ground of assessee's appeal is allowed."*

The said order was challenged by the Revenue before the Hon'bie Gujarat High Court in Tax appeal No. 752 of 2016 for AY 2009-10, and the Hon. High Court has confirmed the finding of the ITAT. The Hon'ble High Court in the said order in the appellant's case has held as under:

> *"3. Now so far as the proposed substantial question of law No, "B" i.e. whether the ITAT has erred in fact and in law in deleting the addition of Rs.1,22,12,831/- made by the Assessing Officer under Section 14A of the Income Tax Act read with Rule 8D of the Income Tax Rules is concerned, we have heard Mr. Sudhir Mehta, learned advocate appearing for the appellant and Mr. S.N.Soparkar, learned Senior Advocate appearing on behalf of the assessee. We have perused the impugned judgment and order passed by the learned ITAT deleting the addition of Rs.1,22,12,831/ made by Assessing Officer under Section 14A of the Income Tax Act read with Rule 8D of the Income Tax Rules, 1962. While deleting the addition of the aforesaid made by the Assessing Officer, the learned Tribunal has heavily relied upon the decision of the Division Bench of this Court in the case of Principal Commissioner of Income Tax Vs. India Gelatine and Chemicals Limited, [2015] 376 ITR 553 (Guj.)], and applying the said decision to the facts of the case on hand, and considering the fact that while making the addition of Rs, 1,22,12,831/ made by the Assessing Officer under Section 14A of the Income Tax Act read with Rule 8D of the Income Tax Rules, 1962, the Assessing Officer did not record as to how the expenditure as claimed by the assesses was not satisfactory, and considering the fact that the assess had sufficient Interest free fund, out of which the concerned investment had been made, it cannot be said that the learned Tribunal has committed any error in deleting the addition made by the Assessing Officer made under Section 14A of the Income Tax Act read with Rule 8D of the Income Tax Rules, 1962. Under the circumstances and considering the direct decision of the Division Bench of this Court in the case of India Gelatine and Chemicals Limited (supra), no substantial question of law arise in the present appeal. Under the circumstances, the present appeal qua proposed substantial question of law No. "B" also deserves to be dismissed and is accordingly dismissed."*

It is seen from the assessment order for AY 2009-10 that the observations of the AO in assessment order for AY 2012-13 is identical except for figures for the respective years. The facts for AY 2009-10 are thus identical to that of the year under consideration and therefore the ratio of the decision in the appellant's own case of the Hon'ble Gujarat High Court being the jurisdictional high court would be squarely applicable to the for the year under consideration as well. Moreover, the appellant has already disallowed proportionate administrative expenses incurred to earn the exempt income. Accordingly, in view of the Hon'ble High Court's order in appellant's own case for AY 2009-10, the disallowance made by the AO under Section 14A of the Act of Rs.1,51,46,813/- is deleted. Grounds nos. 2 to 7 of appeal are allowed."

8. Thus, it appears though it is incumbent upon the Ld. AO to record a satisfaction as to why the disallowance offered by the assessee was not sufficient which is sine qua non before proceeding to apply Rule 8D. Although there is no particular format or manner in which the satisfaction was to be recorded but the same should have been discernible from the order passed by the Ld. AO. We make it clear that no observation, howsoever, has been made as to the sufficiency or insufficiency of suo-moto disallowance offered by the assessee. Thus, having regard to the facts and circumstances of the case we respectfully relying upon the order passed by the Hon'ble Jurisdictional High Court we find no irregularities in the order passed by the Ld. CIT(A) in deleting such addition made by the Ld. AO in the absence of any dissatisfaction recorded by the Ld. AO as regards the amount of disallowance computed by the appellant under Section 14A without any ambiguity so as to warrant interference. Hence, the ground of appeal preferred by the Revenue is found to be devoid of any merit and, thus, dismissed.

9. **Ground No.2:-** The Ld. AO denied the claim of the appellant for ESOP compensation expenses during assessment proceeding as the said claim was not made while filing of return of income by the assessee. Since the appellate authority had the power to admit the new ground or a legal contention in view of the order passed by the Hon'ble Jurisdictional High Court in the case of CIT vs. Mitesh Impex, reported in [2014] 46 taxmann.com 30 (Guj.), the said claim has been admitted by the Ld. CIT(A).

10. The brief facts leading to the case is this that the appellant in 2010 had introduced a scheme called "Employee Stock Option Plan, 2010" for eligible employees of the company who were granted stock options based on certain criteria. Being a listed

company the appellant in accordance with the SEBI guidelines, 1999 charged the difference between the market price as on the date of grant of option and exercised price of total number of options as "ESOP Expenditure" in its financial statements based on vesting pattern and has claimed the same as deduction under Section 37 of the Act.

11. At the time of hearing of the instant appeal the Ld. Senior Counsel appearing for the assessee submitted before us that the issue of deductibility of ESOP expenditure has been decided extensively by the Special Bench of ITAT in Biocon Limited vs. DCIT(LTU), reported in (2013) 35 taxmann.com 335 (Bangalore Trib. – SB). Therefore, relying on this decision the order passed by the Ld. CIT(A) has been supported by the Ld. AR.

12. However, the Ld. DR drew our attention of Page 140 of the Paper Book filed before us wherein the accounting policies for ESOP as framed by SEBI under Schedule-I Clause-13.1 has been described. Further that he has referred the summary of ESOP expenditure of the assessee company appearing as Page 17 of the Paper Book wherein a calculation for the ESOP expenses for A.Y. 2012-13 to the tune of Rs. 3,22,63,452/- has been narrated. In view of the policies framed by the SEBI the Ld. DR prayed before us for setting aside the issue to the file of the Ld. AO to verify as to whether the appropriate revival has been made by the company in terms of the ESOP claim.

13. We have heard both the respective parties, we have also perused the relevant materials available on record including the order passed by the Special Bench of ITAT in the matter of Biocon Limited vs. DCIT (LTU), reported in (2013) 35 taxmann.com 335 (Bangalore Trib. – SB). We have further perused the order passed by the Ld. CIT(A). However, no explanation is forthcoming as to how without verifying the records as regards the actual expenses incurred by the appellant's claim has been allowed. In this regard, we have carefully considered the order passed by the Special Bench in the case of Biocon Ltd. vs. DCIT (LTU) (supra) where it has been held that ESOP compensation expenditure is not a notional expenditure but an allowable expenditure under Section

37(1) of the Act. It has further been held that Special Bench that object of issuing of shares at a lower issue price than the market price to the employees under ESOP must be taken into consideration and thereby it cannot be treated as short receipt of securities premium but a cost on account of compensation of employees. Thus, principally the claim on account of deduction of ESOP compensation is allowable but in our considered opinion it would be in the fitness of things to remit the issue to the file of the Ld. AO to verify the actual expenses incurred by the appellant and to allow the same in terms of ratio laid down by the judgment of Biocon Ltd. The order is passed accordingly. Thus, assessee's claim is allowed for statistical purposes.

ITA No. 382/Ahd/2019 (A.Y. 2013-14):-

14. The identical issue involved in the case has already been dealt with by us in ITA No.381/Ahd/2019 for A.Y. 2012-13 and in the absence of any changed circumstances the same shall apply mutatis mutandis. Hence, the appeal preferred by the Revenue is allowed for statistical purposes.

15. In the combined result, both appeals filed by the Revenue are allowed for statistical purposes.

This Order pronounced in Open Court on	**02/08/2021**

Sd/-	Sd/-
(WASEEM AHMED)	(Ms. MADHUMITA ROY)
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Ahmedabad; Dated 02/08/2021
Tanmay

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The PCIT- Ahmedabad.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाईल / Guard file.

आदेशानुसार/BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad