IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCHES "C", BANGALORE

Before Shri George George K, JM & Ms.Padmavathy S, AM

ITA No.1370/Bang/2018 : Asst.Year 2012-2013
ITA No.1387/Bang/2018 : Asst.Year 2013-2014
ITA No.1388/Bang/2018 : Asst.Year 2014-2015

M/s.Value & Budget Housing Corporation Private Limited No.29/4, 3rd Floor H.M.Stafford House, 7th Cross Vasanthnagar Extn.7th Cross Off Millers Road Bangalore – 560 052. **PAN : AACCV7868G.**	v.	The Deputy Commissioner of Income-tax, Circle 7(1)(2) Bangalore.
(Appellant)		(Respondent)

Appellant by : Sri.Ramasubramaniyan, CA
Respondent by : Smt.Priyadarshini Besaganni, JCIT-DR

Date of Hearing : 01.02.2022		**Date of Pronouncement : 02.02.2022**

O R D E R

Per Padmavathy S, AM

These appeals at the instance of the assessee are directed against three orders of the CIT(A). The relevant assessment years are 2012-2013, 2013-2014 and 2014-2015.

2. The grounds raised by the assessee for all the three assessment years are identical, except variance in figures,. The grounds raised for assessment year 2012-2013 read as follows:-

> *"1. That the order of the learned Commissioner of Income Tax (Appeals) is prejudicial to the interests of the appellant, is bad and erroneous in law and against the facts and circumstances of the case.*

2. That the learned Commissioner of Income Tax (Appeals) erred in law and on facts in disallowing the expenditure of Rs. 49,74,049/- incurred towards issue of shares and ought to have allowed u/s. 35D of the Act.

3. That the learned Commissioner of Income Tax (Appeals) erred in law and on facts in upholding the disallowance of Rs. 49,78,941/- u/s. 14A of the Act even though the appellant has not incurred any expenditure in earning the exempt income.

4. That the learned Commissioner of Income Tax (Appeals) erred in law and on facts in upholding the disallowance of the interest u/s. 14A r.w.r 8D(2)(ii) even though the amounts have been invested out of own funds and not out of the borrowed funds.

5. That the learned Commissioner of Income Tax (Appeals) erred in law and on facts in making disallowance of interest expenses u/s. 14A r.w.r 8D(2)(ii) even though the Interest free funds are more than the investments.

6. That the learned Commissioner of Income Tax (Appeals) erred in law and on facts in upholding the application of Rule 8D(2)(iii) straight away without giving a finding that the appellant had incurred expenditure for the purpose of earning the income.

7. That the learned lower authorities erred in law and on facts in computing the disallowance u/s 14A by taking the investments from which exempt income is not earned and exempt income cannot be earned (taxable investments)."

3. For assessment year 2014-2015, apart from above grounds / issues, the assessee has raised additional grounds, which are ground 2, 3 and 4. The same read as follows:-

"2. That the learned lower authorities erred in law and on facts in adding a sum of Rs.2,33,20,576/- on a notional basis even though the appellant has not received the above amount.

3. That the learned Commissioner of Income Tax (Appeals) erred in law and on facts in confirming the addition of notional rent of Rs.2,33,20,576/- on the plant and machinery leased to sister concerns on the ground that the rent charged by the appellant is not at par with the fair market value even though no material was brought on record to substantiate the FMV arrived by the learned assessing officer.

4. Without prejudice to the above grounds, the learned Commissioner of Income Tax (Appeals) ought to have held that the disallowance can be made only to the extent of Rs.1,19,24,459/- which is the difference between actual expenditure incurred and rental income earned."

4. The brief facts of the case for assessment year 2012-2013 are as follows:-

The assessee is a company, engaged in the business of property development and construction of building. The assessee filed the return of income on 28/09/2012 declaring a total loss of Rs.9,50,41,000. The case was selected for scrutiny assessment under CASS. Notice u/s 143(2) of the Income Tax Act (the Act) was issued on 08/08/2013. Subsequently, notice u/s 142(1) of the Act was issued and details were called for by the AO. The Assessing Officer (AO) completed the assessment by making the following additions -

(i) Disallowance of share issue expenses of Rs.49,74,049/-

(ii) Disallowance u/s 14A r.w Rule 8D of Rs.49,78,941/-

5. Aggrieved by the order of the AO, the assessee filed an appeal before the CIT(A). The Ld. CIT(A) while confirming the disallowance of expenses incurred in connection with the issues of share, relied on the decisions of Hon'ble Supreme Court in the case of Punjab State Industrial Development Corporation Ltd., Vs. CIT (1997) 225 ITR 792 (SC) and also in the case of Brooke Bond India Ltd., Vs. CIT (1997) 25 ITR 798 (SC). Similarly the CIT(A) relied on various judicial pronouncement while confirming the disallowance u/s 14A r.w Rule 8D made by the AO.

6. Aggrieved by the order of the CIT(A), the assessee is before us for disallowance of share issue expenses and the disallowance u/s 14A of the Act

7. We shall first take up for adjudication the issue of disallowance of share issue expenses.

7.1 During the asst. year 2012-13, the assessee had incurred an expenditure of Rs.49,74,049 towards increase in authorized capital to raise funds. The said expenses were claimed as deduction by debiting to the P&L account. During the

course of asst. before the AO, the assessee had filed the details of such expenses vide letter dated 19/5/2014 and 9/12/2014 from which explained that the expenses incurred were towards the authorized share capital of the company. Based on the details furnished the AO disallowed the claim of the assessee which was subsequently confirmed by the CIT(A)

7.2 Before us, the Ld.AR contended that the share issue expenses are allowable in nature and should not be treated as capital expenditure.

7.3 The learned Departmental Representative supported the orders of the Income Tax Authorities.

7.4 We have heard both the parties and perused the matters based on the details and evidences available on record. The provisions of sec.35D allows amortization of certain specified preliminary share issue expenses incurred by an Indian Company or a person other than a company incurred before the commencement of his business or after the commencement of his business in connection with the explanation of his undertaking or in connection with his setting up new unit. However the benefit provisions of section 35D cannot be availed in the following cases:-

(i) When the issue of share capital is not made for public subscription.

(ii) When expenditure other than those specified in sec. 35D are incurred such legal fees paid to ROC professional consultation, and share valuation expenses etc.

(iii) When the share issue is not for the purpose of establishment of new business or expansion of existing business or setting up of a new unit and for other purpose such as to meet the working capital requirements, repayment of debt, streamline debt-equity ratio.

7.6 Based on the facts it is apparent that in the assessee's case the issue of shares is neither made for public subscription nor for the purposes of establishment of new business or expansion of existing business or setting up of a new unit and hence the assessee cannot avail the benefit u/s 35D.

7.7 Now coming to the question of whether the expenses incurred on issue of shares are deductible under general provisions of the Act i.e. if the expenses are revenue or capital in nature.

7.8 The Hon'ble Supreme Court in the case of Brooke Bond India Ltd., (Supra), the Hon'ble Supreme Court held as under:-

> *"Dr. Debi Pal, the learned senior counsel appearing for the appellant-assessee, has submitted that the High Court was in error in holding that the expenses incurred by the assessee In issuing the shares with a view to increase its capital did not constitute revenue expenditure. According to the learned counsel, the said view of the High Court is not in consonance with the law laid by the this Court in Empire Jute Company Ltd. v. Commissioner of Income Tax, 124 ITR 1; Commissioner of Income Tax. Bombay-11 v. Associated Cements Co. Ltd., 172 ITR 257 and Alembic Chemical works Co. Ltd. v. Commissioner of Income Tax. Gujarat, 177 ITR 377. The learned counsel has also invited our attention to the decisions of the High Courts of Andhra Pradesh, Kerala and Madras High Court in Kisenchand Chellaram (India) P. Ltd. (supra). [See: Warner Hindustan Ltd. v. Commissioner of Income Tax (A.P.), 171 ITR 224; Hindustan Machine Tools Ltd. (No. 3) v. Commissioner of Income Tax, Karnataka-11, 175 ITR 220 and Federal Bank Ltd. v. Commissioner of Income Tax, Kerala. 180 ITR 241].*
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> *We find that this matter has come up for consideration before this Court in m/s Punjab State Industrial Development Corporation Ltd., Chandigarh v. Commissioner of Income Tax. Patiala. (Tax Reference No. 1 of 1990 decided on December 4, 1996). In that case, the question under consideration was whether an amount of Rs. 1,50,000/- paid to the Registrar of Companies as filing fee for enhancement of capital was not revenue expenditure. The Court has taken note of the decisions of the Madras, Andhra Pradesh, Karnataka and Kerala High Courts to which reference has been made by Dr. Pal as well as the judgment under challenge in this appeal and the judgment under challenge in this appeal and the judgment of the High Courts taking the same view s that taken in the impugned judgment. This Court has also taken note of the decisions in Empire Jute Company Ltd. (supra) as well as India Cements Ltd. (supra). While holding that the amount of Rs. 1,50,000/- paid to the Registrar of Companies as filing fee for enhancement of the capital was not revenue expenditure, this Court has said:-*
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> *"We do not consider it necessary to examine all the decisions in extenso because we are of the opinion that fee paid to the Registrar for expansion of the capital base of the company was directly related to the capital incidentally that would certainly help in*

the business of the company and may also help in profit making, it still retains the character of a capital expenditure since the expenditure was directly related to the expansion of the capital base of the company. we are, therefore, of the opinion that the view taken by the different High Courts in favour of the Revenue in this behalf is the preferable view as compared to the view based on the decision of the Madras High Court in Kisenchand Chellaram's case."

This decision thus covers the question that falls for consideration in this appeal.

Dr. pal has, however, submitted that this decision does not cover a case. like the present case, where the object of enhancement of the capital was to have more working funds for the assessee to carry on its business and to earn more profit and that in such a case the expenditure that is incurred in connection with issuing of shares to increase the capital has to be treated as revenue expenditure. In this connection, Dr. pal has invited our attention to the submissions that were urged by the learned counsel for the assessee before the Appellate Assistant Commissioner as well as before the Tribunal it was submitted on behalf of the assessee that increase in the capital was to meet the need for working funds for us the assessee-company. But the statement of case sent by the Tribunal does not indicate that a finding was recorded to the effect that the expansion of the capital was undertaken by the assessee in order to meet the need for more working funds for the assessee. We, therefore, cannot proceed on the basis that the expansion of the capital was undertaken by the assessee for the purpose of meeting the need for working funds for the assessee to carry on its business, In any event, the above quoted observations of this Court in m/s Punjab State Industrial Development Corporation Ltd. Chandigarh (supra) clearly indicate that though the increase in the capital results in expansion of the capital base of the company and incidentally that would help in the business of the company and incidentally that would help in the business of the company and may also help in the profit making, the expenses incurred in that connection still retain the character of a capital expenditure since the expenditure is directly related to the expansion of the capital base of the company.

In these circumstances, we do not find any merit in the appeal and it is accordingly dismissed. No order as to costs."

Similar view is taken by the jurisdictional High Court in the case of CIT Vs. Motor Industries Ltd., (1998) 229 ITR 137 wherein, it was held that the expenses incurred in relation to rights issue were of capital in nature.

7.9 The judgment of the Hon'ble Supreme Court in the case of Brooke Bond Ltd., (Supra), squarely covers the case of the assessee and that the expenses incurred for the expansion of the capital base i.e. Fees paid for increase in

authorized capital is capital in nature and cannot be claimed as an expenditure. We therefore up hold the decision of the CIT(A) in disallowing the expenses incurred for share issues for an amount of Rs.49,74,049.

7.10 Therefore, ground 2 in ITA No.1370/Bang/2018 for A.Y. 2012-2013 is rejected.

Disallowance u/s 14A of the Act for Rs.49,78,94.

8.1. During the asst. year 2012-13, the assessee earned a dividend income of Rs.78,71,574 from the investments in mutual funds and the same was claimed as exempt in the return of income filed. According to the assessee, it did not incur any expenditure towards earning this income since the investments were made from its own interest free funds. The AO applying Rule 8D of the Income-tax Rules made a disallowance of Rs.49,78,941.

8.2 On further appeal, the CIT(A) upheld the disallowance, by observing as under:-

> *"5.3 Rule 8D of IT Rules prescribes the method for computation of the expenses relatable to the exempt income which has to be disallowed under section 14A. The method for determining the expenditure in relation to exempt income has three components. The 1st component being the amount of expenditure directly relating to income which does not form part of the total income. The 2nd component being computed on the basis of the formula given therein in a case where the assessee incurs expenditure by way of interest which is not directly attributable to any particular income or receipt. The formula essentially apportions the amount of expenditure by way of interest incurred during the previous year in the ratio of average value of investment, income from which does not or shall not (emphasis supplied) form part of the total income, to the affairs of the total assets of the assessee. The 3rd component, which is also applicable to the appellant, is 0.5% of the average value of the investment, income from which does not or shall not (emphasis supplied) form part of the total income, as appearing in the balance sheet of the assessee, on the I st day and the last day of the previous year. Therefore, the aggregate of these three components constitute the expenditure in relation to exempt income and this amount of expenditure which could be disallowed u/s 14A.*
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> *5.4 Further, the mandate of section 14A requires the assesee to maintain proper books of account in regard to the investments made from which the income can arise which is tax-exempt and such books of account he produced before the Assessing Officer to ascertain the expenditure incurred in relation to income not ineludible in the total income of the*

assessee. In the instant case, apparently the assessee has not maintained any separate account in this regard. This proves that the assessee's claim of incurring no expenditure in relation to the tax free income to be earned from its investments is not supported by documentary evidence as mandated in section 14A(2)/(3) of the Act. In other woE4s, under the given facts and circumstances of the case, the assessee has not discharged the onus cast upon it. In the absence of accounts maintained by the assessee in regard to its investments, the Assessing Officer cannot be expected to examine the claim of the assessee having regard to its accounts. It is observed that the AO has duly considered the claim of the appellant as regards not incurring any direct expenditure for earning the exempt income. But the incurrence of establishment expenses, other administrative & general expenses, etc. cannot be ruled out in regard to maintaining of investment portfolio coupled with fact of involvement of' other employees/officials in the decision-making process and management of investment and earning the tax-free income, The ease law relied upon by the appellant cannot also be of much help as it has not maintained any accounts as mandated in section 14A(2)/(3) of the Act and such an inaction on the part of the appellant cannot automatically shill the burden to the Assessing Officer which is otherwise placed upon the appellant at the first instance. In this view of the matter, the contentions of the assessee are not sustainable and the provisions of section 14A are duly attracted in this case.

5.5 Hon'ble Bombay High Court in case of Godrej and Boyce Manufacturing Co. Ltd V DCIT 328 ITR 81 has considered the implications of Section 14A, even the constitutional validity and applicability of Rule 8D in great detail and ultimately Hon'ble High Court has upheld the provision as well as rule 81). In the case of Sigma Cartons (F) Ltd., the ITAT, Chandigarh (ITA No.769/Chd/2011) for A.Y. 2008-09, has held that:

"12 We have heard the rival submissions carefully. We find that the decision of Hon'ble Jurisdictional High Court in the case CIT Vs. Hero Cycles Ltd, 323 ITR 518 was rendered for Assessment Year 2004-05. Later on Hon'ble Bombay High Court in case of Godrej and Boyce Manufacturing Co. Ltd V. DCIT, 328 ITR 81 has considered the implications of Section 144 even the constitutional validity and applicability of Rule SD in great detail ultimately Hon'ble High Court has given the following conclusion:

'88 Our conclusion In this judgment are as follows:-

(i) Dividend income and income from mutual funds falling within the ambit of section 10(33) of the Income-tax Act, 1961, as was applicable for time assessment year 2002-03 is not includible in computing the total income of the assessee. Consequently, no deduction shall be allowed in respect of expenditure incurred by the assessee in relation to such income which does not form part of the total income under the Act, by virtue of the provisions of section 14A(1);

(ii) The payment by a domestic company under section 115-0(1) of additional income-tax on profits declared, distributed or paid is a charge on a component of the profits oft/me company. The company is chargeable to tax on its profits as a distinct taxable entity and it pays tax in discharge of its own liability and not on behalf of or as an agent for its shareholders. in the hands of the shareholder as the recipient of dividend, income by way of dividend does not form part of the total income by virtue of the provisions a/section 10(33). Income from mutual funds stands on the same basis;

(iii) The provisions of sub-sections (2) and (3) of section 144 of the Income-tax Act 1961 are constitutionally valid,'

(iv) The provisions of rule 8D of the Income-tax Rules as inserted by the income-tax (Fifth Amendment) Rules, 2008, are not ultra vires the provisions of section 14A, more particularly sub-section (2) and do article 14 of the Constitution;

(v) The provisions of rule 8D of the Income-tax Rules which have been notified with effect from March 24, 2008, shall apply with effect from the assessment year 2008-09;

(vi) Even prior to the assessment year 2008-09, when rule 8D was not applicable, the Assessing Officer has to enforce the provisions of subsection (1) of section 14A.

For that purpose, the Assessing Officer is duty bound to determine the expenditure which has been incurred in relation to income which does not form part of total income under the Act. The Assessing of/leer must adopt a reasonable basis or method consistent with all the relevant fads and circumstances after furnishing a reasonable opportunity to the assessee to place all germane material on the record.

13. The above decision has been rendered after considering the decision of lion 'b/c Supreme Court in case of CIT v. Walfort Share and Stock Brokers P Ltd (2010) 326 ITR I (S.C), therefore, in our opinion, the ratio of this decision is applicable to the ease of the assessee and rule 8D would he applicable in the present case which relates to Assessment Year 2008-09.

5.6 Therefore, the disallowance to be computed should always be with reference to the investments made in such activity and the effort made there in. IAT Delhi in case of Technopak Advisors (p) Ltd 18 taxmann.com 146 has held that actual earning of income is not sinequanon for application of section 14A and rule SD. The Honourable P&H IIC has held in 78 taxmann.com 65 that the AO is justified to presume that administrative expenditure is incurred when tax free dividend is earned. The ITAT Chennai in the case of AH Arind (P) Ltd 64 taxmann.com 409 has decided that where the assessee has admitted and disallowed expenditure relating to exempt income, such disallowance has to be calculated under Rule 8D. The Honourable Karnataka HC in the

case of Pradeep Kar 319 ITR 416 has held that expenditure relating to exempt income is not allowable under section 14A.

5.7 As it has been held as per discussions above that provisions of section 14A and rule 8D are applicable in the case of the appellant, the contentions of the appellant are held to be not sustainable. Consequently, the disallowance of Rs 49,78,941 u/s 14A read with rule 8D of the Act made by the AO is upheld. The grounds of appeal of the appellant are dismissed."

8.3 Aggrieved by the order of the CIT(A), the assessee raised this issue before the Tribunal. The learned AR brought our attention to the recent judgment of the Hon'ble Supreme Court in the case of South Indian Bank Ltd., Vs. CIT 438 ITR 1 (SC). The learned AR submitted that in the assessee's case, the investment are made out of assessee's own funds and produced the details of investment and capital and reserve surplus which is reproduced here below:-

Investments	As on 31.03.2012 (Amount in Rupees)	As on 31.03.2011 (Amount in Rupees)
Shares in subsidiaries	2,10,00,000	22,99,970
Debentures / bonds (Taxable)	63,52,68,100	11,69,76,600
Mutual funds	2,47,488	---
Total	65,65,15,588	11,92,76,570

Particulars	As on 31.03.2012 (Amount in Rupees)	As on 31.03.2011 (Amount in Rupees)
Share Capital	6,58,41,510	4,63,28,000
Reserves and Surplus	152,85,45,495	61,18,35,702
Total	159,43,87,005	65,81,63,702

The learned AR submitted that out of the total investments, the majority of the investments are towards debenture / bonds and income arising on such investments are taxable (Hence, section 14A of the I.T.Act has no application). If the investments made in debentures is taken out of the total investment then the balance amount of investment made by the assessee, is below the capital

reserves and surplus (i.e. own interest free funds) and hence submitted that the investments made by the assessee is out of its own funds and squarely covered by the judgment of the Hon'ble Supreme Court in the case of South Indian Bank Ltd., (Supra).

8.4 The learned DR supported the orders of the Income Tax Authorities..

8.5 We have heard both the parties and perused the material on record. From the facts submitted it becomes clear that own funds of the assessee are in excess of the investments made by the assessee that are earning exempt income. Hence the assessee's case is directly covered under the decision of South Indian Bank (Supra). The Hon'ble Supreme Court in this case held that -

> *"27. The aforesaid discussion and the cited judgments advise this court to conclude that the proportionate disallowance of interest is not warranted u/s 14A of the Income-tax Act for investments made in tax free bonds/securities which yield tax free dividend and interest to the assessee banks in those situations where, interest-free own funds available with the assessee exceeded their investment with this conclusion, we un hesitatingly agree with the view taken by this Tribunal favouring the assessee."*

8.6 We place reliance on the judgment of the Hon'ble Supreme Court in the case of South Indian Bank Ltd., (Supra) as the facts of in the case of the assessee are similar where the investments made by the assessee on income earning investments are made out of its own funds. Hence the disallowance made u/s 14A r.w Rule 8D is deleted.

8.7. Therefore, grounds 3 to 7 in ITA No.1370/Bang/2018 are allowed.

ITA No.1387/Bang/2018 (Assessment Year 2013-2014)

Ground No.2 : Disallowance of share issue expenses:

9. Similar issue was raised in ground No.2 in ITA No.1370/Bang/ 2018 for assessment year 2012-2013. Since the facts and circumstances of this issue is mutatis mutandis similar to that of the issue raised in A.Y. 2012-2013, for our reasoning given in A.Y. 2012-2013 from paragraph 7.4 to 7.10 above, we reject ground No.2 raised for assessment year 2013-2014.

Grounds No.3 to 7 : Disallowance u/s 14A :

10. Similar issue was raised in grounds No. 3 to 7 in ITA No.1370/Bang/ 2018 for assessment year 2012-2013. Since the facts and circumstances of this issue is mutatis mutandis similar to that of the issue raised in A.Y. 2012-2013, following our finding given in A.Y. 2012-2013 from paragraph 8.5 to 8.7 above, we allow grounds No.3 to 7 raised for assessment year 2013-2014, as well.

ITA No.1388/Bang/2018 (Assessment Year 2014-2015)

11. For the appeal concerning assessment year 2014-2015, the assessee has raised three issues, namely –

(i) Disallowance of share issue expenses (Ground 5)

(ii) Disallowance u/s 14A of the I.T.Act (grounds 6 to 10)

(iii) Addition of notional rent of Rs.2,33,20,576 (grounds 2 to 4)

We shall adjudicate the above issues as under:-

Disallowance of share issue expenses (Ground 5)

12. Similar issue was raised in ground No.2 in ITA No.1370/Bang/ 2018 for assessment year 2012-2013. Since the facts and circumstances of this issue is mutatis mutandis similar to that of the issue raised in A.Y. 2012-2013, following our finding given in A.Y. 2012-2013 from paragraph 7.4 to 7.10 above, we reject ground No.5 raised for assessment year 2014-2015, as well.

Disallowance u/s 14A (Grounds 6 to 10):

13. Similar issue was raised in grounds No. 3 to 7 in ITA No.1370/Bang/ 2018 for assessment year 2012-2013. Since the facts and circumstances of this issue is mutatis mutandis similar to that of the issue raised in A.Y. 2012-2013, following our finding given in A.Y. 2012-2013 from paragraph 8.5 to 8.7 above, we allow grounds No.6 to 10 raised for assessment year 2014-2015, as well.

Addition of notional rent of Rs.2,33,20,576 (Grounds 2 to 4):

14. Brief facts of the case are that the assessee has leased out plant and machinery, office equipments during the year to its subsidiaries and shown

receipt of lease rent of Rs.2,34,24,491. The amount of lease rent has been determined by adding the depreciation charted on assets and the interest payable on bank loan. To verify the FMV, the A.O. asked the details for WDV of assets leased to sister concerns and depreciation claimed. Thus, the AO found that the actual depreciation claimed by the assessee as per IT Act on these assets was Rs.2,16,88,963 against which the assessee has taken depreciation of Rs.97,64,504 only for charging lease rent from sister concerns. Thus, the AO held that the difference amount of Rs.1,19,24,459 is the lease rent short charged from sister concerns. Further, the A.O. held that the assessee is incurring loss without any plausible reasons and lease rent for any other unrelated party would have fetched the assessee minimum 8% of WDV of assets as lease rent over and above the cost of assets. Thus, he calculated the lease rent at Rs.1,13,96,117 which is 8% of the WDV of Rs.14,24,51,471. By adding the depreciation and the interest expenses to the lease rent as mentioned above, the FMV of lease rent was calculated by the AO at Rs.4,67,45,067. Accordingly, the lease rent short charged from the sister concerns at Rs.2,33,20,576 was added to the income of the assessee.

14.1 Aggrieved by the order of assessment, the assessee raised this issue before the first appellate authority. The CIT(A) upheld the view taken by the A.O. by observing as under:-

> *"5.1 The submission of the appellant has duly been considered. The appellant argues that income generation (lease rent fixation) is the prerogative of the assessee which is determined in line with market trends and the AO has no authority to refix the same holding it as undervalued. However, it is observed that the transaction of leasing the machineries are with the related parties of the appellant. Prima facie, as the AO has pointed out, the depreciation cost and the interest payment on the bank loan for the machineries is more than the lease rent charged by the appellant to its subsidiaries. It is an established and accepted notion that a busi9neness enterprise is established for earning some income. It is the hope of earning profits that inspires people to star5t business. Profit is essential for the survival and growth of every business unit. Therefore, the argument of the appellant that the AO cannot determine the FMV of lease rental is not correct. Further the appellant has argued that the AO failed to appreciate that the machinery let out is unique to construction activities and are not generally available in the market for leasing except to related parties. Even going by such argument of the appellant its unique and rare machine would normally fetch more lease rental for the appellant. It is observed that the AO has discussed the issue logically and has advanced cogent reasons for determining the FMV for lease*

rental in the case of the appellant. The computation of lease rental at the rate of 8% of the WDV of the assets by the AO is also considered reasonable. Though, the decisions relied upon by the AO are not on the issue of FMV of lease rental for machines, the ratio can be applied to the facts in case of the appellant.

5.2 In view of above, the addition of Rs.2,33,20,576 made by the AO is confirmed. The ground of appeal is dismissed."

14.2 Aggrieved, the assessee has raised this issue before the Tribunal. The learned AR submitted that the issue in question is covered in favour of the assessee by the order of the Tribunal in assessee's own case for assessment years 2015-2016 and 2016-2017 in ITA No.2451/bang/2019 and ITA No.37/Bang/2020 (order dated 12.06.2020).

14.3 The learned Departmental Representative was unable to controvert the above assertion of the learned AR.

14.4 We have heard rival submissions and perused the material on record. On identical issue, the Tribunal in assessee's own case for assessment years 2015-2016 and 2016-2017 (supra) has decided the issue in favour of the assessee. The relevant finding of the Tribunal, reads as follows:-

"5. We have considered the rival submissions. We find that this issue was decided by learned CIT(A) as per paras 4.1 and 4.2 of his order and for ready reference, paras 4.1 and 4.2 from the order of CIT(A) are reproduced. These paras are as under:

4.1 The facts involved are that the appellant has leased out plant and machinery, office equipments during the year to its subsidiaries and shown receipt of lease rent of Rs.1,11,58,865/-. The amount of lease rent has been determined by the assessee by adding the depreciation charged on assets and the interest payable on bank loan. To verify the FMV, the AO asked for details of WDV of assets leased to sister concerns and depreciation claimed. Thus. the AO found that the actual depreciation claimed by the assessee as per 11 Act on these assets was Rs.1,82,15,362/- against which the assessee has taken depreciation of Rs 42,08,823/- only for charging lease rent from sister concerns. Thus, the AO held that the difference amount of Rs 1,40,06,539/- is the lease rent short charged from sister concerns. Further. the AO held that the assessee is incurring loss without any plausible reason and lease rent for any other unrelated party would have fetched the assessee minimum 8% of WDV of assets as lease rent over and above the cost of assets. Thus, he calculated the lease rent at Rs.96,61,000/- which is 8% of the WDV of Rs.12,07,62,505/-. By adding the depreciation and the interest expenses to the lease rent as mentioned above, the FMV of lease rent was calculated by the AO at Rs.3,48,26,404/-. Accordingly, the lease rent short charged from the sister concerns at Rs.2,36,67,539/- was added to the income of the assessee.

4.2 The submission of the appellant has dill) been considered. The appellant argues that income generation (lease rent fixation) is the prerogative of the assessee which is determined in line with market trends and the AO has no authority to refix the same holding it as undervalued. However, it is observed that the transaction of leasing the machineries are with the related parties of the appellant. Prima facie, as the AO has pointed out. the depreciation cost and the interest payment on the bank loan for the machineries is more titan the lease rent charged by the appellant to its subsidiaries. It is an established and accepted notion that a business enterprise is established for earning some income. It is the hope of earning profits that inspires people to start business. Profit is essential for the survival and growth of ever. business unit. Therefore, the argument of the appellant that the AO cannot determine the FMV of lease rental is not correct. Further, the appellant has argued that the AO failed to appreciate that the machinery let out is unique to construction activities and arc not generally available in the market for leasing except to related parties. Even going by such argument of the appellant its unique and rare machine would normally fetch more lease rental for the appellant. It is observed that the AO has discussed the issue logically and has advanced cogent reasons for determining the FMV for lease rental in the case of the appellant. The computation of lease rental at the rate of 8% of the WDV of the assets by the AO is also considered reasonable."

6. From the above paras reproduced from the order of CIT(A), it comes out that the addition was made by the AO on this basis that fair market value (FMV) of lease rental is 8% of WDV plus interest expense and depreciation as per Income Tax Act. In the light of these facts, we are now examining the applicability of the judgment of Hon'ble Gauhati High Court cited by the learned AR of the assessee rendered in the case of Highway Construction Co. Pvt. Ltd., Vs. CIT (supra). In this case, it was noted by the AO that the interest free loan was given by the assessee company to its MD free of interest and the AO came to the conclusion that the assessee had diverted the fund raised by loan to its MD during the year without interest and the AO disallowed the interest payment on the loan borrowed. When the assessee carried the matter before learned CIT(A), in that case it is noted by learned CIT(A) that the amount of Rs.5 lakhs was advanced by the assessee company to its MD on 05.04.1972 but the borrowings was made during the period between May 1972 and March 1973 and under these facts, learned CIT(A) came to this conclusion that the borrowings had not been utilized in making advance to the MD and therefore, the interest free advances by the assessee company to its MD were out of assessee's own funds. Learned CIT(A) deleted this disallowance against which the Revenue was in appeal before the Tribunal. In Assessment Year 1979-80, the AO made addition of notional interest on interest free advances by the assessee company to its MD. In those years also, the matter was carried by the assessee in appeal before CIT(A) and learned CIT(A) held that the assessee cannot be forced to earn and he deleted the notional interest added by the AO. The Revenue carried the matter in appeal before the Tribunal and the Tribunal reversed the order of CIT(A) and restored that of the AO. Against this Tribunal order, the assessee was in appeal before Hon'ble Gauhati High Court. Hon'ble Gauhati High Court decided the issue in favour of the assessee and the relevant para of this judgment of Hon'ble Gauhati High Court is reproduced here in below from page 61 of the Paper Book. This para reads as under: "The finding of the Income- tax Officer is that the assessee ought to have collected interest. In other words, the view of the Income-tax Officer, which has been accepted by the Tribunal was that the assessee, as a good business concern, should not have granted

interest-free loan, or should have insisted on payment of interest. If the assessee had not bargained for interest, or had not collected interest, we fail to see how the income-tax authorities can fix a notional interest as due, or collected by the assessee. Our attention has not been invited to any provision of the Income-tax Act empowering the income-tax authorities to include in the income interest which was not due or not collected. In this view, we answer question No. (ii) in the negative, that is, in favour of the assessee and against the Revenue."

7. From the above para reproduced form the judgment of Hon'ble Gauhati High Court, it comes out that in a case where the income is not actually received by the assessee and it has not accrued to the assessee, then under no provisions of Income ITA No. 2541/Bang/2019 ITA No. 37/Bang/2020 S. P. Nos. 29 and 59/Bang/2020 Page 7 of 18 Tax Act, the income tax authorities are authorized to include such income which was neither due nor collected. In the present case also, this is not the case of the AO that higher amount of lease rental was received by the assessee or it has accrued to the assessee and therefore, in our considered opinion, this judgment of Hon'ble Gauhati High Court is squarely applicable in the present case. No contrary decision of Hon'ble Karnataka High Court or of Hon'ble Apex Court has been cited before us by learned DR of the Revenue and learned DR of the Revenue also could not show that in the facts of the present case, this judgment of Hon'ble Gauhati High Court is not applicable. We respectfully follow this judgment of Hon'ble Gauhati High Court and decide this issue in favour of the assessee. Accordingly, ground No.2 of the assessee's appeal is allowed.

14.5 Respectfully following the order of the Co-ordinate Bench of the Tribunal in assessee's own case, we allow grounds 2 to 4 raised in ITA No.1388/Bang/2018.

15. In the result, the appeals filed by the assessee are partly allowed.

Order pronounced on this 02nd day of February, 2022.

Sd/-	**Sd/-**
(George George K)	**(Padmavathy S)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Bangalore; Dated : 02nd February, 2022.
Devadas G*

Copy to :
1. The Appellant.
2. The Respondent.
3. The CIT(A)-7, Bangalore.
4. The Pr.CIT -7, Bangalore.
5. The DR, ITAT, Bengaluru.
6. Guard File.

Asst.Registrar/ITAT, Bangalore