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

BEFORE SHRI PRAMOD KUMAR (VICE PRESIDENT) AND
SHRI RAVISH SOOD (JUDICIAL MEMBER)

ITA Nos.7348 & 7349/MUM/2019
(Assessment Years: 2014-15 & 2015-16)

Bachhraj & Company Private Limited, 2nd Floor, Bajaj Bhawan, 226, Nariman Point, Mumbai – 400 021	Vs.	The Assistant Commissioner of Income-tax, Circle 3(1)(1), Room No. 607, Aayakar Bhavan, M.K. Road, Mumbai – 400 020

PAN No. AAACB5589N

(Assessee)	**(Revenue)**

Assessee by : Shri Kirit Kamdar, A.R
Revenue by : Shri KPRR Murty, D.R

Date of Hearing : 04/10/2021
Date of pronouncement : 08/10/2021

ORDER

PER RAVISH SOOD, J.M:

The captioned appeals filed by the assessee company are directed against the respective orders passed by the CIT(A)-8, Mumbai, dated 14.09.2019 and 22.10.2019, which in turn arises from the respective assessment orders passed by the A.O u/s 143(3) of the Income Tax Act, 1961 (for short 'Act'), dated 20.11.2016 and 28.11.2017 for A.Y. 2014-15 and A.Y 2015-16, respectively. As a common issue is involved in the aforementioned appeals, therefore, the same are being taken up and disposed off by way of a consolidated order. We shall first take up the appeal filed by the assessee for A.Y 2014-15. The assessee has assailed the impugned order on the following grounds before us:

"Disallowance under section 14A in respect of expenditure attributable to earning exempt income:

1. On the facts and in the circumstances of the case and in law, the Commissioner of Income-tax (Appeals) erred in upholding the disallowance under section 14A in respect of expenditure attributable to earning of exempt income.
2. On the facts and in the circumstances of the case and in law, the Commissioner of Income-tax (Appeals) erred in upholding the action of the Assessing Officer in invoking the provisions of Rule 8D without recording non-satisfaction with the correctness of the disallowance of Rs.4,59,311/- made by the appellant on a reasonable basis.
3. On the facts and in the circumstances of the case and in law, the Commissioner of Income-tax (Appeals) erred in holding that the appellant cannot challenge the non-recording of satisfaction before making the disallowance as per Rule 8D on the ground that the appellant had itself made a suo-moto disallowance.
4. On the facts and in the circumstances of the case and in law, the Commissioner of Income-tax (Appeals) erred in not appreciating the fact that disallowance under section 14A can be made only in respect of such expenditure which has a direct and proximate nexus with the earning of exempt income.
5. On the facts and in the circumstances of the case and in law, the Commissioner of Income-tax (Appeals) erred in not considering the without prejudice working of disallowance under section 14A of Rs.7,37,630/- submitted during the course of appellate proceedings, which was worked out after analysing each and every head of expenditure debited to the Profit and Loss account.
6. On the facts and in the circumstances of the case and in law, the Commissioner of Income-tax (Appeals) erred in rejecting the contention of the appellant that no expenditure is required to be incurred by the appellant in respect of long-term legacy investments in group companies.
7. On the facts and in the circumstances of the case and in law, the Commissioner of Income-tax (Appeals) erred in upholding the disallowance under section 14A in respect of expenditure attributable to earning of exempt income, computed at 0.5% of the average value of investments, other than the investments which have yielded only taxable income.
8. On the facts and in the circumstances of the case and in law, the Commissioner of Income-tax (Appeals) erred in ignoring the contention of the appellant that investments which have not yielded exempt income during the relevant year ought to be excluded while computing the disallowance as per Rule 8D.
9. On the facts and in the circumstances of the case and in law, the Commissioner of Income-tax (Appeals) erred in ignoring the contention of

the appellant that investments which are capable of yielding taxable income ought to be excluded while computing the disallowance as per Rule 8D.

10. On the facts and in the circumstances of the case and in law, the Commissioner of Income-tax (Appeals) erred in ignoring the contention of the appellant that investments in growth scheme of mutual funds are not capable of yielding exempt income and hence ought to be excluded while computing the disallowance as per Rule 8D.

11. On the facts and in the circumstances of the case and in law, the Commissioner of Income-tax (Appeals) erred in observing that the disallowance under section 14A ought to be made in respect of securities held as stock-in-trade, thereby not appreciating the fact that the appellant does not hold any securities in the nature of stock-in-trade.

Deduction in respect of education cess paid:

12. On the facts and in the circumstances of the case and in law, the Commissioner of Income-tax (Appeals) erred in holding that education cess on income-tax paid during the year is not an allowable expenditure under section 40(a)(ii) of the Act.

13. On the facts and in the circumstances of the case and in law, the appellant prays that the Assessing Officer be directed to grant deduction in respect of education cess on dividend distribution tax paid during the year since the same is not subject to disallowance under section 40(a)(ii) of the Act.

14. On the facts and in the circumstances of the case and in law, the Commissioner of Income-tax (Appeals) erred in relying on the decision of the Hon'ble Bombay High Court in the case of Lubrizol India Ltd. vs. CIT [1991] 54 Taxman 363 (Bombay), which is distinguishable on facts since the said decision deals with allowability of deduction in respect of surtax.

Each of the above grounds of appeal is without prejudice and in the alternative to each other.

The appellant hereby reserves the right to add to, alter or amplify the above grounds of appeal."

2. Briefly stated, the assessee which is a Non-Banking Financial Company (NBFC) registered with the Reserve Bank of India had filed its revised return of income on 30.09.2015, declaring an income of Rs.53,00,37,680/-. Subsequently, the case of the assessee was selected for scrutiny assessment u/s 143(2) of the Act.

3. During the course of the assessment proceedings, it was observed by the A.O that the assessee has earned exempt dividend income of

Rs.20,78,89,468/-, viz. (i) dividend from domestic companies: Rs.22,42,38,854/-; (ii) income from units of mutual funds: Rs.1,47,70,667/-; (iii) income from partnership firm: Rs. 6,41,62,559/-; and (iv) income from tax free bonds: Rs.47,17,388/-. Observing, that the assesse had on an ad-hoc basis offered a suo-motto disallowance u/s 14A of Rs.4,59,311/-, the A.O called upon it to explain as to why the same may not be computed as per the mechanism provided in Rule 8D. In reply, it was submitted by the assessee that though no specific expenditure was incurred by it for earning the exempt income, however, it had on a deemed basis attributed an expenditure of Rs.4,59,311/- for earning of the exempt dividend income, as under:

Particulars	Amount (Rs.)
0.5% of the average value of investment (excluding investment in group companies)	456838
Demat Charges	2473
Total	459311

However, the A.O was not inclined to accept the aforesaid claim of the assessee and worked out the disallowance u/s 14A r.w.s 8D at an amount of Rs.67,90,998/-, as under:

The disallowance u/s 14A/Rule 8D shall be aggregate of the following:				Amt: (Rs.)
1.	Amount of expense directly related to income which does not form part of the total income			Nil
2.	Amount of the interest expenses indirectly attributable to such income, in accordance with the formula AxB/C, where			Nil
		Average of such investment on the first and last day of previous year		
		786800298 + 1929598875 / 2	=1358199587	
3	0.5 % of the average investments of Rs.1358199587/-			6790998
		Total disallowance u/s 14A		6790998

As the assessee has already offered a suo-motto disallowance of Rs. 4,59,311/- u/s 14A, therefore, the A.O restricted the further addition/disallowance to an amount of Rs.63,31,687/-. Accordingly, vide

his order passed u/s 143(3), dated 30.11.2016 the A.O determined the income of the assessee company at Rs. 53,63,69,370/-.

4. Aggrieved, the assessee carried the matter in appeal before the CIT(A). Before the CIT(A) the assessee assailed the disallowance that was computed by the A.O u/s 14A r.w Rule 8D. Although the CIT(A) principally upheld the disallowance made by the A.O u/s 14A of the Act, however, he directed the A.O to exclude the investments that had yielded taxable income while computing the disallowance u/s 14A of the Act. Also, the assessee had sought deduction of "education cess" on income tax paid during the year. However, the CIT(A) holding a conviction that as income tax was not allowable u/s 40(a)(ii) of the Act, therefore, on the same footing education cess was also not to be allowed as a deduction. Backed by his aforesaid observations the CIT(A) partly allowed the appeal.

5. The assessee being aggrieved with the order of the CIT(A) has carried the matter in appeal before us. It was submitted by the ld. Authorized Representative (for short 'A.R') for the assessee that the A.O without recording any satisfaction that as to why the assessee's claim of disallowance u/s 14A of Rs.4,59,311/- was not to be accepted, had invalidly assumed jurisdiction and worked out the disallowance u/s 14A r.w. Rule 8D of Rs.67,90,998/-. In order to buttress his claim that the A.O before taking recourse to and computing the disallowance as per the mechanism provided in Rule 8D of the Income Tax Rules, 1962 remains under a statutory obligation to record his dissatisfaction as regards the disallowance offered by an assessee u/s 14A of the Act, the ld. A.R had relied on the certain orders of the coordinate benches of the Tribunal, viz. (i) Bajaj Holdings & Investments Limited Vs. ACIT, LTU, Mumbai, ITA

No. 4077 &4078/Mum/2016, dated 02.08.2011 (ITAT Mumbai); and (ii) Anshul Specialty Molecules Pvt. Ltd. Vs. DCIT, CC-6(3), Mumbai, ITA No. 6803/Mum/2016, dated 26.12.2018. Also support was drawn from the judgment of the Hon'ble High Court of Delhi in the case of PCIT-6 Vs. Nalwa Sons Investments Ltd., ITA No. 1142/Mum/2018, dated 26.03.2019 and that of the Hon'ble High Court of Punjab & Haryana in the case of CIT–1, Ludhiana Vs. Abhishek Industries Ltd. (2016) 380 ITR 652 (P&H). Backed by his aforesaid contentions, it was submitted by the ld. A.R that as the A.O had invalidly assumed jurisdiction and substituted the disallowance that was suo-motto offered by the assessee u/s 14A of the Act by that computed by him by triggering the mechanism provided in Rule 8D, therefore, the same was to be struck down on the said count itself. Also, the ld. A.R assailed the order of the CIT(A), on the ground, that he had erred in concluding that "education cess" on Income-tax paid during the year was not allowable as an expenditure u/s 40(a)(ii) of the Act. In support of his aforesaid contention the ld. A.R had relied on the judgment 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).

6. We have heard the ld. Authorized Representatives for both the parties, perused the orders of the lower authorities and the material available on record, as well as considered the judicial pronouncements that have been pressed into service by the ld. A.R to drive home his aforesaid claims. Our indulgence in the present appeal has been sought by the assessee, for adjudicating two issues, viz. (i) that as to whether or not the A.O had validly assumed jurisdiction for dislodging the disallowance that was on a suo-motto basis offered by the assessee u/s 14A of the Act and therein substituting the same by that as was

computed by him by triggering the mechanism provided in Rule 8D. ; and (ii). that as to whether or not the CIT(A) is right in law and facts of the case in concluding that the "education cess" is not allowable as a deduction u/s 40(a)(ii) of the Act.

7. Before adverting to the issue in question i.e as to whether or not the A.O had rightly assumed jurisdiction and dislodged the assessee's claim that no expenditure could be attributed for earning of the exempt dividend income, we think it apt to first cull out the position of law as regards the same. The **Hon'ble Supreme Court** in the case of **Godrej & Boyce Manufacturing Company Ltd. Vs. DCIT & Anr. (2017) 394 ITR 449 (SC)** had, inter alia, held, that the A.O is obligated to mention the reasons while concluding that the claim of the assessee that no expenditure was incurred to earn the exempt dividend income was not to be accepted. It was observed by the Hon'ble Apex court that sub-section (2) and (3) of Sec. 14A of the Act r.w Rule 8D merely prescribe a formula for determination of expenditure incurred in relation to income which does not form part of the total income under the Act in a situation where the assessing officer is not satisfied with the claim of the assessee. It was further observed, that where such determination is to be made on application of the formula prescribed under Rule 8D or in the best judgment of the A.O, what the law postulates is the requirement of a satisfaction in the A.O that having regard to the accounts of the assessee, as placed before him, it is not possible to generate the requisite satisfaction with regard to the correctness of the claim of the assessee. Backed by its aforesaid observations the Hon'ble Court had concluded that it was only after recording the requisite satisfaction that the provisions of Sec. 14A(2) and (3) r.w Rule 8D of the Rules or a best judgment determination, as earlier prevailing, would become applicable.

The Hon'ble Apex Court while concluding as hereinabove had held as under:

> "37. We do not see how in the aforesaid fact situation a different view could have been taken for the Assessment Year 2002-2003. Sub-sections (2) and (3) of Section 14A of the Act read with Rule 8D of the Rules merely prescribe a formula for determination of expenditure incurred in relation to income which does not form part of the total income under the Act in a situation where the Assessing Officer is not satisfied with the claim of the assessee. Whether such determination is to be made on application of the formula prescribed under Rule 8D or in the best judgment of the Assessing Officer, what the law postulates is the requirement of a satisfaction in the Assessing Officer that having regard to the accounts of the assessee, as placed before him, it is not possible to generate the requisite satisfaction with regard to the correctness of the claim of the assessee. It is only thereafter that the provisions of Section 14A(2) and (3) read with Rule 8D of the Rules or a best judgment determination, as earlier prevailing, would become applicable.
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> **38. In the present case, we do not find any mention of the reasons which had prevailed upon the Assessing Officer, while dealing with the Assessment Year 2002-2003, to hold that the claims of the Assessee <u>that no expenditure was incurred to earn the dividend income cannot be accepted</u> and why the orders of the Tribunal for the earlier Assessment Years were not acceptable to the Assessing Officer, particularly, in the absence of any new fact or change of circumstances.** Neither any basis has been disclosed establishing a reasonable nexus between the expenditure disallowed and the dividend income received. That any part of the borrowings of the assessee had been diverted to earn tax free income despite the availability of surplus or interest free funds available (Rs. 270.51 crores as on 1.4.2001 and Rs. 280.64 crores as on 31.3.2002) remains unproved by any material whatsoever. While It is true that the principle of *res judicata* would not apply to assessment proceedings under the Act, the need for consistency and certainty and existence of strong and compelling reasons for a departure from a settled position has to be spelt out which conspicuously is absent in the present case."

Also, the aforesaid view was once again reiterated by the Hon'ble Apex Court in the case of **Maxopp Investment Ltd. Vs. CIT (2018) 402 ITR 640 (SC)**. In its aforesaid order, it was, inter alia, observed by the Hon'ble Court that before taking recourse to the theory of apportionment and computing the disallowance under Sec. 14A(2) r.w. Rule 8D the A.O remains under a statutory obligation to record his satisfaction that the suo-motto disallowance offered by the assessee under Sec. 14A was not

correct. The Hon'ble Apex Court while concluding as hereinabove had observed as under:

> "41. Having regard to the language of Section 14A(2) of the Act, read with Rule 8D of the Rules, we also make it clear that before applying the theory of apportionment, the AO needs to record satisfaction that having regard to the kind of the assessee, *suo moto* disallowance under Section 14A was not correct. It will be in those cases where the assessee in his return has himself apportioned but the AO was not accepting the said apportionment. In that eventuality, it will have to record its satisfaction to this effect. Further, while recording such a satisfaction, nature of loan taken by the assessee for purchasing the shares/making the investment in shares is to be examined by the AO."

As regards the nature of satisfaction that is required to be recorded by the A.O before taking recourse to the mechanism provided in Rule 8D of Income Tax Rules, 1962 for computing the disallowance u/s 14A of the Act, we find that the **Hon'ble High Court of Bombay** in its recent order in the case of **CIT Vs. Sociedade De Fomento Industrial Pvt. Ltd. (2020) 429 ITR 358 (Bom)**, had observed, that the A.O must give a clear finding with reference to the assessee's accounts as to how the other expenditure claimed by it in respect of its non-exempt income is related to its exempt income. It was observed by the Hon'ble High Court that the onus was on the revenue to establish that there is a proximate relationship between the expenditure and the exempt income. It was therein observed that the application of Sec. 14A and Rule 8D is not automatic in each and every case where there is income not forming part of the assessee's total income. Also, it was categorically observed by the Hon'ble High Court that the A.O is obligated to give a clear finding as to how the expenditure incurred by the assessee during the relevant year related to the income not forming part of its total income and, the same cannot be justified merely on the basis of surmises or conjectures. The observations of the Hon'ble High Court qua the aforesaid issue for the sake of clarity are being reproduced as under:

"11. As the record reveals, the Assessee received dividend income of Rs.13,85,03,376/-. It was exempted under the IT Act. The Assessee claimed that he did not incur any expenditure to earn that dividend. It is said to have invested surplus funds through the bankers and other financial institutions. The mutual fund officials used to come to the Assessee's doorstep to fill up the forms and to do all other things necessary in that regard. The Assessee only issued the cheques. The AO disagreed. He reckoned that without devoting time and without analysing the nature of the investment, the Assessee could not have invested in the mutual funds. The AO took the view that section 14A clearly applied to the Assessee's case. The AO accordingly invoked Rule 8D and computed the disallowance at 0.5% of Rs. 381,67,09,7317-, the average investment. Then, he disallowed Rs.1,90,83,548/-. The Assessee appealed to the CIT(A). Indeed, the appellate authority confirmed the AO's disallowance. Of course, the Tribunal reversed it. Let us see whether the Tribunal's view is sustainable.

12. Section 14A, inserted by the Finance Act 2001 with retrospective effect from 1 April 1962, aims to disallow expenditure incurred in relation to income which did not form part of the total income under the IT Act. This section has to be read with Rule 8D, which provides the method of calculation of disallowance. Section 14A statutorily recognises the principle that tax is leviable only on the net income. That is, the profits and gains of business or profession are taxed after deducting expenditure from income In that regard, there is no need for the Assessee to establish a one-to-one correlation between income and expenditure. The provision reads:

Section 14A. Expenditure incurred in relation to income not includible in total income.—

(1) For the purposes of computing the total income under this Chapter, no deduction shall be allowed in respect of expenditure incurred by the assessee in relation to income which does not form part of the total income under this Act.

(2) The Assessing Officer shall determine the amount of expenditure incurred in relation to such income which does not form part of the total income under this Act, in accordance with such method as may be prescribed, if the Assessing Officer, having regard to the accounts of the assessee, is not satisfied with the correctness of the claim of the assessee in respect of such expenditure in relation to income which does not form part of the total income under this Act.

(3) The provisions of sub-section (2) shall also apply in relation to a case where an assessee claims that no expenditure has been incurred by him in relation to income which does not form part of the total income under this Act:

Provided that nothing contained in this section shall empower the Assessing Officer either to reassess under section 147 or pass an order enhancing the assessment or reducing a refund already made or

otherwise increasing the liability of the assessee under section 154, for any assessment year beginning on or before the 1st day of April, 2001.

13. Rule 8D of the Income Tax Rules provides the methods for determining the amount of expenditure in relation to income not includible in the total income. But this Rule comes into play once an expenditure falls within the mischief of section 14A of the IT Act. We need not elaborate on that Rule.

14. In Kanga & Palkhiwala: Law & Practice of Income Tax, (Lexis Nexis, New Delhi, 11 ed. Online edition), the learned revising author Arvind P. Datar has an interesting word about this 'inequitable and unfair[1] provision. According to Kanga & Palkhiwala, on a cursory reading, section 14A seeks to prevent a deduction that may result when income does not form part of the taxable income. But the expenditure incurred to earn that income is allowable as a deduction. However, this section and Rule 8D have been amended several times. Those amendments have resulted in highly unfair consequences for Assessees who earn dividend income. The object of exempting dividend income under section 10(34) and income from mutual funds under section 10(33) was to encourage investments in shares and promote savings.

15. Dividends are not taxed in the hands of the shareholder, but it would be incorrect and anomalous, according to the revising author, to state that dividends are a category of income which does not suffer any tax. The object of section 14A is to disallow expenditure on income which has not suffered tax. That said, under section 115-O, the dividend is taxed at the time of distribution at the prescribed rate. That means, tax is paid by the company irrespective of whether an Assessee has income below the taxable limit. Had the dividend been paid directly to him, it would not have suffered tax. There is no provision to file any form seeking an exemption or to claim a refund of the dividend distribution tax for such Assessees. So, to disallow the expenditure in the case of dividend is not correct, Ibid.

16. Section 14A refers to 'income which does not form part of total income under the Act'; it Joes not refer to 'income which does not form part of the total income in the hands of the sssessee[1]. Then, Kanga & Palkhiwala takes note of the latest amendment under the Finance Act, 2020: that dividend distribution tax has been deleted, As long as the income is taxed, it should not attract section 14A, opines Kanga & Palkhiwala.

17. Recently, this Bench disposed of a batch of Tax Appeals in CIT, Goa v. M/s. Sociedade De Fomento Industrial Pvt. Ltd, (High Court of Bombay, at Goa**,** Judgment, dated 22 Dctober 2020). One of the substantial questions of law there was identical to the one before us. Rejecting the Revenue's contention, this Court has noted that the respondent invested certain funds in exempted categories such as mutual funds; it earned income. During the assessment year, income from such sources stood exempted under section 10(35) of the IT Act. The only issue was whether the respondent incurred any expenditure while earning that exempted

income and whether it included that expenditure in the common indirect expenditure of its own. First, the appellant noted, rather guessed, that the respondent borrowed funds to invest and that there ought to be an interest element. But the respondent asserted that it utilised its surplus funds. This Court, then, found that there was no material for the appellant to conclude that the respondent borrowed the funds. Second, given the volume of investment, the respondent is said to have received charge-free services from the managers of the banks and other financial institutions with whom they have invested. So there is said to be no expenditure.

18. This Court rejected the appellant's contentions and affirmed the Tribunal's findings. Here, too, we face an identical problem, similar assertions and counter assertions, and the same result: the Tribunal reversed CIT(A)'s findings. Can our response be different here?

19. Here, on facts, the Tribunal noted that the AO only discussed the provisions of section 14A(I) but has not justified how the expenditure the Assessee incurred during the relevant year related to the income not forming part of its total income. The AO, according to the Tribunal, straightaway applied Rule 8D. Indeed, there must be a proximate relationship between the expenditure and the tax-exempt income. Only then would a disallowance have to be effected. This Court, we may note, on more than one occasion, has held that the onus is on the Revenue to establish that there is a proximate relationship between the expenditure and the exempt income. That is, the application of section I4A and rule 8D is not automatic in each and every case, where there is income not forming part of the total income. No doubt, the expenditure under section 14A includes both direct and indirect expenditure, but that expenditure must have a proximate relationship with the exempted income. Surmise or conjecture is no answer.

20. We may further reiterate that before rejecting the disallowance computed by the Assessee, the Assessing Officer must give a clear finding with reference to the Assessee's accounts as to how the other expenditure claimed by the Assessee out of the non-exempt income is related to the exempt income.

21. So, we see no valid reasons to upset the Tribunal's well- reasoned judgment on this substantial question of law."

In the backdrop of the aforesaid position of law, we are of the considered view, that the issue that an A.O before taking recourse to the provisions of Sec. 14A(2) and (3) r.w Rule 8D of the Income Tax Rules 1962, is statutorily obligated to give a clear finding with reference to the assessee's accounts as to how the expenditure claimed by the assessee in respect of its non-exempt income were related to the exempt income; is

no more res-integra pursuant to the aforesaid judgments of the Hon'ble Apex Court.

8. On a perusal of the assessment order, we find, that as stated by the ld. A.R, and rightly so, the A.O while dislodging the suo moto disallowance that was offered by the assessee u/s 14A in its return of income had failed to record his satisfaction that having regard to the accounts of the assessee, as placed before him, it was not possible to generate the requisite satisfaction with regard to the correctness of the claim of the assessee. As is discernible from the assessment order, the A.O had primarily focused on the fact that the legislature in order to plug claim of any expenditure incurred by an assessee in relation to an income which does not form part of its total income under the Act had made available Sec. 14A on the statute with retrospective effect from 01.04.1982. Backed by his aforesaid observations, we are of a strong conviction that the A.O instead of recording his dissatisfaction as regards the suo-motto disallowance that was offered by the assessee in its return of income a/w the reasons as to why the said claim of the assessee having regard to its accounts, as were placed before him, was not to be accepted, was more carried away by the fact that the legislature had in Rule 8D provided a mechanism for computing the disallowance u/s 14A of the Act. On a careful perusal of the assessment order, we find that the A.O had though observed that he was not satisfied with the correctness of the claim of the assessee that no expenditure was incurred in relation to the income which did not form part of its total income, however, he except for making general observations in context of the expenditure claimed by the assessee, viz. general administrative expenses, legal fees, employee salary, general expenses etc. had before rejecting the disallowance that was offered by the assessee on a suo-motto deemed

basis, failed to give a clear finding with reference to the assessee's accounts as to how the other expenditure that were claimed by the assessee in respect of its non-exempt income was related to its exempt income. In our considered view, the failure on the part of the A.O to record his satisfaction that having regard to the accounts of the assessee, as placed before him, it was not possible to generate the requisite satisfaction with regard to the correctness of the claim of the assessee, therein, divests him of the jurisdiction for dislodging the claim of the assessee and substituting the same by an amount arrived at by triggering the mechanism provided in Rule 8D. Accordingly, backed by our aforesaid observations, we are unable to persuade ourselves to subscribe to the view taken by the CIT(A) who had upheld the disallowance made by the A.O u/s 14A of the Act. We, thus, set-aside the order of the CIT(A) and vacate the additional disallowance of the Rs. 63,31,687/- made by the A.O u/s 14A of the Act. The **Grounds of appeal Nos. 1 to 11** are allowed in terms of our aforesaid observations.

9. We shall now advert to the claim of the assessee that the CIT(A) had erred in concluding that "education cess" on Income tax paid during the year was not an allowable expenditure u/s 40(a)(ii) of the Act. It was submitted by the ld. A.R that the aforesaid issue was squarely covered by the recent judgment 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). The ld. A.R submitted that the Hon'ble High Court in its said judgment had observed, that if the legislature intended to prohibit the deduction of amounts paid by an assessee towards "Education Cess" or any other "Cess" and Higher and Secondary Education Cess, then, the legislature could have easily included reference to "cess" in clause (ii) of Sec. 40(a). It was further submitted by the ld. A.R that the High Court

had observed, that as the legislature had not included "education cess" or any other "cess" in clause (ii) of Sec. 40(a), therefore, it would mean that there was no prohibition in claiming deduction of the said amounts while computing the income of the assessee under the head "Profits and gains of business or profession". Per contra, the ld. D.R failed to rebut the claim of the assessee's counsel that the aforesaid issue was squarely covered by the judgment of the Hon'ble High Court of Bombay in the case of Sesa Goa Limited (supra).

10. It is the claim of the Ld. A.R before us 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 as stated by the ld. A.R, and rightly so, the aforesaid 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:

> "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 deductable 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 deductable 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."

As the issue in hand in the present appeal of the assessee is squarely covered by the aforesaid judgment of the Hon'ble Jurisdictional High Court, therefore, we respectfully follow the same and conclude that

"Education Cess" is not disallowable as a deduction u/s 40(a)(ii) of the Act. We, thus, direct the A.O that the "education cess" paid by the assessee during the year be allowed as a deduction under Sec. 40(a)(ii) of the Act. The **Grounds of appeal No. 12 to 14** are allowed in terms of our aforesaid observations.

11. The appeal of the assessee company is allowed in terms of our aforesaid observations.

ITA No.7349/Mum/2019
A.Y.2015-16

12. As the facts and the issues involved in the present appeal remains the same as were there before us in the appeal of the assessee for A.Y 2014-15 in ITA No.7348/Mum/2019, therefore, our order therein passed shall apply *mutatis mutandis* for the purpose of disposal of the present appeal of the assessee for A.Y. 2015-16 in ITA No 4739/Mum/2019. Accordingly, the appeal filed by the assessee is allowed on the same terms.

13. Resultantly, both the appeals filed by the assessee i.e for A.Y.2014-15 in ITA No. 7348/Mum/2019 and for A.Y. 2015-16 in ITA No. 7349/Mum/2019 are allowed in terms of our aforesaid observations.

Order pronounced in the open court on 08.10.2021

Sd/-	Sd/-
(Pramod Kumar)	(Ravish Sood)
VICE PRESIDENT	JUDICIAL MEMBER

Mumbai;
Dated: 08.10.2021
PS: Rohit

Copy of the Order forwarded to :

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

BY ORDER,
//True Copy//

(Sr. Private Secretary)
ITAT, Mumbai