IN THE INCOME TAX APPELLATE TRIBUNAL,
DELHI BENCH: 'C' NEW DELHI

BEFORE SHRI O.P. KANT, ACCOUNTANT MEMBER
AND
SHRI KULDIP SINGH, JUDICIAL MEMBER
[Through Video Conferencing]

ITA No.5706/Del/2017
Assessment Year: 2011-12
And
ITA No.5707/Del/2017
Assessment Year: 2012-13

DCIT, Circel-12(1), New Delhi	**Vs.**	ICRA Ltd., 1105, Kailash Building, 11th Floor, 26 Kasturba Marg, New Delhi
		PAN :AAACI0218B
(Appellant)		**(Respondent)**

And
C.O. No.8/Del/2018
[Arising out of ITA No.5707/Del/2017]
Assessment Year: 2012-13

ICRA Ltd., 1105, Kailash Building, 11th Floor, 26 Kasturba Marg, New Delhi	**Vs.**	DCIT, Circel-12(1), New Delhi
PAN :AAACI0218B		
(Appellant)		**(Respondent)**

Department by	Ms. Sunita Singh, CIT(DR) Ms. Anima Barnwal, Sr.DR
Assessee by	None

Date of hearing	30.09.2021
Date of pronouncement	14.10.2021

ORDER

PER O.P. KANT, AM:

The appeal by the Revenue for assessment year 2011-12 is directed against order dated 15/05/2017 in appeal No.337/16-17 passed by the Learned Commissioner of Income-tax (Appeals)-39, New Delhi [in short 'the CIT(A)]. The appeal by the Revenue and cross objection by the assessee for assessment year 2012-13 are directed against order dated 15/05/2017 in appeal No.339/16-17. As common issues in dispute are involved in both the appeals of the Revenue and Cross Objection of the assessee, we have heard these together and disposed off by way of this consolidated order for convenience and to avoid repetition of facts.

ITA No.5706/Del/2017 for AY: 2011-12

2. First, we take up the appeal of Revenue for assessment year 2011-12. The grounds raised by the Revenue are reproduced as under:

1. *On the facts and circumstances of the case, the Ld. CIT(A) has erred in deleting the disallowance of Employee Stock Option Scheme Compensation, amounting to Rs.7,51,29,706/-.*
2. *On the facts and circumstances of the case, the Ld. CIT(A) has erred in deleting the disallowance u/ 14A r.w. Rule 8D, amounting to Rs.69,21,744/-.*
3. *The appellant craves leave for reserving the right to amend, modify, add or forego any ground(s) of appeal at any time before or during the hearing of appeal.*

3. At the outset, we may like to mention that despite notifying neither anyone was present on behalf of the assessee, nor any application was filed for adjournment on behalf of the assessee.

In the circumstances, we proceeded to hear the appeal on the basis of arguments advanced by Learned Departmental Representatives and material available on record.

4. We have heard learned Departmental Representative and perused the relevant material on record.

4.1 The ground No.1 of the appeal of the Revenue relates to deletion of disallowance of Employee Stock Option Scheme (ESOP) compensation, amounting to ₹ 12,91,99,000/-.

4.2 Briefly stated facts relevant to the adjudication of the issue in dispute before us are that the Assessing Officer disallowed the claim made in profit and loss account of employees stock option scheme compensation of ₹ 12,91,99,000/- on the ground that expenditure was on account of issuance of share capital, which being in the nature of capital expenditure, was not allowed as business expenditure. The detailed finding of Learned Assessing Officer is reproduced as under:

> *"i. The expenditure on ESOP compensation expenditure is not revenue expenditure as the same has been incurred towards the raising of share capital which is clearly capital in nature. The Various Hon'ble Courts has held in their decisions that the nature of expense should be taken in the broad way to which it is attributable.*
>
> *ii. The amount of expenditure claimed as Compensation towards Employees Stock Option Plan/Scheme is not an actual expenditure incurred by the company. It is just a notional loss.*
>
> *iii. SEBI guidelines are not a prerogative for determining allowability or otherwise of an item for income tax purpose.*
>
> *iv. The shares were the capital of the assessee company and any loss to the capital can be considered as capital loss and not revenue expenditure. Reliance is placed on decisions in the*

following cases; M/s VIP INDUSTRIES LTD Vs DCIT, & Ranbaxy Laboratories vs. Add.CIT 124 TTJ (Del) 771.

v. *Section 145 of the Income Tax, 1961 provides that income chargeable under the head "Profit and gains of business and profession" shall be computed in accordance with mercantile system of accounting regularly employed by the assessee. However there is a rider in section 145 that the Central Government may notify Accounting standards to be followed by the assessee. It is relevant to mention that Central Government has not notified any accounting standard in the matter of ESOP*

vi *It is necessary to claim deduction that the expenditure should relate to the previous year In order to ascertain, whether the expenditure relates to the relevant previous year or not, one has to examine the method of accounting generally being adopted by the assessee. To avail deduction of expenditure it is necessary that the business in respect of which expenses are incurred should be carried on by the assessee during the previous year. Expenditure should have been incurred in connection with assessee's own business.*

vii. *In Income Tax Act, certain expenses are an allowable expenditure on the amortization basis provided these are actual one These expenses are identified like expenditure in connection with preparation of feasibility report .preparation of project report (section 35D), amortization of expenditure in the case of amalgamation and de-merger (section 35DD),voluntary retirement scheme (section 35DDA).Besides the expenses as specified above certain expenses are allowable u/s 37 of the Act provided these are actual expenditure viz there is an outgo of the capital in transaction relating to business activity of the assessee during the relevant year. As the assessee has not purchased the shares from the market but exhausted its own quota of issued capital while giving it to the employee and there is no monitory outgoing in its existing capital and no actual expenditure has been incurred by the assessee company. Even if the method of accounting of the assessee company is considered (mercantile), expenses are allowed on provision basis if it is ascertained one but first and foremost condition that needs to be fulfilled is that there has to be a transaction which can be termed as expenditure.*

viii. *Further, the case laws cited by the assessee have not been accepted by the Department and appeal is pending before the Hon'ble Courts in the respective cases.*

4.3 The Ld. CIT(A) deleted the disallowance observing as under:

"5.1 It is gathered from the appellant's submission at para 4 and 4.1 above that in AY 2011 - 12, the appellant granted ESOP to its employees under its Employee Stock Option Scheme, 2006 whose objective was –

- *Further the appellant's growth and development*
- *Motivate employees towards the appellant's objectives*
- *Maintain ability to attract and retain outstanding employees for positions of substantial responsibility*

The appellant recognized this 'employee' cost in its books of account as an expense in accordance with the extant SEBI Guidelines - mandatory for listed companies. Under the ESOP 2,72,500 shares were granted to its eligible employees in November 2010 vesting in the eligible employees over a period of 3 years - @ 40%, 30% and 30%. Accordingly, shares of face value of Rs.10/- were issued at Rs.330/- per share (IPO price) allotted to "ICRA Employees Welfare Trust" while the market price on the granting date was Rs. 1,423.85/- per share. The intrinsic value of shares of Rs.1,093.85 i.e. difference between market price of Rs.1,423.85 and the grant price of Rs.330/-, was adopted for computing the ESOP expenses in accordance with the SEBI guidelines which provided that the ESOP expenses will be amortized on a straight line basis over the vesting period - the pro rata expenditure debited as employee compensation in the relevant PY was Rs.7,51,29,706/- was claimed as a deduction in the revised return filed by the appellant on 7/03/2013.

5.1a It is also observed from the appellant's submissions filed at the appellate stage that the appellant is a listed company and hence, it is mandatory, in my view, to abide by SEBI Guidelines in respect of any action /activity undertaken by it under the Company Law. The question of deductibility of ESOP compensation as an expenditure under the Income tax Act [u/s 37(1)] is altogether a completely different issue. Secondly, the appellant has to also satisfy the generally accepted accounting principles and thereafter claim a deduction on account of an expenditure or loss. It is only thereafter that the applicability of the provisions of the Income tax Act 1961 applies.

5.1b It is gathered from its response to all the reasons mentioned in the impugned order for the disallowance of its claim of deduction for the loss incurred on the ESOP scheme during the relevant PY (albeit on a 3 year pro rata basis) that while the appellant's contention is

fortified by the judicial precedents relied on by it, especially by the IT AT Bangalore (SB) in the Biocon case (supra), its contention that the facts of the case apply to those in the present case squarely, is borne out from records. As regards the question of incurring 'actual expenditure' vis-a-vis 'notional expenditure' as held in the impugned order, the appellant's contention appears plausible in view of the fact that 'expenditure' is nowhere defined in the Act and that if the liability to incur an expenditure is ascertained, it is sufficient to claim the expenses under the mercantile system of accounting adopted regularly by the appellant as held legally by courts. In fact, it is mentioned in the aforesaid case, inter alia, ***"9.2.8*** *Though discount on premium is nothing but an expenditure U/S 37 (1), it is worth noting that the Hon'ble Supreme Court in the case of CIT vs Woodword Governor India (P) Ltd (2009) 312 ITR 254 (SC) / 179 Taxmann 326 has gone to the extent of covering "loss" in certain circumstances within the purview of "expenditure" as used in section 37 (1).... their Lordships noticed that the word "expenditure" has not been defined in the Act. They held that: the word "expenditure" is, therefore, required to be understood in the context in which it is used. Section 37 enjoins that any expenditure not being expenditure of the nature described in sections 30 to 36 laid out or expended wholly and exclusively for the purposes of the business should be allowed in computing the income chargeable under the head "profits and gains of business or profession" in sections 30 to 36 the expression "expenditure incurred", as well as allowance and depreciation, has also been used for example depreciation and allowances are dealt with in section 32, therefore, the parliament has used expression "any expenditure" in section 37 to cover both. Therefore, the expression "expenditure" as used in section 37 made in the circumstances of a particular case, covers an amount which is really a "loss" even though the said amount has not gone out from the pocket of the assessee. From the above enunciation of law by the Hon'ble Summit Court, there remains no doubt whatsoever that the term 'expenditure' in certain circumstances can also encompass 'loss' even though no amount is actually paid out. Ex consequent, the alternative argument of the Ld. DR that discount on shares is 'loss' and hence can't be covered under section 37(1), also does not hold water in the light of the above judgement. In view of the above discussion, we, with utmost respect, are unable to concur with the view taken in Ranbaxy Laboratories Ltd (supra).....* ***9.3.2*** *It is a trite law and there can be no quarrel over the settled legal position that deduction is permissible in respect of an ascertained liability and not a contingent liability. Section 31 of the Indian Contract Act, 1872 defines "contingent contract" as "a contract to do or not to do something, if some event, collateral to such contract does not happen". We need to determine as to whether the liability arising on the assessee - company for issuing shares at a discounted premium*

*can be characterized as a contingent liability in the light of the definition of contingent contract... **9.3.3** The Hon'ble Supreme Court in Bharat Earth Movers vs CIT (2000) 245 ITR 428 / 112 Taxman 61 dealt with the deductibility or otherwise of provision for liability towards encashment of earned leave.... With this legislative amendment, the application of the ratio decidendi in the case of Bharat Earth Movers (supra) to the provision for leave encashment has been nullified. However, the principle laid down in the said judgement is absolutely intact that a liability definitely incurred by an assessee is deductible notwithstanding the fact that its quantification may take place in a later year. The mere fact that the quantification is not precisely possible at the time of incurring the liability would not make an ascertained liability a contingent... **9.3.5** When we consider the facts of the present case in the backdrop of the ratio laid down by the Hon'ble Supreme Court in Bharat Earth Movers (supra) and Rotork Controls India (P) Ltd (supra), it becomes vivid that the mandate of these cases is applicable with full force to the deductibility of the discount on incurring of liability on the rendition of service by the employees. The factum of the employees becoming entitled to exercise options at the end of the vesting period and it is only then that the actual amount of discount would be determined, is akin to the quantification of the precise liability taking place at a future date, thereby not disturbing the otherwise liability which stood incurred at the end of each year on availing the services..."*

5.1c Further, it is observed that the appellant's contention regarding deductibility of the compensation in ESOP supports itself on the fact that this loss is actually for the employees - providing a part of the wealth to the employees in order to motivate them to harness their potential in increasing the growth and thereby profits of the appellant. Hence, its contention that the loss can also be looked at as employees' welfare and thereby allowable under the Act u/s 37(1) appears plausible. Also plausible is the argument taken by the appellant's AR in submitting that there is no increase in the number of shares or in the paid up capital of the appellant in the present case but loss taken in its accounts - difference between the market price of the share and its issue price i.e. fixed by the appellant on the effective date of the ESOP scheme. It is observed that the appellant has relied on the Tribunal's decision in Biocon Ltd vs. Dy. CIT (LTU) [2013] 35 taxmann.com 335 (ITAT Bang)(SB). This decision has 'over ruled' that of ITAT (Del) in Ranbaxy Laboratories Ltd, vs. Addl. CIT (2010) (39 SOT 17). Also, both the jurisdictional High Court in CIT vs. Lemon Tree Hotels Ltd. (2015) ITA No.107/2015 and ITAT Delhi in Bharti Airtel Ltd. vs. Addl. CIT (2014) (43 taxmann.com 50) have ruled that such compensation is deductible as a revenue expenditure. In fact, the Hon'ble HC has relied on the decision of the

Madras HC in PVP Ventures (supra) while the ITAT Delhi has relied on the decision of the ITAT Bangalore (SB) in Biocon (supra).

5.1d Accordingly, in due deference to the decisions of the jurisdictional HC and the ITAT (Bang)(SB) and ITAT Delhi following the decision of the SB of ITAT Bangalore as well as the judicial precedents relied upon by the appellant I am in agreement with the appellant's contention that the compensation on account of the "loss" on ESOP is an expenditure eligible for deduction u/s 37(1) of the Act, being revenue in nature on the strength of the argument that it represents "employee cost" and cannot be considered as a capital loss as held in the impugned order. Hence, the disallowance of the appellant's claim of deduction towards ESOS compensation (Rs.7,51,29,706/-) made in the impugned order is deleted. This ground is therefore allowed."

4.4 We find that learned CIT(A) has allowed the appeal of the assessee following the decision of the Special Bench of Tribunal in the case of **Biocon Ltd.** (supra) and other decision of jurisdictional High Court. We do not find any infirmity in the order of the Learned CIT(A) in following binding precedents, and allowing employee stock option compensation as revenue expenditure. The ground of the appeal of the Revenue is, accordingly, dismissed.

5. The ground No.2 of the appeal is related to disallowance of ₹ 69,21,744/- under section 14A read with Rule 8D of Income-Tax Rules, 1962 (in short 'the Rules').

5.1 Brief facts qua the issue in dispute are that the assessee claimed exempted income of ₹ 4,88,16,855/- which included dividend income of ₹ 2,69,42,798/- and profit on redemption of investment of ₹ 2,18,74,057/-. The assessee made *suo motu* disallowance of ₹ 16,22,056/- for earning the above exempted income. Despite being specifically asked by the Assessing Officer, no details of working of *suo motu* disallowance of ₹ 16,22,046/-

was provided by the assessee. Consequently, the Assessing Officer invoking Rule 8D of the Income-tax Rules, 1962 (in short 'the Rules') Rules computed disallowance of ₹ 85,43,800/- as under:

S. No.	***Particulars***		***Amount***
(i)	*Expenditure Directly relating to income which does not form part of total income*		*NIL*
(ii)	*Expenditure incurred by way of Interest (A*B/C)*		
	A= Amount of Interest		
	B= Average Value of Investments	*1708760000*	
	Investment as on 01-04-2010 1117949000		
	Investment as on 31 -03-2011 2299571000		
	C= Average of Total Assets		
	Total Assets as on 01-04-2010		
	Total Assets as on 31-03-2011		
	*A * B/C subject to Maximum of A*		
(iii)	*One half % of Average value of Investment income from which does not form part of total Income.*		
	Average Value of Investments	*1708760000*	
	One half % of Average value of Investment.		*8543800*
	TOTAL DISALLOWANCE AS PER RULE 8D		***85,43,800***

5.2 The Assessing Officer made net disallowance of ₹ 69,21,744/- after reducing the sum of ₹ 16,22,056, which was disallowed *suo motu* by the assessee. On further appeal, the Ld. CIT(A) deleted the disallowance observing as under:

"5.2c It can therefore be safely inferred from the impugned order that the satisfaction of the AO for disallowance of expenses, in view of the presumed tax-exempt dividend income , u/s 14A of the Act is drawn from the fact that the appellant suo motu made a disallowance of Rs. 16,22,056/- but as per the impugned order, no explanation/working of the disallowance 14A was provided by the appellant. The disallowance was worked out based on available information. However, it is observed that the average of the entire investment was working out the disallowance as per the extant Rule 8D(2)(iii) instead of what is stipulated-"...average of the value of investment, income from which does not or shall not form part of the total income..." From the audited accounts, this is discernible - income from growth funds is taxable and forms a part of the total income. Hence investment in such funds are to be excluded 3 working out the disallowance under Rule 8D(2)(iii). In fact, the AR's version of the facts is borne out from records. Also, investment in subsidiary where the object of such investment is no: dividend but controlling stake is also excluded while working out the disallowance under Rule 8D(2)(iii). Accordingly, in view of the extant law on the subject, presently settled by judicial precedents from the courts including the jurisdictional High Court (Delhi HC) –

- *Maxopp Investment Ltd vs. CIT (A Y 2002-03) IT A no. 687/2009 (Del)*
- *Cheminvest Ltd. vs. CIT (AY 2004-05) (2015) 61 taxmann.com 118 (Del) [the ITAT decision mentioned in the impugned order stands overruled by this decision]*
- *CIT vs. Holcim India Pvt. Ltd. ITA No. 486/2014 and 299/2014 (Del)*
- *CIT vs. Taikisha Engineering India Ltd (2014) ITA 115/2014 & 119/2014 (Del)*
- *DCM Ltd. vs. DCIT and Vice-Versa (2015) 9 TM11110 (ITAT, Delhi)*
- *Joint Investments Pvt. Ltd. vs. CIT 372ITR 694 (Del)*
- *CIT vs. Hero Cycles Ltd.[2010] 189 taxmann 50 (P&H)*
- *ACB India Ltd. vs. ACIT (2015) 62 taxmann.com 71 (Del)*
- *DLF Ltd vs Addl. CIT ITA No. 2677/Del/2011(2016) (ITAT Delhi)*

and in due deference to the aforementioned court decisions, I am inclined to agree with the contention of the appellant in this regard and delete the disallowance (Rs.69,21,744/-) made u/s 14A of the Act in the impugned order."

5.3 We find that the Ld. CIT(A) has deleted the disallowance mainly on the ground that investment from growth fund is

taxable, and therefore, said investment should be excluded while working out the disallowance under Rule 8D(2)(iii) of the Rules. Also directed not to consider investment in subsidiary, which according to the Ld. CIT(A), was for controlling stake. We find that in view of the recent decision of the Hon'ble Supreme Court in the case of **Maxxop Investment Ltd Vs. CIT, CIVIL APPEAL NOS. 104-109 OF 2015 & Ors. (Order dated 12th February, 2018)** strategic investment for obtaining controlling stake has also been found liable for computing disallowance under Rule 8D(2)(iii) of the Rules and therefore to this extent, the order of the Ld. CIT(A) is set aside and matter restored back to the learned Assessing Office for re-computing the disallowance under Rule 8D(2)(iii) of the Rules. The Assessing Officer is also directed to verify whether income from growth funds has been included under taxable income and if so, then he shall exclude the said investment for computing disallowance in terms of Rule 8d(2)(iii) of Rules. The ground of the appeal of the Revenue is accordingly allowed partly for the statistical purposes.

ITA No.5707/Del/2017 & C.O.No.8/Del/2018 for AY:2012-13

6. Now, we take up the appeal of Revenue for assessment year 2012-13 as well as the Cross Objection filed by the assessee. The grounds of the appeal for assessment year 2012-13 and cross objections by the assessee are reproduced as under:

Grounds raised by the Revenue:

1. *On the facts and circumstances of the case, the Ld. CIT(A) has erred in deleting the disallowance of Employee Stock Option Scheme Compensation, amounting to Rs.12,91,99,000/-.*

2. *On the facts and circumstances of the case, the Ld. CIT(A) has erred in deleting the disallowance u/s 14A r.w. Rule 8D, amounting to Rs.1,00,53,608/-.*
3. *The appellant craves leave for reserving the right to amend, modify, add or forego any ground(s) of appeal at any time before or during the hearing of the appeal.*

Cross Objections raised by the assessee:

1. *That the Ld. CIT(A) erred on facts and in law, in upholding disallowance under section 14A read with rule 8D of the Act in respect to investments in Indian subsidiaries.*

The Appellant prays for leave to add, alter, vary, omit, substitute or amend the above grounds of cross objections at any time before or at the time of hearing of the appeal.

7. We find that ground No.1 of the appeal of the Revenue in the year under consideration is identical to ground No.1 of the appeal of the Revenue for assessment year 2011-12, and therefore following our finding in assessment year 2011-12, the ground No.1 of appeal of the Revenue for assessment year 2012-13 is dismissed.

8. The ground No. 2 of the appeal and cross objection relate to disallowance under section 14A of the Act read with Rule 8D of Rules.

8.1 Brief facts qua the issue-in-dispute for the year under consideration are the assessee claimed exempted income of ₹ 2,10,87,429/- and against which disallowed sum of ₹ 15,47,540/- for earning the said exempted income. In the year under consideration also, no details of *suo motu* disallowance was provided by the assessee and, therefore, the Assessing Officer

invoking Rule 8D of Rules made disallowance of ₹ 1,16,01,148/- computation of which is reproduced as under :

S. No.	***Particulars***		***Amounts***
(i)	*Expenditure Directly relating to Income which does not form part of total income*		*NIL*
(ii)	*Expenditure incurred by way of Interest (A*B/C)*		
	A= Amount of Interest		
	B= Average Value of Investments	*232,02,29,500*	
	Investment as on 01-04-2011 2299571000		
	Investment as on 31-03-2012 2340888000		
	C= Average of Total Assets		
	Total Assets as on 01-04-2010		
	Total Assets as on 31-03-2011		
	*A * B/C subject to Maximum of A*		
(iii)	*One half % of Average value of Investment income from which does not form part of total Income.*		
	Average Value of Investments	*232,02,29,500*	
	One half % of Average value of Investment.		*1,16,01,148*
	TOTAL DISALLOWANCE AS PER RULE 8D		***1,16,01,148***

8.2 The finding of the Ld. CIT(A) on the issue in dispute is reproduced as under:

> *"5.2b In the impugned order it is mentioned, inter alia, "….During the year under consideration, the assessee company has claimed exempted income of Rs.2,10,87,429/-. The assessee has further disallowed a sum of Rs.15,47,540/- being related to the earning of the exempted income. However, no working has been provided by the assessee to suggest as to how it has reached to such amount of disallowance u/s 14A. Further perusal of profit & loss account and balance sheet reveals that assessee company has made investment in shares/mutual funds at Rs.2,29,95,71,000/- as on 31.03.2011 and Rs. 2,34,08,88,000/- as on 01.04.2012 for the purpose of earning dividend income, long term capital gains and interest income*

which has been claimed and will be claimed exempted and not chargeable to tax under the Income tax Act. During the assessment proceedings, the AR of the assessee proceedings, the AR of the assessee was asked to provide the working of disallowance of Rs.15,47,540/- made suo moto u/s 14A and also asked to explain as to why disallowance u/s 14A should not be made in accordance with Rule 8D. However, nothing has been furnished by the assessee in this regard. Hence the claim of the assessee in this regard is found to be acceptable and the issue is decided on the basis of information available on record...

...There is no rationale furnished by the assessee in deciding the amount disallowed at Rs.15,47,540/-. Further, no separate staff or work station has been deployed/maintained by the assessee towards the investment activities. Further the earning of exempt income is not in the nature of passive activity having no input. In fact in present situation making of investment, maintaining or continuing of Investment and time to exit from Investment are well informed and well coordinated management decision involving not only inputs from various source but also acumen of senior management functionaries. Therefore cost is inbuilt into even so called "passive" investment. There are incidental expenditures of collection, telephone, follow up etc. Therefore expenses in relation to earning of income are embedded in indirect expenses...

... Therefore, the disallowance u/s 14A r.w. Rule 8D is computed at Rs. 1,16,01,148/-. As the assessee has already added back the sum of Rs.15,47,540/- to the total income, the remaining amount of Rs.1,00,53,608/- is hereby disallowed u/s 14A r.w. Rule 8D and added back to the total income of the assessee for the year under consideration..."

5.2c It can therefore be safely be inferred from the impugned order that the satisfaction of the AO for disallowance of expenses, in view of the presumed tax-exempt dividend income, u/s 14A of the Act is drawn from the fact that the appellant suo motu made a disallowance of Rs. 15,47,540/- but as per the impugned order, no explanation / working of the disallowance u/s 14A was provided by the appellant. The disallowance was worked out based on available information. However, it is observed that the average of the entire investment was taken in working out the disallowance as per the extant Rule 8D(2)(iii) instead of what is stipulated - "...average of the value of investment, income from which does not or shall not form part of the total income..." From the audited accounts, this is discernible - income from growth funds is taxable and forms a part of the total income. Hence investment in such funds are to be excluded while working out the disallowance under Rule 8D(2)(iii). In fact, the AR's version of the facts is borne out from records.

Accordingly, in view of the extant law on the subject, presently settled by judicial precedents from the courts including the jurisdictional High Court (Delhi HC) –

- *Maxopp Investment Ltd vs. CIT (A Y 2002-03) ITA no. 687/2009 (Del)*
- *Cheminvest Ltd. vs. CIT (AY 2004-05) (2015) 61 taxmann.com 118 (Del) [the ITAT decision mentioned in the impugned order stands overruled by this decision]*
- *CIT vs. Holcim India Pvt. Ltd. ITA No. 486/2014 and 299/2014 (Del)*
- *CIT vs. Taikisha Engineering India Ltd (2014) ITA 115/2014 & 119/2014 (Del)*
- *DCM Ltd. vs. DCITand Vice-Versa (2015) 9 TM11110 (ITAT Delhi)*
- *Joint Investments Pvt. Ltd. vs. CIT 372ITR 694 (Del)*
- *CIT vs. Hero Cycles Ltd.[2010] 189 taxmann 50 (P&H)*
- *ACB India Ltd. vs. ACIT (2015) 62 taxmann.com 71 (Del)*
- *DLF Ltd vs Add! CIT ITA No. 2677/Del/2011(2016) (ITAT Delhi)*

and in due deference to the aforementioned court decision, I am inclined to agree with the contention of the appellant in this regard and deleted the disallowance (Rs.1,00,53,608/-) made u/s 14A of the Act in the impugned order."

8.3 We have heard submission of Learned Departmental Representative and perused the relevant material on record. In view of the decision of Hon'ble Supreme Court in the case of Maxoop Investment Ltd. (supra), the investment in subsidiaries made for acquiring controlling stake, cannot be excluded for the purpose of the computation of disallowance under Rule 8D and, therefore, we uphold the finding of the Ld. CIT(A) on the issue in dispute and dismiss the cross objection raised by the assessee. As far as claim of income from growth fund, which is claimed by the assessee as taken into consideration for computed total income, has been restored to the file of the Assessing Officer for verification in assessment year 2011-12, and to have consistency

in our finding, the issue-in-dispute in the year under consideration is also restored to the file of the Assessing Officer. The ground of the appeal of the Revenue is accordingly allowed for statistical purposes.

9. In the result, the appeals of the Revenue for assessment year 2011-12 and 2012-13 are allowed partly for statistical purposes and Cross Objection of the assessee for assessment year 2012-13 is dismissed.

Order pronounced in the open court on 14th October, 2021

Sd/-	***Sd/-***
(KULDIP SINGH)	**(O.P. KANT)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 14th October, 2021.
RK/-(DTDC)
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi