आयकर अपीलीय अधिकरण 'सी' न्यायपीठ चेन्नई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH, CHENNAI

माननीय श्री वी. दुर्गा राव, न्यायिक सदस्य एवं
माननीय श्री मनोज कुमार अग्रवाल ,लेखा सदस्य के समक्ष।
BEFORE HON'BLE SHRI V. DURGA RAO, JUDICIAL MEMBER AND
HON'BLE SHRI MANOJ KUMAR AGGARWAL, AM

आयकरअपीलसं./ **ITA Nos.1059 to 1063/Chny/2016 &**
ITA Nos.947 & 1846/Chny/2017
(निर्धारणवर्ष / Assessment Years: 2008-09 to 2014-15)

M/s.J.K.Fenner (India) Limited (Formerly known as M/s Fenner (India) Ltd.) No.3, Madurai-Melakkal Road, Kochadai, Madurai-625 016.	**बनाम**/ Vs.	The JCIT /The ACIT, Corporate Range-1/ Corporate Circle-1, Madurai.
स्थायीलेखासं./जीआइआरसं./**PAN/GIR No. AAACJ-7230-N**		
(अपीलार्थी**/Appellant**)	:	(प्रत्यर्थी / **Respondent**)

&

आयकरअपीलसं./ **ITA Nos.1076 to 1078, 1272/Chny/2016 &**
ITA Nos.967 & 1883/Chny/2017

(निर्धारणवर्ष / Assessment Years: 2008-09 to 2010-11, 2012-13 to 2014-15)

ACIT Corporate Circle-1 Madurai.	**बनाम**/ Vs.	**M/s.J.K.Fenner (India) Limited** (Formerly known as M/s Fenner (India) Ltd.) No.3, Madurai-Melakkal Road, Kochadai, Madurai-625 016.
स्थायीलेखासं./जीआइआरसं./**PAN/GIR No. AAACJ-7230-N**		
(अपीलार्थी**/Appellant**)	:	(प्रत्यर्थी / **Respondent**)

अपीलार्थीकीओरसे/ **Appellant by**	:	Shri R. Vijayaraghavan (Advocate) – Ld. AR
प्रत्यर्थीकीओरसे/**Respondent by**	:	Shri M. Murali, Ld. CIT-DR
सुनवाईकीतारीख/ **Date of Hearing**	:	09-12-2021
घोषणाकीतारीख / **Date of Pronouncement**	:	21-01-2022

आदेश / O R D E R

Per Bench

1. The assessee is in further appeal before us for AYs 2008-09 to 2014-15 whereas the revenue is in further appeal before us for AYs 2008-09 to 2010-11 & 2012-13 to 2014-15. These appeals arise out of separate orders of learned first appellate authority. However, the facts as well as issues are common and it is admitted position that adjudication in any one year shall equally apply to the other years also. All these appeals emanates from separate orders of learned Commissioner of Income Tax (Appeals)-1, Madurai.

2. It could be observed that these appeals were disposed-off by Tribunal as group matter vide common order dated 12.03.2018 which was challenged by assessee as well as revenue before Hon'ble High Court of Madras vide TCA Nos.785 of 2018&ors. wherein these appeals were disposed-off by Hon'ble Court vide order dated 11.12.2018. Before Hon'ble Court, the subject matter of revenue's appeal was disallowance u/s 14A and adjustment of unabsorbed depreciation of earlier years beyond eight Assessment Years. Ground No.1 relating to nature of expenditure to set up new unit was decided against the revenue. The subject matter of assessee's appeal was disallowance u/s 14A.

3. The issue of unabsorbed depreciation as raised in revenue's appealwas remitted back by Hon'ble Court to Tribunal with following observations: -

> 6. The second substantial question of law raised by the Revenue is regarding unabsorbed depreciation for the previous years.
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> 7. The Revenue contends before us that the eight years limitation in respect of carry forward of the depreciation had expired and therefore, the assessee was not permitted to carry forward. This order was reversed by the CIT(A) on an erroneous ground, which was

confirmed by the Tribunal without considering the fact that Section 32(2) of the Act is a substantive provision and not a procedural one.

8. It is further contended by the Revenue that the finding rendered by the Tribunal is not acceptable, as, in the case of Peerless General Finance and Investment Company Limited Vs. CIT [reported in (2016) 380 ITR 165], the Hon'ble Supreme Court held that the unabsorbed depreciation can be set off only against business income for a period of eight years only.

9. Per contra, the learned counsel for the assessee contends that the provision pertaining to the relevant assessment year should be taken into consideration and therefore, the decision of the jurisdictional High Court has decided in favour of the assessee after taking note of the decision in the case of Peerless General Finance and Investment Company Limited.

10. Before the Tribunal, the assessee referred to the decisions of the High Court of Gujarat in the case of CIT Vs. Gujarat Themis Biosyn Limited [reported in (2014) 105 DTR 72] and in the case of General Motors India (P) Ltd. Vs. DCIT [reported in (2013) 354 ITR 244].

11. The learned Senior Standing Counsel for the Revenue would contend that the decision could not have been arrived at by the Tribunal without reference to the decision of the Hon'ble Apex Court in the case of Peerless General Finance and Investment Company Limited.

12. We have gone through the order passed by the Tribunal and we find that this issue was dealt with by the Tribunal in paragraph 28. The Tribunal held that the issue is squarely covered by the principles laid down by the High Court of Gujarat in the aforementioned decisions. However, the factual aspect has not been gone into nor there is a discussion as to how the Tribunal was satisfied that the decisions of the Gujarat High Court would apply to the assessee's case and that the decision of the jurisdictional High Court would not apply and as to why the decision of the Hon'ble Supreme Court in the case of Peerless General Finance and Investment Company Limited cannot be applied to the facts and circumstances of the case. Therefore, we hold that the Tribunal should have assigned reasons however brief it may be and recorded satisfaction as to how the decisions of the Gujarat High Court would be squarely applicable to the case of the assessee.

13. Therefore, we are of the considered view that this issue relating to unabsorbed depreciation has to be reconsidered by the Tribunal after due opportunity to the Revenue and the assessee to enable them to place all the decisions on this point. Accordingly, the finding rendered by the Tribunal with regard to carry forward of the unabsorbed depreciation relating to the assessment year 1997-98 is set aside and the matters are remanded to the Tribunal for a fresh decision on merits and in accordance with law. Accordingly, substantial question of law No.2 raised by the Revenue is left open.

It is evident that the matter has been remitted back to us for re-adjudication in the light of factual matrix after considering all the applicable decisions including the decision of Hon'ble Supreme Court in **Peerless General Finance and Investment Co. Ltd. V/s CIT (380 ITR 165).**

4. Pursuant to these directions, we have heard the arguments made by both the sides and also considered the various decisions as applicable to the facts of the case. Having heard rival submission and after due consideration of applicable judicial decisions including the orders of lower authorities, our adjudication would be as under.

5. The grounds raised by the revenue for AY 2008-09 read as under: -

> 3.1 The CIT(A) has erred in directing the AO to allow set off of carried forward losses pertaining to Assessment years 1997-98, 1998-99 and 1999-2000 against this AY 2008-09 even though 8 years lapsed without considering that sub-section (2) of section 32 it is clear that it is a substantive provision and not a procedural one.
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> 3.2 The CIT(A) ought to have seen that the amendment to substantive provision is normally prospective unless expressly stated otherwise. Further, it is nowhere stated that the substitution of sub-section (2) of section 32 is retrospective.
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> 3.3 The CIT(A) ought to have seen that the quoted decision is not a jurisdictional High Court's decision and it appears that the issue has not reached finality.

6. The material fact in AY 2008-09 are that during the course of assessment proceedings, it transpired that the assessee claimed set-off of depreciation pertaining to AYs 1997-98 to 1999-2000 in this year. The depreciation claim aggregated to Rs.2511.88 Lacs. The Ld. AO, taking note of amendment made by Finance Act, 1996, with effect from 01.04.1997, to Sec. 32(2) and further amendment by Finance Act, 2001, with effect from 01.04.2002, held that current depreciation for the year u/s 32(1) starting from AYs 1997-98 up-to 2001-02 could be set off firstly against business incomeand then against income under any other head. However, current depreciation for AYs 1997-98 to AY 2001-02 which could not be set-off in this manner, could be carriedforward only for a maximum period of eight AYs from the Assessment Year immediately succeeding the AY for which it wasfirst computed and the same could be set-off only against the income under the head 'Profit and Gains from Business or Profession'. Thus, the depreciation for AYs 1997-98 to

1999-2000 could be set-off during eight AYs only which would expire during AY 2007-08. The changes brought in to Sec.32(2) was substantiative provisions and not a procedural one and therefore, the amendment made by way of Finance Act, 2001, with effect from 01.04.2002, permitting set-off of depreciation for infinite period was prospective in nature and applicable from AY 2002-03 onwards only. Therefore, the adjustment as claimed by the assessee could not be allowed. Accordingly, the set-off was denied to the assessee.

7. During appellate proceedings, the assessee submitted that the unabsorbed depreciation available to the assesseeas on 01.04.2002 couldbe carry forward and set-off for any number of years. The logic was that the unabsorbed depreciation of AYs 1997-98 to 1999-2000 became unabsorbed depreciation of AY 2002-03 and subsequent years and therefore, the same could be set-off during any number of years. The said position was approved by Hon'ble Gujarat High Court in the case of **General Motors India (P) Ltd. V/s DCIT (354 ITR 244)** wherein Hon'ble High Court referred to Board's Circular No. 14 of 2001 and held that any unabsorbed depreciation as available to the assessee as on 01.04.2002 shall be dealt with in accordance with the provisions of Sec. 32(2) as amended by Finance Act. 2001 and not by the provisions of Sec.32(2) as it stood before the amendment. Reliance was also placed on the other decision of Hon'ble Gujarat High Court in **Synbiotics Ltd. V/s ACIT (370 ITR 119)**, the decision of Hon'ble Karnataka High Court in **Karnataka Co-op Milk Producers Federation Ltd. V/s DCIT (53 DTR 81)** and the decision of Hon'ble High Court of Madras in **CIT V/s S&S Power Switch Gears Ltd. (218 CTR 701)** to support the same**.**

8. The Ld. CIT(A) concurred with assessee's submissions that the issue stood covered in assessee's favor by the decision of Hon'ble Gujarat High Court in the case of **General Motors India (P) Ltd. V/s DCIT (354 ITR 233)**. In the Board circular also, it was held that the unabsorbed depreciation available to the assessee as on 01.04.2002 could be carry forward to any number of assessment years. Similar was the ratio of other decisions cited by the assessee. Accordingly, Ld. AO was directed to allow set-off of depreciation of all these years. Aggrieved, the revenue is in further appeal before us.

9. Upon careful consideration of material facts, we find that during this year, the assessee has claimed set-off of unabsorbed depreciation pertaining to AYs 1997-98 to 1999-2000. The Ld. AO, taking note of amendment made by Finance Act,1996, with effect from 01.04.1997, to Sec.32(2) and further amendment by Finance Act, 2001, with effect from 01.04.2002, held that current depreciation for the year u/s 32(1) starting from AYs 1997-98 up-to 2001-02 could be set off firstly against business income and then against income under any other head. However, current depreciation for AYs 1997-98 to 2001-02 which could not be set-off in this manner, could be carried forward for a maximum period of eight AYs from the Assessment Year immediately succeeding the Assessment Year for which it was first computed and the same could be set-off only against the income under the head 'Profit and Gains from Business or Profession'. Thus, the depreciation for AYs 1997-98 to 1999-2000 could be set-off during eight AYs only which would expire during AY 2007-08. It was also noted that the changes brought in to Sec.32(2) was substantiative provisions and not a procedural one and therefore, the amendment made by way of Finance Act, 2001, with effect

from 01.04.2002, permitting set-off of depreciation for infinite period was prospective in nature and applicable from AY 2002-03 onwards only. Accordingly, the adjustment as claimed by the assessee could not be allowed.

10. The Ld. CIT(A) reversed the stand of Ld. AO and held that the unabsorbed depreciation available to the assessee as on 01.04.2002 could be carry forward and set-off for any number of years. The logic was that the unabsorbed depreciation of AYs 1997-98 to 1999-2000 would become part of depreciation of AY 2002-03 and subsequent years and therefore, the same could be set-off during any number of years. The same was as per the ratio laid down by Hon'ble Gujarat High Court in the case of **General Motors India (P) Ltd. V/s DCIT (354 ITR 244)** wherein Hon'ble High Court referred to Board's Circular No. 14 of 2001 and held that any unabsorbed depreciation as available to the assessee as on 01.04.2002 shall be dealt with in accordance with the provisions of Sec.32(2) as amended by Finance Act. 2001 and not by the provisions of Sec.32(2) as it stood before the amendment. The relevant observations were as under: -

> **30.** The last question which arises for consideration is that whether the unabsorbed depreciation pertaining to A.Y. 1997-98 could be allowed to be carried forward and set off after a period of eight years or it would be governed by Section 32 as amended by Finance Act 2001? The reason given by the Assessing Officer under section 147 is that Section 32(2) of the Act was amended by Finance Act No. 2 of 1996 w.e.f. A.Y. 1997-98 and the unabsorbed depreciation for the A.Y. 1997-98 could be carried forward up to the maximum period of 8 years from the year in which it was first computed. According to the Assessing Officer, 8 years expired in the A.Y. 2005-06 and only till then, the assessee was eligible to claim unabsorbed depreciation of A.Y. 1997-98 for being carried forward and set off against the income for the A.Y. 2005-06. But the assessee was not entitled for unabsorbed depreciation of Rs. 43,60,22,158/- for A.Y. 1997-98, which was not eligible for being carried forward and set off against the income for the A.Y. 2006-07.
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> **31.** Prior to the Finance Act No. 2 of 1996 the unabsorbed depreciation for any year was allowed to be carry forward indefinitely and by a deeming fiction became allowance of the immediately succeeding year. The Finance Act No. 2 of 1996

restricted the carry forward of unabsorbed depreciation and set-off to a limit of 8 years, from the A.Y. 1997-98. Circular No. 762 dated 18.2.1998 issued by the Central Board of Direct Taxes (CBDT) in the form of Explanatory Notes categorically provided, that the unabsorbed depreciation allowance for any previous year to which full effect cannot be given in that previous year shall be carried forward and added to the depreciation allowance of the next year and be deemed to be part thereof.

32. So, the unabsorbed depreciation allowance of A.Y. 1996-97 would be added to the allowance of A.Y. 1997-98 and the limitation of 8 years for the carry-forward and set-off of such unabsorbed depreciation would start from A.Y. 1997-98.

33. We may now examine the provisions of section 32(2) of the Act before its amendment by Finance Act 2001. The section prior to its amendment by Finance Act, 2001, read as under:-

"Where in the assessment of the assessee full effect cannot be given to any allowance under clause (ii) of sub-section (1) in any previous year owning to there being no profits or gains chargeable for that previous year or owing to the profits or gains being less than the allowance, then, the allowance or the part of allowance to which effect has not been given (hereinafter referred to as unabsorbed depreciation allowance), as the case may be,-

(*i*)	shall be set off against the profits and gains, if any, of any business or profession carried on by him and assessable for that assessment year;
(*ii*)	if the unabsorbed depreciation allowance cannot be wholly set off under clause (i), the amount not so set off shall be set off from the income under any other head, if any, assessable for that assessment year;
(*iii*)	if the unabsorbed depreciation allowance cannot be wholly set off under clause (i) and Clause (ii), the amount of allowance not so set off shall be carried forward to the following assessment year and-

(*a*)	it shall be set off against the profits and gains, if any, of any business or profession carried on by him and assessable for that assessment year;
(*b*)	if the unabsorbed depreciation allowance cannot be wholly so set off, the amount of unabsorbed depreciation allowance not so set off shall be carried forward to the following assessment year not being more than eight assessment years immediately succeeding the assessment year for which the aforesaid allowance was first computed:

Provided that the time limit of eight assessment years specified in sub-clause (b) shall not apply in case of a company for the assessment year beginning with the assessment year relevant to the previous year in which the said company has become a sick industrial company under sub-section (1) of section 17 of the Sick Industrial Company (Special Provisions) Act, 1985 (1 of 1986) and ending with the assessment year relevant to the previous year in which the entire net worth of such company becomes equal to or exceeds the accumulated losses.

Explanation.- For the purposes of this clause, "net worth" shall have the meaning assigned to it in clause (ga) of sub-section (1) of section 3 of the Sick Industrial Companies (Special Provisions) Act, 1985."

34. The aforesaid provision was introduced by Finance (No. 2) Act, 1996 and further amended by the Finance Act, 2000. The provision introduced by Finance (No. 2) Act was clarified by the Finance Minister to be applicable with prospective effect.

35. Section 32(2) of the Act was amended by Finance Act, 2001 and the provision so amended reads as under :-

"Where, in the assessment of the assessee, full effect cannot be given to any allowance under sub-section (1) in any previous year, owing to there being no profits or gains chargeable for that previous year, or owing to the profits or gains chargeable for that previous year, owing to the profits or gains chargeable being less than the allowance, then, subject to the provisions of sub-section (2) of section 72 and sub-section (3) of section 73, the allowance or the part of the allowance to which effect has not been given, as the case may be, shall be added to the amount of the allowance for depreciation for the following previous year and deemed to be part of that allowance, or if there is no such allowance for that previous year, be deemed to be allowance of that previous year, and so on for the succeeding previous years."

36. The purpose of this amendment has been clarified by Central Board of Direct Taxes in the Circular No.14 of 2001. The relevant portion of the said Circular reads as under :-

"Modification of provisions relating to depreciation

30.1 Under the existing provisions of section 32 of the Income-tax Act, carry forward and set off of unabsorbed depreciation is allowed for 8 assessment years.

30.2 With a view to enable the industry to conserve sufficient funds to replace plant and machinery, specially in an era where obsolescence takes place so often, the Act has dispensed with the restriction of 8 years for carry forward and set off of unabsorbed depreciation. The Act has also clarified that in computing the profits and gains of business or profession for any previous year, deduction of depreciation under section 32 shall be mandatory.

30.3 Under the existing provisions, no deduction for depreciation is allowed on any motor car manufactured outside India unless it is used (i) in the business of running it on hire for tourists, or (ii) outside in the assessee's business or profession in another country.

30.4 The Act has allowed depreciation allowance on all imported motor cars acquired on or after 1st April, 2001.

30.5 These amendments will take effect from the 1st April, 2002, and will, accordingly, apply in relation to the assessment year 2002-03 and subsequent years."

37. The CBDT Circular clarifies the intent of the amendment that it is for enabling the industry to conserve sufficient funds to replace plant and machinery and accordingly the amendment dispenses with the restriction of 8 years for carry forward and set off of unabsorbed depreciation. The amendment is applicable from

assessment year 2002-03 and subsequent years. This means that any unabsorbed depreciation available to an assessee on 1st day of April, 2002 (A.Y. 2002-03) will be dealt with in accordance with the provisions of section 32(2) as amended by Finance Act, 2001 and not by the provisions of section 32(2) as it stood before the said amendment. Had the intention of the Legislature been to allow the unabsorbed depreciation allowance worked out in A.Y. 1997-98 only for eight subsequent assessment years even after the amendment of section 32(2) by Finance Act, 2001 it would have incorporated a provision to that effect. However, it does not contain any such provision. Hence keeping in view the purpose of amendment of section 32(2) of the Act, a purposive and harmonious interpretation has to be taken. While construing taxing statutes, rule of strict interpretation has to be applied, giving fair and reasonable construction to the language of the section without leaning to the side of assessee or the revenue. But if the legislature fails to express clearly and the assessee becomes entitled for a benefit within the ambit of the section by the clear words used in the section, the benefit accruing to the assessee cannot be denied. However, Circular No.14 of 2001 had clarified that under Section 32(2), in computing the profits and gains of business or profession for any previous year, deduction of depreciation under Section 32 shall be mandatory. Therefore, the provisions of section 32(2) as amended by Finance Act, 2001 would allow the unabsorbed depreciation allowance available in the A.Y. 1997-98, 1999-2000, 2000-01 and 2001-02 to be carried forward to the succeeding years, and if any unabsorbed depreciation or part thereof could not be set off till the A.Y. 2002-03 then it would be carried forward till the time it is set off against the profits and gains of subsequent years.

38. Therefore, it can be said that, current depreciation is deductible in the first place from the income of the business to which it relates. If such depreciation amount is larger than the amount of the profits of that business, then such excess comes for absorption from the profits and gains from any other business or business, if any, carried on by the assessee. If a balance is left even thereafter, that becomes deductible from out of income from any source under any of the other heads of income during that year. In case there is a still balance left over, it is to be treated as unabsorbed depreciation and it is taken to the next succeeding year. Where there is current depreciation for such succeeding year the unabsorbed depreciation is added to the current depreciation for such succeeding year and is deemed as part thereof. If, however, there is no current depreciation for such succeeding year, the unabsorbed depreciation becomes the depreciation allowance for such succeeding year. We are of the considered opinion that any unabsorbed depreciation available to an assessee on 1st day of April 2002 (A.Y.2002-03) will be dealt with in accordance with the provisions of section 32(2) as amended by Finance Act, 2001. And once the Circular No.14 of 2001 clarified that the restriction of 8 years for carry forward and set off of unabsorbed depreciation had been dispensed with, the unabsorbed depreciation from A.Y. 1997-98 upto the A.Y. 2001-02 got carried forward to the assessment year 2002-03 and became part thereof, it came to be governed by the provisions of section 32(2) as amended by Finance Act, 2001 and were available for carry forward and set off against the profits and gains of subsequent years, without any limit whatsoever.

Similar is the ratio of decision of Hon'ble Gujarat High Court in **Synbiotics Ltd. V/s ACIT (370 ITR 119)**, the decision of Hon'ble Karnataka High Court in **Karnataka Co-op Milk Producers Federation Ltd. V/s DCIT (53 DTR 81)** and the decision of Hon'ble High Court of Madras in **CIT V/s S&S Power Switch Gears Ltd. (218 CTR 701).**

11. So far as the case law of decision of Hon'ble Supreme Court in **Peerless General Finance and Investment Co. Ltd. V/s CIT (380 ITR 165)** is concerned, we find that the Special Leave Petition (SLP) of the assessee has been dismissed by Hon'ble Court with following observations: -

> **2.** The Special Leave Petition is dismissed subject to the observation that the unabsorbed depreciation as on 1st April, 1997 can be set off against the income from any Head for the immediate Assessment Year following 1st April, 1997 and thereafter if there still is any unabsorbed depreciation the same can be set off only against the Business Income for a period of eight (08) Assessment years.

The SLP was dismissed against the decision of Hon'ble High Court of Calcutta (72 Taxmann.com 257) wherein the issue in dispute was that whether Tribunal erred in construing the amendment of Section 32(2) by the Finance Act, 1996 as retrospective in effect so as to preclude the assessee's claim for adjustment of unaccumulated unabsorbed depreciation allowance brought forward as on 01.04.1997 from earlier years against Income from House Property and Income from other Sources for AY 1998-98. The Hon'ble Court confirmed the stand of Tribunal and held that the intention of the legislature appearing from the amendment made by the Finance (No. 2) Act, 1996 is that the depreciation unabsorbed or otherwise or current would be set off against the income arising from business or profession or any other income, but the left-over portion thereof could not be set off in the assessment year

1998-99 except against the income arising from business or profession. Thus, the dispute was with respect to head of income from where unabsorbed depreciation could be adjusted by the assessee. However, the same is not the dispute in the present case and therefore, this case law would have no application to the facts of present case.

12. In fact, Hon'ble High Court of Madras, in its later decision of **CIT V/s Sanmar Speciality Chemicals Ltd. (428 ITR 237; 14.09.2020)** has considered all the case laws including the decision of Hon'ble Supreme Court in the case of **Peerless General Finance and Investment Co. Ltd. V/s CIT (380 ITR 165)** and held as under: -

> **4.** The short issue, which falls for consideration, is as to whether, in the facts and circumstances of the case, the Tribunal was right in permitting the assessee to carry forward the depreciation loss pertaining to the assessment year 1997-98 to the present assessment year namely 2006-07, which is beyond the eight year period mandated under the provisions of section 32 of the Act.
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> **5.** The revenue is before us by referring to the decision of the High Court of Calcutta in the case of *Peerless General Finance & Investment Co. Ltd.* v. *CIT* [2016] 73 taxmann.com 257/242 Taxman 209 and submitting that an identical issue was considered by the Calcutta High Court wherein the assessee was not granted relief. It is further submitted that the said decision of the Calcutta High Court was tested for its correctness by the Hon'ble Supreme Court and the special leave petition filed against the judgment of the Calcutta High Court was dismissed in the decision in *Peerless General Finance & Investment Co. Ltd.* v. *CIT* [2016] 73 taxmann.com 258/242 Taxman 173/380 ITR 165 (SC).
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> **6.** After elaborately hearing the learned Senior Standing Counsel appearing for the appellant - Revenue, we are of the considered opinion that the reliance placed on the decision in the case of *Peerless General Finance & Investment Co. Ltd*. (*supra*), would, in no manner, assist the case of the Revenue. We say so after referring to Circular No. 14/2001 dated 22-11-2002 issued by the Central Board of Direct Taxes, which are Explanatory Notes on Provisions relating to Direct Taxes. Paragraph 30 of the said circular deals with modification of provisions relating to depreciation.
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> **7.** For better appreciation, we quote paragraphs 30.1 to 30.5 of the said circular as hereunder:
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> "30.1 Under the existing provisions of section 32 of the Income-tax Act, carry forward and set-off of unabsorbed depreciation is allowed for 8 assessment years.
>
> 30.2 With a view to enable the industry to conserve sufficient funds to replace plant and machinery, specially in an *era* where obsolescence takes place so often, the Act has dispensed with the restriction of 8 years for carry forward and set-off of unabsorbed depreciation. The Act has also clarified that in computing the profits and gains of business or

profession for any previous year, deduction of depreciation under section 32 shall be mandatory.

30.3 Under the existing provisions, no deduction for depreciation is allowed on any motor car manufactured outside India unless it is used (*i*) in the business of running it on hire for tourists, or (*ii*) outside India in the assessee's business or profession in another country.

30.4 The Act has allowed depreciation allowance on all imported motor cars acquired on or after 1st April, 2001.

30.5 These amendments will take effect from the 1st April, 2002, and will, accordingly apply in relation to the assessment year 2002-2003 and subsequent years."

8. From paragraph 30.2 of the above circular, it is clear that the restriction of 8 years for carry forward and set-off of unabsorbed depreciation was dispensed with, with a view to enable the industries to conserve sufficient funds to replace plant and machinery.

9. The learned Senior Standing Counsel appearing for the Revenue would point out that those amendments took place with effect from 1-4-2002 and would accordingly apply in relation to the assessment year 2002-03 and the subsequent years whereas in the assessee's case, the depreciation loss, which they sought to carry forward is for the assessment year 1997-98.

10. The proper manner, in which, the modification has to be understood, is to the effect that from the assessment year 2002-03, if the eight years' period was not lapsed, then the assessee would be entitled to carry forward the loss without any restriction on the time limit. This aspect has been dealt with elaborately in the decision of the Division Bench of the Gujarat High Court in the case of *General Motors India (P.) Ltd.* v. *Dy. CIT* [2012] 25 taxmann.com 364/210 Taxman 20/[2013] 354 ITR 244 wherein the relevant portions are as follows :

"37. The CBDT Circular clarifies the intent of the amendment that it is for enabling the industry to conserve sufficient funds to replace plant and machinery and accordingly the amendment dispenses with the restriction of 8 years for carry forward and set-off of unabsorbed depreciation. The amendment is applicable from assessment year 2002-03 and subsequent years. This means that any unabsorbed depreciation available to an assessee on 1st day of April, 2002 (A.Y. 2002-03) will be dealt with in accordance with the provisions of section 32(2) as amended by Finance Act, 2001 and not by the provisions of section 32(2) as it stood before the said amendment. Had the intention of the Legislature been to allow the unabsorbed depreciation allowance worked out in A.Y. 1997-98 only for eight subsequent assessment years even after the amendment of section 32(2) by Finance Act, 2001 it would have incorporated a provision to that effect. However, it does not contain any such provision. Hence keeping in view the purpose of amendment of section 32(2) of the Act, a purposive and harmonious interpretation has to be taken. While construing taxing statutes, rule of strict interpretation has to be applied, giving fair and reasonable construction to the language of the section without leaning to the side of assessee or the revenue. But if the legislature fails to express clearly and the assessee becomes entitled for a benefit within the ambit of the section by the clear words used in the section, the benefit accruing to the assessee cannot be denied. However, Circular No. 14 of 2001 had clarified that under section 32(2), in computing the profits and gains of business or profession for any previous year, deduction of depreciation under section 32 shall be mandatory. Therefore, the provisions of section 32(2) as amended by Finance Act, 2001 would allow the unabsorbed depreciation allowance available in the A.Ys. 1997-98, 1999-2000, 2000-01 and 2001-02 to be carried forward to the succeeding years, and if any unabsorbed depreciation or part thereof could not be set off till

the A.Ys. 2002-03 then it would be carried forward till the time it is set-off against the profits and gains of subsequent years.

38. Therefore, it can be said that, current depreciation is deductible in the first place from the income of the business to which it relates. If such depreciation amount is larger than the amount of the profits of that business, then such excess comes for absorption from the profits and gains from any other business or business, if any, carried on by the assessee. If a balance is left even thereafter, that becomes deductible from out of income from any source under any of the other heads of income during that year. In case there is a still balance left over, it is to be treated as unabsorbed depreciation and it is taken to the next succeeding year. Where there is current depreciation for such succeeding year the unabsorbed depreciation is added to the current depreciation for such succeeding year and is deemed as part thereof. If, however, there is no current depreciation for such succeeding year, the unabsorbed depreciation becomes the depreciation allowance for such succeeding year. We are of the considered opinion that any unabsorbed depreciation available to an assessee on 1st day of April 2002 (A.Y. 2002-03) will be dealt with in accordance with the provisions of section 32(2) as amended by Finance Act, 2001. And once the Circular No. 14 of 2001 clarified that the restriction of 8 years for carry forward and set-off of unabsorbed depreciation had been dispensed with, the unabsorbed depreciation from A.Y.1997-98 upto the A.Y. 2001-02 got carried forward to the assessment year 2002-03 and became part thereof, it came to be governed by the provisions of section 32(2) as amended by Finance Act, 2001 and were available for carry forward and set-off against the profits and gains of subsequent years, without any limit whatsoever."

11. A similar issue was considered by a Division Bench of the Bombay High Court in the case of *CIT* v. *Bajaj Hindustan Ltd.* [IT Appeal Nos. 134 to 136 and 140, 141 and 148 of 2018, dated 13-6-2018] following the decision in the case of *CIT* v. *Hindustan Unilever Ltd.* [2016] 72 taxmann.com 325/[2017] 394 ITR 73 (Bom.). The special leave petition filed by the Revenue against the above decision was dismissed by the Hon'ble Supreme Court in the decision in *Pr. CIT* v. *Bajaj Hindustan Ltd*. [SLP (C) Diary No. 48020 of 2018, dated 25-1-2019].

12. In the decision of the Punjab & Haryana High Court in the case of *CIT* v. *G.T.M. Synthetics Ltd.* [2013] 30 taxmann.com 83/[2012] 347 ITR 458], an identical issue was considered in the following terms :

'8. The effect of omission of the aforesaid proviso was enumerated by the Central Board of Direct Taxes, *vide* Circular No. 794 dated 9-8-2000 [(2000) 245 ITR (Statute)] 21 that the unabsorbed depreciation allowance could be set-off against the income under any other head even where the business was not carried on.

Clause 22 of the said circular which is relevant is as under:

"22. Requirement of continuance of same business for set-off of unabsorbed depreciation dispensed with:

22.1 Under the existing provisions of sub-section (2) of section 32 of the Income-tax Act, carried forward unabsorbed depreciation is allowed to be set-off against profits and gains of business or profession of the subsequent year, subject to the condition that the business or profession for which depreciation allowance was originally computed continued to be carried on in that year. A similar condition in section 72 for the purpose of carry forward and set-off of unabsorbed business loss was removed last year.

22.2 With a view to harmonise the provisions relating carry forward and set-off of unabsorbed depreciation and unabsorbed loss, the Act has dispensed with the condition of continuance of same business for the purpose of carry forward and set-off of unabsorbed depreciation.

22.3 This amendment will take effect from 1st April, 2001, and will, accordingly, apply in relation to the assessment year 2001-2002 and subsequent years."

9. The CIT(A) and the Tribunal, thus, rightly allowed unabsorbed depreciation relevant to the assessment year 1996-97 to be set-off against the income from long term capital gains and income from other sources for the assessment year 2001-2002.'

13. Recently, in the decision of a Division Bench of the Bombay High Court in the case of *Pr. CIT* v. *Gunnebo India (P.) Ltd.* [2019] 104 CCH 227, the issue was considered in favour of the assessee after referring to the decision of the Division Bench of the Gujarat High Court in the case of General Motors India (P.) Ltd., wherein the relevant portions read thus :

"3. The Revenue carried the matter in appeal. The Appellate Tribunal dismissed the appeal of the Revenue making the following observations- "16. We have observed that the current year's depreciation is allowed to be set-off against the income from business as well as against the other heads of income and unabsorbed depreciation in carry forward and become part of the depreciation of the subsequent year and the total depreciation becomes current year's depreciation as per section 32(1) of the Act, which is allowed to be set-off against the income under any head of income. As per the provisions of section 32(2) of the Act r.w.s. 70, 71 and 72 of the Act, it becomes very clear that the total depreciation comprising of the depreciation of the relevant assessment year along with the unabsorbed depreciation of the earlier years becomes the total current year's depreciation which is allowed to be set off against income under any head of income including long term capital gain. Accordingly, we find no reason to interfere with the order of CIT(A) *qua* this issue and the same is hereby upheld. We also hold that as per provisions of section 72 of the Act, the unabsorbed business loss (other than speculative loss) of earlier years shall be allowed to be set-off only against the profits and gains from business carried on by the assessee of the current year and so on. We order accordingly. However, our above decision with respect to ground nos. (*i*) and (*ii*) raised in memo of appeal filed by Revenue should be read in conjunction with and subject to our findings with respect to ground nos. (*iii*) and (*iv*) which are decided by us in the preceding para's of this order and the computation shall be made accordingly."

4. Having heard the learned counsel for parties and having perused the documents on record, we do not find any error in the order of the Appellate Tribunal. Gujarat High Court in the case of *General Motors India (P.) Ltd.* (*supra*) had considered somewhat similar issue, of course in the backdrop of the assessee's challenge to a notice of reopening of the assessment. The Gujarat High Court had held and observed as under -

"38 Therefore, it can be said that, current depreciation is deductible in the first place from the income of the business to which it relates. If such depreciation amount is larger than the amount of the profits of that business, then such excess comes for absorption from the profits and gains from any other business or business, if any, carried on by the assessee. If a balance is left even thereafter, that becomes deductible from out of income from any source under any of the other heads of income during that year. In case there is a still balance left over, it is to be treated as unabsorbed depreciation and it is taken to the next succeeding year. Where there is current depreciation for such succeeding year the unabsorbed depreciation is added to the current depreciation for such succeeding year and is deemed as part thereof. If,

however, there is no current depreciation for such succeeding year, the unabsorbed depreciation becomes the depreciation allowance for such succeeding year. We are of the considered opinion that any unabsorbed depreciation available to an assessee on 1st April, 2002 (asst. yr. 2002-03) will be dealt with in accordance with the provisions of section 32(2) as amended by Finance Act, 2001. And once the Circular No. 14 of 2001 clarified that the restriction of 8 years for carry forward and set-off of unabsorbed depreciation had been dispensed with, the unabsorbed depreciation from asst. yr. 1997-98 up to the asst. yr. 2001-02 got carried forward to the asst. yr. 2002-03 and became part thereof, it came to be governed by the provisions of section 32(2) as amended by Finance Act, 2001 and were available for carry forward and set-off against the profits and gains of subsequent years, without any limit whatsoever."

14. In our considered view, the above decisions will clearly enure to the benefit of the respondent - assessee.

15. Accordingly, the above tax case appeal is dismissed and the substantial question of law is answered against the Revenue. No costs.

Same view has been taken by Hon'ble Court in subsequent decision of **CIT V/s KMC Speciality Hospitals India Ltd. (130 Taxmann.com 315; 06/07/2021)** as well as in **Harvey Heart Hospitals Ltd. V/s ACIT (127 Taxmann.com 805; 06/01/2021).** Therefore, respectfully following the binding judicial precedents, we do not find any infirmity in the impugned order. The grounds raised in revenue's appeal, for all the years, stand dismissed.

Disallowance u/s 14A

13. One of the issues raised in assessee's appeal as well as revenue's appeal was disallowance u/s 14A. We find that this issue was also remitted back by Hon'ble Court to Tribunal with following observations: -

14. Substantial question of law Nos.3 and 4 raised by the Revenue pertain to disallowance under Section 14A of the Act. On this issue, the assessee is also on appeal before us not being satisfied with the relief granted by the Tribunal. The Tribunal, in paragraph 12 of the impugned order, recorded that it was fairly agreed by both sides that the issue was settled by the decision of the High Court of Delhi in the case of M/s.Joint Investments Private Limited Vs. CIT [reported in (2015) 372 ITR 694]. This is seriously disputed by the learned counsel on either side and the Departmental Representative was not authorized to give any such concession nor the Authorized Representative of the assessee.

15. It is the submission of the Revenue before us that the Tribunal erred in directing the Assessing Officer to restrict the disallowance under Section 14A of the Act by applying Rule 8D of the Income Tax Rules, 1962 (for brevity, the Rules) to the extent of exempt income even without considering the fact that the assessee had not discharged the onus cast upon it and in the absence of accounts maintained by the assessee in regard to its investments, the Tribunal was not right in interfering with such order.

16. On the other hand, the assessee is also aggrieved by the finding rendered by the Tribunal and more particularly in paragraph 15 of the order.

17. The learned counsel for the assessee submits that confirmation of the disallowance of expenditure attributable to earning dividend income on notional basis by invoking the provisions of Section 14A of the Act read with 8D of the Rules without pointing out any specific expenditure incurred to earn dividend income and without rejecting the assessee's contention is incorrect. It is further contended that the expression 'expenditure incurred' in Section 14A of the Act refers to actual expenditure and not some imaginary expenditure, in relation to or in connection with or pertaining to exempt income and that unless the Assessing Officer establishes that specific expenditure has been incurred by the assessee for earning exempt income, there can be no disallowance under Section 14A of the Act.

18. It is also contended by the assessee that under Section 14A(2) of the Act, expenditure can be determined as prescribed under Rule 8D of the Rules only where the Assessing Officer, having regard to the accounts of the assessee, is not satisfied with the correctness of the claim that the expenditure made by the assessee in relation to income, which does not form part of total income under the Act.

19. It is further contended by the assessee that the assessee already disallowed an expenditure for the relevant assessment years for earning dividend income and hence, no further notional expenditure could be deducted from the said income. He again submits that the Assessing Officer is bound to give cogent reasons in terms of Section 14A(2) of the Act with regard to his satisfaction with the correctness of the claim of the assessee in respect of such expenditure, which does not form part of the total income.

20. The learned counsel for the assessee has placed reliance on the decision of the Hon'ble Supreme Court in the case of Godrej & Boyce Manufacturing Co. Ltd. Vs. DCIT [reported in (2017) 394 ITR 449] wherein it has been held as follows :

> “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.”

21. The learned counsel for the assessee submits that in terms of Rule 8D(2)(ii) of the Rules, if to be applied, there must be an expenditure by way of interest, which is not directly attributable to any particular income or receipt. Therefore, it is submitted that the interest expenditure incurred for earning taxable income cannot be reckoned for disallowance under

Rule 8D(2)(ii) of the Rules. Reliance is placed on the decision of the High Court of Delhi in the case of CIT Vs. Bharti Overseas Private Limited [ITA.No.802/2015 dated 17.12.2015].

22. The learned counsel for the assessee has placed reliance on the High Court of Bombay in the case of CIT Vs. HDFC Bank Ltd. [89 CCH 185] wherein it has been held that where the assessee's capital, profit reserves, surplus and current account deposits were higher than the investments in tax free securities, it would have to be presumed that the investments made by the assessee would be out of the interest free funds available with the assessee and no disallowance was warranted under Section 14A of the Act.

23. Reliance is also placed by the assessee on the decision of the Gujarat High Court in the case of CIT Vs. Gujarat State Fertilizers & Chemicals Ltd [reported in 85 CCH 273] to support his argument that if the assessee has sufficient funds available with it, no adhoc disallowance of dividend income under Section 14A of the Act could be made. Further, according to the assessee, while computing disallowance under Section 14A of the Act, only those investments made in the current assessment year that yielded dividend income should be taken.

24. With these submissions, the learned counsel for the assessee contends that specific questions of law were raised before the Tribunal. However, the Tribunal has not considered the same, but disposed of the matter by following the decision of the Delhi High Court in the case of M/s. Joint Investments Private Limited.

25. In our considered view, the disallowance under Section 14A of the Act has been a point of dispute in several cases. Therefore, we opine that the Tribunal shall reconsider the said issue factually taking note of the precedents relied upon by both the Revenue as well as the assessee and take a reasoned decision so that they could be applied in future cases as well. Considering the above, we are of the view that substantial question of law Nos.3 and 4 raised by the Revenue i.e. the issue pertaining to disallowance under Section 14A of the Act for all the assessment years requires to be redone.

26. For all the above reasons, the appeals filed by both the Revenue as well as the assessee are allowed and the matters are remanded to the Tribunal to take a fresh decision on the said issue after sufficient opportunity to both the Revenue as well as the assessee and also after considering the decisions, which may be cited before the Tribunal both by the Revenue as well as the assessee. Accordingly, the substantial questions of law raised by the Revenue and the assessee on this issue are left open.

It is evident that matter of disallowance u/s 14A has been remitted back to us for fresh decision in the light of various judicial pronouncements.

14. The material facts in AY 2008-09 are that the assessee being resident corporate assessee is stated to be engaged in manufacturing and sale of industrial belts, auto-mobile fans, rubber molded products etc. The assessee earned exempt dividend income of Rs.260.22 Lacs and offered suo-moto disallowance of Rs.2.22 Lacs in the return of income. The sad disallowance was arrived at after considering a portion

of staff salary which could be said to be involved in the making / maintaining of the investment. The Ld. AO proceeded to compute disallowance u/s 14A read with rule 8D against which the assessee submitted that the investments were made out of surplus funds and no part of borrowed funds was used to make the said investment. However, rejecting the same, Ld. AO computed aggregate disallowance of Rs.425.16 Lacs which included interest disallowance u/r 8D(2)(ii) for Rs.378.91 Lacs and indirect expense disallowance u/r 8D(2)(iii) for Rs.46.24 Lacs, being computed @0.5% of average investments held the assessee. Accordingly, the amount of disallowance of Rs.425.16 Lacs was added to the income of the assessee without adjusting the suo-moto disallowance already offered by the assessee in the return of income.

15. During appellate proceedings, it was submitted that all the loans taken by the assessee were for business purposes and no borrowed funds were used for the purpose of making investments. It was also submitted that own share capital, reserves and surplus far exceeded the investment made by the assessee. The attention was also drawn to the fact that the dividend income was received only on two scrips. Further, Ld. AO did not record any objective satisfaction, having regards to the accounts of the assessee, as to why the suo-moto disallowance offered by the assessee was not sufficient. The Ld. AO mechanically applied Rule 8D without proving any infirmity or mistake in the disallowance made by the assessee and Ld. AO was duty bound to deal with assessee's explanation on merits which was not done. The Ld. AO did not prove that there was proximate connection between any particular expenditure and earning of tax-free income. Another argument was that the disallowance could not exceed the exempt income earned by the

assessee. Further, the investment which did not yield any exempt income was to be excluded while computing disallowance as per Rule 8D. The Ld. CIT(A) concurred with assessee's submissions that own funds of Rs.30456.14 Lacs including depreciation as available with the assessee far exceeded the year-end investment of Rs.5397.85 Lacs and therefore, it not be said that the borrowed funds were utilized for the purpose of business. Further, major portion of investment was made in earlier years and only a part of investment was made in one scrip during the year. Also, as per settled legal position, in the absence of exempt income, no disallowance could be made u/s 14A. Considering all the aspects Ld. CIT(A) concluded that the disallowance was to be restricted to the extent of exempt income earned by the assessee. Since the assessee had earned exempt income of Rs.260.21 Lacs and already offered suo-moto disallowance of Rs.2.22 Lacs, Ld. AO was directed to restrict the disallowance to the extent of differential i.e., Rs.257.99 Lacs. The Ld. AO was directed to make the aforesaid disallowance while computing income under normal provisions as well as while computing Book-Profits u/s 115JB. Aggrieved, the revenue as well as assessee is in further appeal before us.

The grounds raised by the assessee read as under

> 2. The Commissioner of Income Tax (Appeals) erred in restricting the disallowance of the expenses u/s 14A by applying Rule 8D to the dividend income earned by the appellant during this year amounting to Rs.2,60,21,900/-.
>
> 2.2 The Commissioner of Income Tax (Appeals) ought to have appreciated that the notification no.S.O.547(E) containing disallowance sub-section of (2) of Section 14A read with Rule 8D had come in form from 24th March, 2008 ie., it is well settled that law prevailing on the first day of assessment year should be adopted and hence rule 8D cannot be applied to assessment year up-to 2008-09.
>
> 2.3 The Commissioner of Income Tax (Appeals) ought to have appreciated that Hon'ble Punjab and Haryana High Courtin the case of Hero Cycles reported in 323 ITR 518 and the Delhi Tribunal in the case of ACIT V/s Sun investments reported in 8 ITR (Tri) 33 have held that unless the assessing officer established that specific

expenditure has been incurred by the appellant for earning exempt income there can be no disallowance under Section 14A.

2.4 The Commissioner of Income Tax (Appeals) ought to have appreciated that the dividend income of Rs.2.60 Crores was received by the appellant is only from M/s J.K. Lakshmi Cements Ltd. and M/s J.K.Paper Ltd., which are within the same group viz. JK Organisation.

2.5 The Commissioner of Income Tax (Appeals) ought to have appreciated that such investments had been made by the assessee to promote their business through these companies and were on account of business expediency. Therefore, the investments made by the assessee in its subsidiary is not be reckoned for disallowance u/s 14A r.w. Rule 8D. EIH Associated Hotels Ltd. V/s CIT reported in 2013-TIOL-796-ITAT-Mad, Ay-2008-09, Dt. 17.07.2013.

2.6 The Commissioner of Income Tax (Appeals) ought to have appreciated the fact that the appellant had own funds of Rs.304.56 Crores whereas the investments during the year was only Rs.14.76 Crores, evidencing the fact that the investment was made wholly out of the own funds and that no borrowings were used for the same.

2.7 The Commissioner of Income Tax (Appeals) failed to appreciate that as per Rule 8D(2)(ii), only the amount of expenditure by way of interest which is not directly attributable to any particular income or receipt alone should be considered while working out the disallowance. In the present case, the interest expenditure is directly attributable for earning its business income and hence disallowance u/s 14A r.w. Rule 8D is unwarranted.

2.8 Where assessee's capital, profit reserves, surplus and current account deposits were higher than the investment in tax-free securities, it would have to be presumed that investments made by the assessee would be out of interest-free funds available with the assessee and no disallowance was warranted u/s 14A-CIT v. HDFC Bank Ltd. [2014] 366 ITR 505 (Bom), CIT V. Reliance Utilities and Power 313 ITR 340 (Bom) and CIT v. Hotel Savera 239 ITR 735 (Mad).

2.9 The Commissioner of Income Tax (Appeals) ought to have appreciated that the investment in M/s Modern Cotton Yarn Sinners Ltd. and M/s Southern Spinners and processors Ltd represent strategic investments. Further, no dividend was received from these investments, making it clear that these investments should not be taken into consideration for the computation.

2.10 The Commissioner of Income Tax (Appeals) failed to appreciate that as per Rule 8D(2)(iii), only the average value of investment, income from which does not or shall not form part of the total income, should be taken into consideration for the computation. Investments from which no dividend income was received should not be considered for the purpose of computing the disallowance. REI Agro Ltd. V. DCIT – 144 ITD 141 (kol.).

3. The Commissioner of Income Tax (Appeals) erred in directing the assessing officer to restrict the addition to Rs.2,57,99,631/- u/s 14A while determining the Book Profits u/s 115JB.

The grounds raised by the revenue read as under

2.1 The CIT(A) ought to have seen that as per Board's Circular No.5/2014 dt. 11.12.2014 when the expenditure is incurred in relation to exempt income, it has to

suffer disallowance irrespective of the fact whether any exempt income earned by the assessee or not.

2.2 The CIT(A) has erred in directing the AO to restrict the disallowance u/s 14A by applying Rule 8D to the extent of exempt income earned without considering the Board's Circular No.5/2014 dt. 11.12.2014.

2.3 The CIT(A) ought to have seen that it is mandatory that the assessee requires to maintain proper books of account with regard to the investment made from which exempt income can arise and such books of accounts to be produced before the AO to ascertain the expenditure incurred in relation to income not includible in the total income of the assessee.

2.4 The CIT(A)has erred in directing the AO to restrict the disallowanceu/s 14A by applying the Rule 8D to the extent of exempt income earned without considering the fact that the assessee as not discharged the onus cast upon it, In the absence of accounts maintained by the assessee in regard to its investment.

16. Having heard rival submissions and after due consideration of various judicial pronouncements as placed before us, our adjudication to this issue would be as given in succeeding paragraphs.

17. Upon careful perusal of factual matrix as enumerated by us in the preceding paragraphs, it could be seen that the assessee has earned exempt dividend income of Rs.260.22 Lacs during the year and offered suo-moto disallowance u/s 14A for Rs.2.22 Lacs. The said disallowance was worked as by taking a portion of staff salary which could be said to have been dedicated by the assessee towards investment activity. However, Ld. AO, without recording any objective satisfaction, having regards to the accounts of the assessee, as to why the disallowance u/s 14A was not sufficient, proceeded to compute the disallowance u/s 14A read with rule 8D. The said action, in our considered opinion, was against the statutory mandate of Sec.14A r.w.r. 8D. The failure to record an objective satisfaction would make the disallowance unsustainable in law. It is settled legal position that the application of Rule 8D is not automatic as held by Hon'ble Supreme Court in **Godrej & Boyce Manufacturing Co. Ltd. V/s DCIT (2017 394 ITR 449).** Upon perusal of

assessment order, we find that Ld. AO has failed to record any objective satisfaction as to why the assessee's stand was not acceptable, having regards to the accounts of the assessee, as per the mandate of Sec.14A. This jurisdictional requirement was not satisfied by Ld. AO in the present case and Ld. AO straightway proceeded to compute disallowance as per Rule 8D. The application of Rule 8D, in our considered opinion, was not mechanical or automatic.

18. The Hon'ble Apex Court in the cited case of **Godrej & Boyce Manufacturing Co. Ltd. V/s DCIT (2017 394 ITR 449)** held that 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. The said principle has been reiterated by Hon'ble High Court of Madras in the case of **Marg Limited V/s CIT (TCA NO.41 to 43 & 220 of 2017 dated 30.09.2020).** Similar is the view of Hon'ble Delhi High Court in **Joint Investments Private Ltd. V/s CIT (59 Taxmann.com 295)** wherein it was held that where assessee declared tax exempt

income and voluntarily disallowed certain expenditure under section 14A, in absence of reason why assessee's claim for disallowance under section 14A had to be rejected, Assessing Officer was not justified in recomputing disallowance. Further Hon'ble Apex Court in **Maxopp Investment Limited V/s CIT (91 Taxmann.com 154)** at para-32 observed that it is that expenditure alone which has been incurred in relation to the income which is not includible in total income, is to be disallowed. If expenditure has no casual connection with the exempt income, such expenditure would be an allowable expenditure.

19. Proceeding further, different facets of the issue are that it was observed by Ld. CIT(A) that own funds in the shape of share capital and reserves far exceeded the investments made by the assessee. Therefore, unless nexus of borrowed funds vis-à-vis investments made by the assessee was established by Ld. AO, a presumption was to be drawn in assessee's favor that the investments were sourced out of own funds. We find that no such finding has been recorded by Ld. AO. Therefore, interest disallowance, in our considered opinion, could not be made in such a case. This proposition is duly supported by the decision of Hon'ble High Court of Bombay in **CIT V/s HDFC Bank Ltd. (366 ITR 505)** as well as another decision of same court in **CIT V/s Reliance Utilities & Power Ltd. (313 ITR 340).** The ratio of decision of Hon'ble High Court of Madras in **CIT V/s Hotel Savera (239 ITR 795)** is also applicable to the facts of the case wherein it was held that in case own funds and borrowed funds were inextricably mixed up in such a way that it was impossible to delineate which funds were advanced to group concern, no interference could be made in the Tribunal's finding that no disallowance u/s 36(1)(iii) would be called for.

20. It is also settled law that disallowance made u/s 14A could not exceed the exempt income earned by the assessee. Further, disallowance u/r 8D(2)(iii) was to be computed only by considering those investments which have yielded exempt income during the year. These propositions are duly supported by the decision of Hon'ble Madras High Court in the case of **Redington India Private Ltd. (392 ITR 633)** as well as another decision of Hon'ble Court in **CIT V/s Chettinad Logistics Private Ltd. (95 Taxman.com 250)**.

21. The assessee's plea that the investments were strategic investment and therefore, no disallowance was to be computed, is to be disregarded in the light of decision of Hon'ble Supreme Court in the case of **Maxopp Investment Limited V/s CIT (91 Taxmann.com 154).**

22. Therefore, on the given facts and circumstances of the case, we direct Ld. AO to record an objective satisfaction as to why the disallowance made by the assessee was not sufficient or acceptable. If Ld. AO is satisfied, then he could proceed to apply Rule 8D and compute the disallowance subject to our observation made in preceding paras. Needless to add that adequate opportunity of hearing shall be granted to the assessee.

23. We would also hold that the adjustment of disallowance u/s 14A could not be made while computing Book Profits u/s 115JB as per the decision of Special Bench of Delhi Tribunal in **ACIT V/s Vireet Investment (P) Ltd. (165 ITD 27)** as well as the recent decision of Hon'ble Karnataka High Court in **Sobha Developers Ltd. V/s DCIT (2021; 125 Taxmann.com 72).** We order so.

24. To summarize, Ground Nos. 2.1 & 2.2 of revenue's appeal stand dismissed. Ground Nos.2.3 & 2.4 do not require any specific adjudication

since the assessee has not maintained separate books of accounts which would have facilitated computation of disallowance u/s 14A and the issue would not have arisen. In fact, for the same very reason, the provisions of Rule 8D has been invoked. These grounds stand dismissed as infructuous. Ground No.2, 2.3, 2.4,2.6, 2.7, 2.8, 2.10 and 3 stand allowed for statistical purposes. Ground No. 2.2, 2.5, 2.9 stand dismissed.

25. In AY 2009-10, the assessee earned exempt income of Rs.265.19 Lacs and offered suo-moto disallowance of Rs.3.21 Lacs. However, Ld. AO computed aggregate disallowance of Rs.802.72 Lacs and added the differential of Rs.799.51 Lacs to the income of the assessee. The Ld. CIT(A) directed Ld. AO to restrict the disallowance to the extent of exempt income earned by the assessee. The disallowance was to be made while computing income under normal provisions as well as while computing Book-Profits u/s 115JB. Aggrieved, the assessee as well as revenue is in further appeal before us.

In AY 2010-11, the assessee earned exempt income of Rs.569.75 Lacs and offered suo-moto disallowance of Rs.2.80 Lacs. However, Ld. AO computed aggregate disallowance of Rs.643.78 Lacs and added the differential of Rs.640.97 Lacs to the income of the assessee. The Ld. CIT(A) directed Ld. AO to restrict the disallowance to the extent of exempt income earned by the assessee. The disallowance was to be made while computing income under normal provisions as well as while computing Book-Profits u/s 115JB. Aggrieved, the assessee as well as revenue is in further appeal before us.

In AY 2011-12, the assessee earned exempt income of Rs.611.95 Lacs and offered suo-moto disallowance of Rs.3.45 Lacs. However, Ld. AO

computed aggregate disallowance of Rs.399.47 Lacs and added the differential of Rs.396.01 Lacs to the income of the assessee. The Ld. CIT(A) upheld the disallowance by observing the disallowance computed by Ld. AO was less than exempt income earned by the assessee. Aggrieved, the assessee is in further appeal before us.

In AY 2012-13, the assessee earned exempt income of Rs.244.62 Lacs and offered suo-moto disallowance of Rs.3.80 Lacs. However, Ld. AO computed aggregate disallowance of Rs.1264.69 Lacs and added the differential of Rs.1260.88 Lacs to the income of the assessee. The Ld. CIT(A) directed Ld. AO to restrict the disallowance to the extent of exempt income earned by the assessee. The disallowance was to be made while computing income under normal provisions as well as while computing Book-Profits u/s 115JB. Aggrieved, the assessee as well as revenue is in further appeal before us.

In AY 2013-14, the assessee earned exempt income of Rs.685.43 Lacs and offered suo-moto disallowance of Rs.4.42 Lacs. However, Ld. AO computed aggregate disallowance of Rs.1863.34 Lacs and added the differential of Rs.1858.91 Lacs to the income of the assessee. The Ld. CIT(A) directed Ld. AO to restrict the disallowance to the extent of exempt income earned by the assessee. The disallowance was to be made while computing income under normal provisions as well as while computing Book-Profits u/s 115JB. Aggrieved, the assessee as well as revenue is in further appeal before us.

In AY 2014-15, the assessee earned exempt income of Rs.638.95 Lacs and offered suo-moto disallowance of Rs.4.51 Lacs. However, Ld. AO computed aggregate disallowance of Rs.1697.80 Lacs and added the same to the income of the assessee. The Ld. CIT(A) directed Ld. AO to

restrict the disallowance to the extent of exempt income earned by the assessee subject to adjustment of suo-moto disallowance of Rs.4.51 Lacs already offered by the assessee. The disallowance was to be made while computing income under normal provisions as well as while computing Book-Profits u/s 115JB. Aggrieved, the assessee as well as revenue is in further appeal before us.

26. Facts in all these years being pari-materia the same as in AY 2008-09, our findings as well as adjudication for AY 2008-09 shall equally apply to all these years. Resultantly, the revenue's grounds of appeal stand dismissed whereas the assessee's grounds stand partly allowed for statistical purposes, in the same manner.

Conclusion

27. The revenue's appeal stand dismissed whereas the assessee's appeal stands partly allowed for statistical purposes.

Order pronounced on 21st January, 2022.

Sd/-	**Sd/-**
(V. DURGA RAO)	**(MANOJ KUMAR AGGARWAL)**
न्यायिक सदस्य /JUDICIAL MEMBER	**लेखा सदस्य /ACCOUNTANT MEMBER**

चेन्नईChennai; दिनांकDated : 21-01-2022

JPV

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT– concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, चेन्नई/ DR, ITAT, Chennai
6. गार्डफाईल / Guard File

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उप/सहायकपंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, चेन्नई **/ ITAT, Chennai**