IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH, MUMBAI

BEFORE SHRI VIKAS AWASTHY, HON'BLE JUDICIAL MEMBER AND SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER

ITA NOs. 1325/MUM/2013 (A.Y: 2009-10)

M/s. ICICI Home Finance Company Ltd., 7th Floor, West Wing, South Tower ICICI Bank Towers Bandra Kurla Complex Bandra (E), Mumbai -400051 **PAN: AAACI6285N**	*v.*	Addl. CIT-Range-10(1) 4th Floor Aayakar Bhavan, M.K. Road Mumbai - 400020
(Appellant)		**(Respondent)**

ITA NO. 1358/MUM/2013 (A.Y: 2009-10)

DCIT-Range-10(1) Room No. 455, 4th Floor Aayakar Bhavan, M.K. Road Mumbai – 400020	*v.*	M/s. ICICI Home Finance Company Ltd., 7th Floor, West Wing, South Tower ICICI Bank Towers Bandra Kurla Complex Bandra (E), Mumbai -400051 **PAN: AAACI6285N**
(Appellant)		**(Respondent)**

ITA NO. 1431/MUM/2016 (A.Y: 2009-10)

Asst. CIT -14(2)(1) Room No. 474, 4th Floor Aayakar Bhavan, M.K. Road Mumbai – 400020	*v.*	M/s. ICICI Home Finance Company Ltd., 7th Floor, West Wing, South Tower ICICI Bank Towers Bandra Kurla Complex Bandra (E), Mumbai -400051 **PAN: AAACI6285N**
(Appellant)		**(Respondent)**

Assessee by	**:**	**Aarti Vissanji**
Department by	**:**	**R.A. Dhyani**
Date of Hearing	**:**	**07.03.2022**
Date of Pronouncement	**:**	**03.06.2022**

O R D E R

PER S. RIFAUR RAHMAN (AM)

1. These cross appeals are filed by the assessee and revenue against order of the Learned Commissioner of Income Tax (Appeals)-21, Mumbai [hereinafter in short "Ld.CIT(A)"] dated 15.11.2012 for the A.Y.2009-10. Appeal filed by the revenue in ITA.No. 1431/Mum/2016 (A.Y: 2009-10) is against deleting the penalty levied by the Assessing Officer.

2. First we take up the appeal of the assessee in ITA.No. 1325/Mum/20213, assessee has raised following grounds in its appeal: -

> *"(1) Being aggrieved by the order bearing No. CIT(A)21/IT/416/2011-12 dated November 15 2012 issued by the Commissioner of Income-tax (Appeals) — 21, Mumbai (hereinafter called the CIT(A)) under section 250 of the Income-tax Act, 1961 (hereinafter called The Act] and communicated to the Appellant on December 20, 2012, the Appellant appeals against and on the following amongst other grounds which are without prejudice to each other.*
>
> *[A]* ***Re: Disallowance under section 14A read with Rule 8D***

[2] On the facts and circumstances of the case and in law, the CIT(A) erred by confirming | the disallowance under section 14A for managerial and administrative purposes upto y 0.50% of the average of the value of investment, income form which did not or shall not form part of the total income as appearing in the balance sheet on the first day and last day of the previous year.

[3] On the facts and circumstances of the case and in law, the CIT(A) failed to appreciate evaluate & verify the method for computing the disallowance under section 14A offered for taxation by the appellant voluntarily in its Return of Income and erred in applying Rule 8D mandatorily.

[B] Re: Special Reserve Deduction u/s 36(1)(viii)

[4] On the facts and circumstances of the case and in law, the CIT(A) erred in excluding the following income on the ground that the same do not qualify for deduction under section 36(1)(viil) without appreciating the facts explained by the appellant during the course of appeal hearings :

Sr.No.	*Particulars*	*Amount*
1.	*Interest on Buyout Portfolio*	*232,73,63,039*
2.	*Interest income - Securitisation Cases*	*9,93,70,283*
3.	*Interest on Termination Waived Off*	*49,04,263*
4.	*Principal Adjust Interest Expense*	*(10,33,740)*
5.	*Pre EMI Due From Customer*	*14,39,243),*
6.	*Termination Excess Income*	*48,886*
7.	*Ops Risk Account HL*	*(1,04,041)*
8.	*Premium - Buyout W/Off*	*(4,98,15,449)*
9.	*Termination Excess Income - New Lap*	*1,318 10.*
10.	*Interest on Termination Waive Off-New LAP*	*27,13,167)*
11.	*Principal Amt Waiver ~ Termination - New LAP*	*(15,04,858)*
12.	*Interest on Termination Waived Off - DDA*	*(12,89,411)*
13.	*Principal Amt Waiver-Termination - DDA :*	*(90,568)*

[5] On the facts and circumstances of the case and in law, the CIT(A) failed to appreciate the special reserve computation method adopted by the Appellant.

[C] ***Re: Disallowance under section 37(1) of Interest for delay payment of Income Tax - TDS amounting to f 31,78,935/***

6. On the facts and circumstances of the case and in Jaw, the CIT(A) erred by confirming the disallowance amounting to ₹.31,78,935/- under section 37(1), towards Interest for delay payment of Income Tax = TDS in accordance with section 201(1A) of the Act.

[D) GENERAL:

7. The Appellant craves leave and reserves its rights to vary, amend, alter and/or add / or withdraw any or all the grounds of appeal and to produce such oral and documentary evidence and file such compilation of documents as may be necessary at the time of hearing of the appeal."

3. At the time of hearing, Ld. Counsel for the assessee submitted that Ground No.1, 2, 3 are not pressed, accordingly, the same stand dismissed.

4. With regard to Ground No. 4, Ld. Counsel for the assessee filed submissions which are reproduced below: -

"During the course of hearing on March 7, 2022, the Hon'ble Members directed the Appellants to file a note on ground no. 4 of appellant's appeal on claim for deduction under section 36(1)(viii) of the Income Tax Act, 1961 (the 'Act') on interest income earned from securitization trust. Accordingly, the Appellants submit the following:

1. The appellant being a housing finance company is in the business of providing housing loans to the customers. Since the appellant is a "housing finance company", it is eligible for deduction under section 36(1)(viii) of the Act for the income earned from housing finance business.

2. The appellant earns interest income from the securitization trust ('the trust') based on its purchase of units /security receipts/pass through certificates issued by the trust. The trust received interest income from the underlying assets held by it, being the housing loans.

3. The trust in which the appellant has invested, holds housing finance loans either securitized by the appellant or by other lenders in the banking/housing finance sector. This fact is supported by Note e) of the annual audited accounts for the year ended March 31, 2009 relevant to the assessment year 2009-10 on page 23 of the paper book, extracted hereunder for ease of reference:

"Loans & other credit facilities include subordinated interest of Z 296,625,203 (Mar 08— 334,635,473) in the underlying trust property of housing loans of Mortgage Backed Securitisation Trust Series VI & VII"

4. Under the Indian tax laws, the trust is a pass-through entity and the interest income is that of the members of the trust. There were no specific provisions in the Act for the assessment year 2009-10 relating to taxation of securitization trust and the normal provision of the revocable transfer under section 61 of the Act and / or the trust taxation as per section 161 of the Act were applicable for the year under appeal. As per section 61 and or section 161 of the Act, the interest income from housing loans securitized is taxable in the hands of the appellant as an investor in the Trust.

5. The interest income earned from the housing loans securitized through the trust has been included in the total income of the appellant for the year under consideration and has also been assessed as such. We, therefore, submit that interest income received from the trust was includible for computing deduction under section 36(1)(viii) of the Act. Subsequently, the Income Tax Act, 1961 was amended by the Finance Act 2013 to specifically provide for exemption for both the securitization trust and the investor in the securitization trust with an income distribution tax on distribution made by the securitization trust. Thereafter, by the Finance Act 2016, the distribution tax was substituted by withholding tax and pass-through status was enacted into the law. The tax law has been amended to insert section 115TCA of the Act by the Finance Act 2016 to provide pass-through status to the securitization trust. Section 115TCA(1) of the Act provides that "Notwithstanding anything contained in this Act, any income accruing or arising to, or received by, a person, being an investor of a securitisation trust, out of investments made in the securitisation trust, shall be chargeable to income-tax in the same manner as if it were the income accruing or arising to, or received by, such person, had the investments by the securitisation trust been made directly by him.:"

6. As per section 115TCA(2) of the Act, "the income paid or credited by the securitisation trust shall be deemed to be of the same nature and in the same proportion in the hands of the person referred to in sub-section (1), as if it had been received by, or had accrued or arisen to, the securitisation trust during the previous year."

7. Thus, securitization trust is a pass through entity and the appellant as an investor in the Trust earns interest income on housing finance loans securitised and the appellant as an investor in the securitization trust is taxed on such interest income for the year under appeal, as if the loan has been provided by the appellant company, directly.

In view of the above we respectfully submit that the interest income on securitization of housing finance loans is eligible for deduction under section 36(1)(viii) of the Act.

We request you to take the above on record and oblige."

5. Further, Ld. Counsel for the assessee filed written submissions vide letter dated 23.08.2017 which are reproduced below: -

"Deduction under sec.36(1)(viii) on

(i) interest income from Buyout Portfolio — Rs. 232,73,63,039

(ii) interest income from securitisation cases — Rs.9,93,70,283

- *The Appellant had claimed deduction of Rs.11,36,58,074 under sec.36 (1) (viii) @ 20% of its income Rs. 56,82,90,372 derived from the business of providing long term housing finance computed under the head 'Profits and gains from Business'. Income from long term housing finance worked out to 36% of the total business income and inter alia included interest income from Buyout Portfolio and from long term housing finance loans that were securitised*

- *The AO rejected the claim for deduction under sec.36(1)(viii), the CIT(A) allowed the claim against which Dept. is in appeal (Ground No. — 2).*

- *The CIT(A) has allowed deduction amounting to Rs.6,70,72,713 under sec.36(1)(viii). However he has inter alia*

excluded the interest income from (a) buyout portfolio on the ground that the loans were disbursed by other banks and the appellant had purchased a source of income from those banks and (b) securitisation cases on the ground that the Appellant had purchased housing loans from others by contributing in their loan portfolio trusts. This ground is restricted to these 2 items of interest income. The appellant is not in appeal against other income that has been disqualified by the CIT(A).

Submissions:

Sec.36(1)(viii) reads as under:

'in respect of any special reserve created and maintained by a specified entity, an amount not exceeding 20% of the profits derived from eligible business computed under the head "Profits and gains of business or profession" (before making any deduction under this clause) carried to such reserve account'.

Explanation clause (a) defines a 'Specified entity' to include `(v) a housing finance company'.

Explanation clause (b) defines 'Eligible business' to inter alia mean `(ii) in respect of the specified entity referred to in sub-clause (v) of clause (a), the business of providing long term finance for the construction or purchase of houses in India for residential purposes;'

Explanation clause (e) defines a 'Housing finance company' to mean a public company formed and registered in India with the main object of carrying on the business of providing long-term finance for construction or purchase of houses in India for residential purposes'.

Explanation clause (h) defines 'Long term finance' to mean 'any loan or advance where the terms under which moneys are loaned or advanced provide for repayment along with interest thereof during a period of not less than 5 years'.

The stand of the CIT(A) that loans should have in the first instance been disbursed by the assessee to qualify for the deduction is not justified. No such condition has been prescribed in sec.36(1)(viii) and cannot be read into it. The appellant satisfies the twin conditions that is, (i) it is a housing finance company as defined in Explanation clause (e) (ii) it carries on the eligible business that is, the business of providing long term finance for purchase or construction of residential houses in India. On purchase of the housing loan portfolio

the appellant steps into the shoes of the original lender. In the absence of any condition in sec.36(1)(viii) debarring deduction in respect of housing loans acquired from other banks/entities, the appellant is entitled to the deduction claimed in respect of its entire portfolio of long term loans advanced for purchase or construction of houses irrespective of whether the loans were disbursed by the appellant or by other banks and purchased by the appellant.

- *In paragraph 7 of the Remand Report dated 03.04.2017 for A.Y.2011-12 the AO has accepted Interest from Buyout Portfolio as eligible for deduction under sec.36(1)(viii). (Report submitted at the hearing on 18.08.2017)*

- *So far as securitisation cases are concerned, the source of interest received is long term housing loans that have been securitised through a SPV. The SPV is a pass through vehicle and hence the nature of interest does not change. The CIT(A)'s action in denying the said deduction in respect of interest in securitisation cases ought to be reversed.*

The following decisions relied upon by the ld. CIT DR are distinguishable on facts:

In Gruh Finance Ltd. v ACIT, 126 ITD 416 (Ahd), the ground of appeal was whether deduction under sec.36(1)(viii) was permissible in respect of discounting charges and interest on bank deposit and ICD. In paragraph 11 the ITAT held that the immediate source of discounting charges earned from the business of discounting investments and interest on bank and other deposits was not from the business of providing long term finance for purchase of construction of houses. Relying upon the judgment in Sterling Foods' case, the ITAT rejected the assessee's claim.

In Tourism Finance Corp. of India Ltd. [2010] 2 ITR (Trib) 1 (Del) the ITAT held that interest on equipment credit scheme, lease rental and financial charges, dividends and profit on sale of investment, miscellaneous income, interest on deposits, other fees and charges did not fall within the ambit of income derived from long term finance and deduction under sec, 36(1)(viii) was not allowable.

Unlike both the above cases, in the present case interest that the appellant has claimed as qualifying for the said deduction from Buyout housing loan portfolio as also securitisation cases is in fact

derived from long term housing loans and therefore eligible for the purpose of working of the deduction under sec.36(1)(viii).”

6. With regard to Ground No. 4, Ld.DR submitted that loans are Buyout loans by the Trust, he brought to our notice Page No. 331 and 332 of the Paper Book and he submitted that these transactions are not relating to A.Y. 2011-12 and Further, he brought to our notice Page No. 333 of Paper Book and submitted that the decision of the Ld.CIT(A) is not disturbed. Therefore, this issue is not relevant to this assessment year under consideration. Further, he submitted that section 36(1)(viii) is available only to eligible business only to the transactions relating to housing loans and he submitted that once securitization done the above exemption is not available to the assessee. in this regard he brought to our notice Page No. 11 and 20 of the Ld.CIT(A) order, and he relied on the findings of the Ld.CIT(A).

7. Considered the rival submissions and material placed on record, we observe from the record that the assessee has received interest from the loan acquired through the trust created for the securitization of bad loans or illiquid assets. Securitization is a method of converting the receivables in the form of illiquid assets of the financial institutions or banks into bonds and then bonds are sold to the investors thru the Special Purpose Vehicle

(SPV). In the given case, the assessee has purchased/invested in the above said bonds in proportion to the investment made by the assessee in the SPV. The assessee claims that the character of the loan remains intact even after above securitization of the above loan. Therefore, the assessee claimed the benefit u/s 36(1)(viii) of the Act. After careful consideration, we notice that there is no doubt the banks sanctions housing loans to borrowers and upon default by them, it becomes bad or illiquid assets to the banks and it becomes burden in their Balance Sheet, hence they prefer to transfer or sell the same to the SPV at a discounted rate. This is possible because the banks write off these loans in their Balance Sheet. When they do the securitization thru SPV, in turn SPV sells the same to the investors. When this process takes place, the original loan becomes a new loan, which does not carry the character of Housing Loan, it becomes an instrument even though the SPV recovers from the original borrowers or give them extended period for recovery. The terms are of completely new and altered to suit the recovery of the original loan between the SPV and the Investors as well as SPV and the original borrower. In essence the original housing loan loses its character and it becomes an instrument as far as investors are concerned. The assessee has earned the interest not as an lender but as an investor.

8. Considering the above discussion, in our view, the purpose of granting deduction u/s 36(1)(viii) is to encourage the long term housing finance and the benefit to the small borrowers. Therefore, it is available to the specified entity and on the profits derived from eligible business. No doubt the specified entity includes housing finance company like assessee. It is important that the eligible business means it is for the purpose of long term housing finance business for the purpose of construction or purchase of residential units. In the given case, the interest is not earned for lending the money for the purpose of purchase or construction of residential units rather it is earned from the portion of bonds held by the assessee or to the extent of investment made in the SPV. Therefore, the purpose of investment has changed even though the original purpose of lending was for residential housing but when it becomes loss assets or illiquid assets, it loses the character and one cannot expected to retain the character when the purpose of investment in the SPV changes. At the time of hearing, Ld.AR relied on the case of DCIT *v.* AIG Home Finance India Ltd., [2011] 13 taxmann.com 168 (Chennai). In the above case, the facts are, the assessee in process of securitization, the future receivables for a period of ten years were discounted with banks and the banks paid the Net Present Value of future

receivables to the assessee as part of securitization arrangement. In the above case, the assessee has received the discounted future interest receivable. Therefore, the nature of transaction has not changed. Therefore, the ITAT has allowed the deduction claimed by the assessee. In the given case, the facts are distinguishable. Therefore, in our considered view, interest earned by the assessee does not fulfill the conditions specified in the section 36(1)(viii) of the Act. Hence, we do not see any reason to interfere with the findings of Ld CIT(A). Therefore, the ground raised by the assessee is dismissed.

9. Coming to Ground No. 5 which is in respect of method of computation of computing the deduction u/s.36(1)(viii), Ld. Counsel for the assessee submitted written submissions which are reproduced below:-

> *"• The CIT(A) has considered the qualifying receipts from housing finance at 20 Rs.269,33,04,534 and the ratio of this income to total receipts including capital gain, dividend etc. @ 18.19%. After allocating expenses in the same ratio of 18.19% to the qualifying income = Rs.235,79,40,968, the income eligible for the said deduction has been worked out at Rs.33,53,63,565 and the amount of deduction @ Rs.6,70,72,713 as against the claim of Rs. 11.36 crores.*
>
> *• The starting point of the appellant's working is the income from operations as 4 (Pb) per P & L A/c. The appellant has worked out the ratio of the income from housing finance to the total income excluding non-business receipts such as capital gain, dividend etc. The business receipts have been bifurcated into long term housing finance (36%) and non-qualifying income (64%) eg. home loans less*

than 5 years, and other fees etc.. This ratio was applied to the 'Profits from Business and Profession', 20% of such profit, subject to the amount transferred to the Special Reserve has been claimed as deduction.

- *The only business carried on by the appellant is home financing which is an eligible business. The said deduction is allowed @ 20% of the profits derived from eligible business computed under the head 'Profits and Gains of Business'. Hence the basis adopted by the CIT(A) viz, working out the ratio of qualifying receipts to total receipts including non-housing finance related receipts such as capital gain, dividend etc. is erroneous.*

10. Ld. DR vehemently supported the orders of the authorities below.

11. Considered the rival submissions and material placed on record, we observe from the record that the assessee claimed deduction u/s.36(1)(viii) of the Act on the basis of income earned from the long term housing finance business and it is the only activity carried by the assessee. When the legislature intends to give benefit based on the activities of the housing finance then deduction also has to be determined based on these activities only. We notice that assessee has claimed deduction based on the income earned thru the housing finance and it has bifurcated the same into long term which is more than 5 years and short term which is less than 5 years' duration. It has claimed deduction only to the extent of income earned from the long term financing. In our view, it is proper method and the tax authorities included other source of income like capital

gains, dividends etc., in the total income to deny the ratio of actual deduction, which is not proper. We direct the AO to calculate the deduction from the profit derived from the eligible business, which is the earning of income from the activities in line of earning income from construction or purchase of residential purpose. In the given case the eligible profit is the profit earned from the business of lending for residential housing purpose, which includes short term as well as long term. With the above direction, we allow the ground raised by the assessee.

12. Coming to Ground No. 6 which is relating to disallowance of interest for delayed payment of TDS amounting to ₹.31,78,935/-, Ld. Counsel for the assessee submitted as under: -

> *"AO - paragraph 8*
>
> *CIT(A) has confirmed the disallowance relying upon Ferro Alloys Corp.Ltd. v CIT, 196 ITR 406 (Born) -paragraph 4.3*
>
> *Submission:*
>
> *Interest is compensatory and not penal and hence allowable*
>
> *Oriental Insurance Co. Ltd. 315 ITR 102 (Kar) and CIT v United Insurance Co. Ltd. 325 1TR231 (Kar)"*

13. Ld.DR vehemently supported the orders of the authorities below.

14. Considered the rival submissions and material placed on record, it is settled principle that interest on late payment of TDS is not penal in nature, since it is compensatory in nature, it is eligible for deduction u/s.37 of the Act as it is expended wholly and exclusively for the business purpose and payment of interest on late remittance of TDS is neither an offence nor prohibited by law, as held in the case of Lachmandas Mathura *v.* CIT (254 ITR 799) (SC). Therefore, we direct AO to allow the claim of the assessee, hence the ground raised by the assessee is allowed.

15. In the result, appeal filed by the assessee is partly allowed.

16. Coming to the appeal filed by the revenue in ITA.No. 1358/Mum/2013 (A.Y: 2009-10), revenue has raised following grounds in its appeal: -

> *"1. (i) "On the facts and in the circumstances of the case and in law, the Ld., CIT(A)'s erred in omitting the interest expenditure incurred by the assessee holding that the same was not attributable for earning exempt income."*
>
> *1.(ii) "On the facts and in the circumstances of the case and in law, the Ld., CIT(A)'s erred in restricting the disallowance u/s.14A without appreciating the fact that as per the provisions of the Act if the AO is not satisfied with the working of sec.14A of the assessee then, the AO has to re-work the disallowance u/s.14A r.w.Rule 8D."*
>
> *1.(iii) "On the facts and in the circumstances of the case and in law, the Ld., CIT(A)'s erred in restricting the disallowance u/s.14A by holding that the total investments i.e. Rs.1353,84,55,490/- is not*

attributable for earning exempt income. And in holding that investments of Rs.428,89,06,341/- is attributable for earning the exempt income."

2. "On the facts and in the circumstances of the case and in law, the Ld CIT(A)'s erred in allowing the claim of the assessee u/s.36(1)(viii) of the Act."

3. "On the facts and in the circumstances of the case and in law, the Ld CIT(A)'s erred in giving relief on disallowances made by AO relating to delay in Govt payments by assessee on account of interest paid for delay in payment to Govt pertaining to service tax/work contract tax/Profession Tax."

4. "On the facts and in the circumstances of the case and in law, the Ld CIT(A)'s erred in giving relief on disallowances u/s.40(a)(ia) made by AO based on remarks by the Auditors in the Tax Audit Report in the Form 3CD dated 26/9/2009 without remanding the issue to the A.O. for verification. It is now pleaded that this ground should be set-aside to the file of A.O. for verification thereof."

5. "On the facts and in the circumstances of the case and in law, the Ld CIT(A)'s erred in giving relief on disallowance made by the AO u/s.80G for which supportive evidence thereof being Original Receipt & Bank statement wherefrom the money is paid for donation, is not submitted by the assessee"

6. The appellant prays that the order of the CIT(A)'s on the above ground be setaside and that of the assessing officer be restored.

7. The appellant craves leave to add, amend, vary, omit or substitute any of the aforesaid grounds of appeal at any time before or at the time of hearing of appeal."

17. With regard to Ground No. 1 relating to 14A disallowance, Ld. DR brought to our notice Para No. 6 of the Assessment Order and also submitted that order u/s 154 was passed in this regard and further he brought to our notice Page No. 4 and 5 of the Ld.CIT(A) order and he

submitted the facts of the present case. Further, he submitted that assessee itself disallowed ₹.27.37 lacs suo moto and submitted that assessee has made investments during this year, also there is no sufficient interest free funds for making above said investments. Therefore, Assessing Officer is justified in making disallowance u/s. 14A of the Act.

18. On the other hand, Ld. Counsel for the assessee submitted the facts and her submissions, which are reproduced below: -

> *"Ground No. (1)— Against deletion of interest expenditure by the CIT(A) holding that the same was not attributable for earning exempt income.*
>
> - *AO disallowed Rs.122,22,47,259 under Rule 8D(2)(ii) — paragraph 5*
> - *Post rectification the disallowance was reduced to Rs.40,86,20,945 —*
>
> *CIT(A)'s order — paragraph 2.3*
>
> - *CIT(A) deleted the disallowance of interest for the following reasons:*
>
> *(a) Loans borrowed were for home finance business and could not be utilized for any other purpose; reference to the agreement with Oriental Bank of Commerce dated 27.09.2000*
>
> *(b) Share capital and reserves exceeded investments; HDFC Bank Ltd. (ITAT Mum) and CIT v Reliance Utilities 313 ITR 340 (Born) relied upon.*
>
> *Submissions:*
>
> *A. No disallowance of interest in the preceding year — Assessment order for A.Y.2007-08 (paragraph 6.3, pg. 4) submitted.*

• Other than investment of Rs.50,00,00,000 in Cumulative Preference Shares, tax free investments as on 31.03.2009 remained the same compared with tax free investments as on 31.3.2008 — Sch. VI of the Audited Accounts for the year ended 31.3.2009.

• Increase in capital and reserves during the relevant year — Rs.356.42 crores B/S.

CIT v HDFC Bank, 366 ITR 505 (Born)

CIT v Reliance Utilities & Power Ltd. 313 ITR 340 (Born)

CIT v Torrent Power Ltd. 354 ITR 630 (Guj)

B. Interest received Rs. 1283.38 crores exceeded interest paid Rs.989.19 Cr.

Sch. X & XII.

No disallowance based on principle of netting; reliance placed on: DCIT v Trade Apartment Ltd. ITA NO.1277/Ko1/2011-para 4

ITO v Karnavati Petrochem Pvt. Ltd. ITA NO.2228/AHD/2012 -para 7 Morgan Stanley India Securities ITA No.5072/M/2005 and 6774/M/08 (Mum) — para 7

Damodar Valley Corporation (2016) 66 taxmann.com 25 (Kol) Motilal Oswal Securities Ltd. ITA 6204/M/2013 — para 5.1

Cash flow statement shows that investments made during the year were out of cash inflows from financing activities and not borrowings.

Net worth – 193(PB)

D. Borrowed funds were utilised for housing finance activity giving rise to taxable income

Increase in Secured Loans -1070.00 crores

Increase in Unsecured Loans —3479.27 crores

Increase in loans and other credit facilities- 4366.49 crores

Idle/surplus borrowed funds were gainfully invested in liquid funds payable on demand — Auditors' note no.(xvi)

Sample loan agreements with (1) Oriental Bank of Commerce

(2) UCO Bank

(3) Central Bank of India

show that funds were advances for appellant's lending activities.

Thus, interest on borrowed funds used for purpose of business (financing activities) was allowable under sec.36(1)(iii). Since borrowed funds were not used for acquiring Preference Shares Rs.50 crores which was the only additional/incremental investment in tax free securities, no part of the interest was disallowable under sec.14A r.w.Rule 8D.

E. Without prejudice, interest expense incurred for earning taxable income ie. interest and other income from home financing activity must be excluded from the formula in Rule 8D(2)(ii)

Pr. CIT v Bharti Overseas (P) Ltd. [2015] 64 taxmann.com 340 (Del)
CIT v Champion Commercial Co. Ltd., 139 ITD 108 (Kol. ITAT)

Ground 1(ii) — whether recording of satisfaction is necessary for disallowance under sec. 14A

AO has mechanically invoked Rule 8D — paragraph 6

Submission:

Recording of satisfaction is essential

I.P. Support Services India P. Ltd. 378 ITR 340 (Del)

CIT v REI Agro Ltd. GA 3022 of 2013 (Cal)

Shapoorji Pallonji & Co. v DCIT, 164 ITD 42 Mum ITAT — para 3.5
Punjab Tractors v CIT 393 ITR 223, 237 (18-21) (P&H)

Ground No. 1(iii) — whether CIT(A) erred in restricting the disallowance under sec.14A holding that the total investments of Rs. 1353.84 crores is not attributable for earning exempt income and in holding that investment of Rs. 428.89 crores is attributable for earning exempt income.

Submissions:

AO had adopted average of total investments as per financials including investments yielding taxable income.

Vide rectification order dated 02.03 .2012, AO has considered only investments earning tax free income and this has been affirmed by the CIT(A)

19. Considered the rival submissions and material placed on record, on the issue of interest disallowance u/r.8D(2)(ii), we observe that Ld CIT(A) had deleted the disallowance based on the findings that the agreements signed between Oriental Bank of Commerce and assessee clearly indicate that the funds intended for housing finance cannot be diverted to any other purpose and there is no material brought on record by the AO that any funds were diverted for any other purpose. With regard to investments made, he observed from the financial statement that the availability of interest funds i.e., own funds are more than the investment made by the assessee, therefore, it can be reasonably presumed that the investments are made from the non-interest bearing funds, he by relying in the decisions of Hon'ble Bombay High Court decision in the case of Reliance Utilities, allowed the grounds raised by the assessee. We do not see any reason to interfere with the above findings. Therefore, we are inclined to dismiss the ground no 1 raised by the revenue.

20. With regard to Ground No. 2, Ld. DR brought to our notice Para No.7 of Assessment Order and also Page No. 15 of Ld.CIT(A) order.

Further, he submitted that the issue under consideration is covered by Hon'ble High Court order.

21. On the other hand, Ld. Counsel for the assessee submitted the facts and her submissions, which are reproduced below: -

> *"Ground No. 2 - The CIT(A) erred in allowing the claim of the assesse under sec.36(1)(viii)*
>
> *AO - paragraph 7.3 - The company has discontinued the housing finance business from November 2001 but manages the old home loans disbursed by it and has entered into other allied activities like property services and processing loans on behalf of ICICI Bank, FD interest etc. and therefore not entitled to deduction u/s.36(1)(viii).*
>
> *CIT(A) - paragraph 3.2 - 4.3*
>
> *Submissions:*
>
> *• The appellant continued its home financing activity during the relevant year: The denial of the said deduction by AO on the ground that that the assessee has discontinued the business of giving housing loans from November 2001 has been found to be factually incorrect by the Tribunal in the Appellants own case vide order dated 30 November 2012 for the Assessment year 2005-06, para 7 page 7 wherein interalia it has been stated that facts and figures of the Assesses own case are sufficient to show that it is very much carrying on the business of providing long term finance for development of housing in India making it entitled for deduction under section 36(1)(viii). This order of Tribunal was challenged at Bombay High Court by the Department and the Hon'ble High Court has dismissed the Appeal at the per-admission stage and stated that the facts of the Company's case itself establish that the Company was entitled for claiming deduction under section 36(1)(viii), since it was engaged in business of providing housing finance loans. Thus the Bombay High Court has upheld the decision of the Tribunal order dated 30 November 2012*

(a) Annual Return filed with NHB; At pg. 151 are details of home loans Rural and Urban disbursed during the year; 50,825 loans to the tune of Rs.3324.43 crores were disbursed.

(b) Break up of income earned from home financing and other during the 1 88(Pb) relevant year - income from operations as per P&L account - Rs. 1405.57 crores;

the appellant's income from long-term housing finance was 505.71 crores + other income from operations Rs 899.86 crores - CIT(A)'s order 164(Pb) Summary of loan portfolio and income received

(c) Sample statement of account of 2 borrowers evidencing disbursal of home loans.

(d) Submissions dated 07.05.2012 to CIT(A) -Paragraph 17

Submissions dated 11.06.2012 Paragraph 2 read with statement at 187(Pb)

On the basis of the factual data contained in the annual return filed with NHB, the details of home loans and the interest and other income earned from financing activity and other details for the relevant year, CIT(A) has allowed the said deduction.

22. Considered the rival submissions and material placed on record, we observe from the record that there is enough evidence from the facts of the assessee's case and as held by the Hon'ble Bombay High Court decision in the assessee's own case in which they dismissed the revenue case at preadmission stage with the observation that the facts of the company itself establish that they company was entitled for claiming deduction u/s 36(1)(viii) of the Act. Therefore, Ld CIT(A) has clearly brought on record that the assessee has primarily engaged in the providing long term financing and also the profit was derived from

providing long term housing finance. Therefore, there is no dispute with regard to activities of the assessee, hence we are inclined to accept the findings of Ld CIT(A) and detailed submissions of the assessee in the regard. Accordingly, the grounds raised by the revenue is dismissed.

23. With regard to Ground No. 3, Ld.DR brought to our notice Para No.8 of the Assessment Order and Page No. 21 of the Ld.CIT(A) order, However, he relied in the order of Assessing Officer.

24. On the other hand, Ld. Counsel for the assessee submitted the facts and her submissions, which are reproduced below: -

> *"Ground No. 3 CIT(A) erred in granting relief on disallowance made by AO relating to delay in Govt. payments by assessee on account for interest paid for delay in payment to Govt. pertaining to service tax/works contract tax/Profession tax etc.*
>
> *AO — paragraph 8- disallowed treating interest as penalty for violation of law 21-22*
>
> *CIT(A) — paragraph 4.3 allowed on the ground that interest is compensatory in 22 nature*
>
> *Submission:*
>
> *CIT(A)'s conclusion is supported by the following judgments:*
>
> *Mahalaxmi Sugar Mills Co. v CIT, 123 ITR 429 (SC) Interest under U.P.Sugar Cane Cess Act*
>
> *Lachmandas Mathuradas v CIT, 254 ITR 799 (SC)- interest on arrears of sales tax CIT v Kaypee Mechanical India (P) Ltd. [2014] 45 taxmann.com 363 (Guj) -interest under Service Tax provisions allowed*

CIT v Delhi Automobiles 272 ITR 381 (Del) — sales tax penalty for delayed payment allowed"

25. Considered the rival submissions and material placed on record, the payment of interest on the delayed payment of Service tax and work contract taxes are considered as compensatory in nature and these are settled issue. Hence such payments are deductible and revenue in nature as held in the case of Mahalaxmi Sugar Mills Co (supra) and CIT *v.* Kaypee Mechanial India (P) Ltd (supra). Therefore, we are inclined to accept the findings of Ld CIT(A) in this regard. Accordingly, ground raised by the revenue is dismissed.

26. With regard to Ground No. 4, Ld. DR brought to our notice Page No. 9 of the Assessment Order and Page No. 26 of the Ld.CIT(A) order, he submitted that the issue involved needs further verification and he submitted that Ld.CIT(A) has not verified the issue under consideration, hence, he prayed that this issue maybe remitted to Assessing Officer for further verification.

27. On the other hand, Ld. Counsel for the assessee submitted the facts and her submissions, which are reproduced below: -

"Ground No.4 — CIT(A) erred in giving relief on disallowance made under section 40(a)(ia) made by the AO based on remarks by the Auditors in the Tax Audit Report, without remanding the issue to the AO for verification. It is now pleaded that the ground should be set-aside to the file of AO for verification.

Facts:

The Appellant had made a provision of Rs.53,74,54,883 comprising of interest on fixed deposits — Rs.31,81,79,296 and the balance Rs.21,92,72,587 for various expenses pertaining to brokerage, commission, rent, professional fees, contractors' payment.

In respect of interest on FDs appellant had deducted TDS and paid the same.

The balance provision was reversed in April 2009 and offered to tax in the year of reversal, that is, A.Y.2010-11.

AO — Paragraph 9 disallowed the entire amount provision for expenses under section 40(a)(ia) for not deducting TDS.

Submission dated 13 December 2011 filed with the AO

CIT(A)- Paragraph 5.3 page 25 — Has allowed Rs.31.81 crores out of the total amount of Rs. 53.74 crores as appellant has deducted tax at source and paid the same. CIT(A) also allowed the balance provision of Rs.21.92 crores as (a) the provision was reversed in the next assessment year and offered to tax (b) since payees were not identifiable section 40(a)(ia) is not applicable.

Submission

1. No additional evidence/facts etc has been filed on this issue before the CIT(A) which was not filed before the AO and therefore the question of restoring the aforesaid ground to the AO for verification does not arise.

2. CIT(A) at page 26 has stated that the appellants has reversed this entry in the next assessment year, This is the regular method of account appellant is following, the income which is reversed is offered as taxable income in the next assessment year."

28. Considered the rival submissions and material placed on record, we observe that the assessee had created provisions during this year and not deducted the TDS on the amount of Rs. 21.92 crores as the provision was on the payees, who are unidentifiable at the year end and the assessee had reversed the same on the beginning of the next assessment year and offered for taxation. This is regular method of accounting adopted by the assessee and consistently followed method. Therefore, there is no loss to the revenue and assessee has followed double entry system of accounting which requires the matching principle of recording the transaction of revenue and related expenditure. Therefore, we do not see any reason to remit this issue back to Assessing Officer as prayed by Ld DR. Accordingly, the ground raised by the revenue is dismissed.

29. With regard to Ground No. 5, Ld. DR brought to our notice Para No.11 of the Assessment Order and Page No. 29 of the Ld.CIT(A) order. He vehemently argued and supported the findings of the Assessing Officer.

30. On the other hand, Ld. Counsel for the assessee submitted the facts and her submissions, which are reproduced below: -

"Ground No.5 — CIT(A) erred in giving relief on disallowance made by the AO under sec.80G for which supportive evidence being original receipt and Bank statement wherefrom the money is paid for donation is not submitted by assesse.

Submission:

Donation Receipt"

31. Considered the rival submissions and material placed on record, we observe that the assessee had filed letter dated 25.11.2011 alongwith the donation receipt from ICICI Foundation for inclusive Growth. This evidence was ignored by the Assessing Officer and Ld CIT(A) has acknowledged the above evidence and allowed the deduction. Therefore, we are inclined to accept the findings of Ld CIT(A) and dismissed the ground raised by the revenue.

32. In the result, appeal filed by the Revenue is dismissed.

33. Coming to the appeal of the revenue in ITA.No.1431/Mum/2016 (A.Y: 2009-10), revenue has raised following grounds in its appeal: -

"1. "On the facts and circumstance of the case and in law, the Ld.CIT(A) has erred in deleting the penalty levied u/s 271(1)(c) amounting to Rs.1,56,80,632/-"

2. "The appellant craves leave to add, amend, vary, omit or substitute any of the aforesaid grounds of appeal at any time before or at the time of hearing of appeal."

3. "The appellant prays that the order of CIT(A) on the above ground be set-aside and that of the assessing officer be restored."

34. Ld. DR submitted that Ld.CIT(A) has erred in deleting the penalty levied u/s 271(1)(c) amounting to ₹.1,56,80,632/- and prayed the order of the Assessing Officer be restored.

35. Ld. AR relied on the order of the Ld.CIT(A).

36. Considered the rival submissions and material placed on record, on a perusal of the order of the Ld.CIT(A) we find that the Ld.CIT(A) has deleted the penalty levied by the Assessing Officer considering the facts of the case and also following the decision of the Hon'ble Apex Court in the case of Reliance Petroproducts Pvt. Ltd. (2010) 322 ITR 158 (SC), while deleting the penalty Ld.CIT(A) observed as under: -

"4.6 I have considered the facts and circumstances of the case. I find that the Assessing Officer's observation that the appellant did not file any reply in response to penalty notice issued is factually incorrect. It is seen that the appellant had filed detailed reply vide letter dated 27.03.2014 which was received in the office of the Assessing Officer on 28.03.2014.1 also find that the appellant's claim of deduction on account of Special Reserves u/s 36(1)(viii) has been allowed in principlé by CIT(A) in the appellant's case for assessment years 2009-10 & 2010-11 vide orders dated 15.11.2012 and 31.07.2013 respectively subject to certain receipts being held as not eligible for deduction. The Hon'ble ITAT in its order dated 30.11.2012 for assessment year 2005-06 had also held that the appellant is entitled for deduction u/s 36(1)(viii). In view of these orders of the appellate authorities, it can be inferred that the appellant had made

a bonafide claim for deduction u/s 36(1)(viii). The disallowance made by the Assessing Officer and as partly confirmed by CIT(A) emanated from the facts disclosed on record as per the appellant's return of income, computation of. income and financials and would not amount to concealment of income or furnishing inaccurate particulars of income. The deduction claimed is also a debatable issue and involves difference of opinion as is evident from the treatment of the appellant's claim by the Assessing Officer and the CIT(A). Though the full quantum of 'the deduction claimed may not be found eligible for deduction and was partly confirmed by the CIT(A), such confirmation would not per se lead to confirmation of penalty as held by the Hon'ble Apex Court in the case of Reliance Petroproducts Pvt. Ltd. (2010) 322 ITR 158 (SC). Considering all the facts and circumstances of the case as discussed, the penalty of Rs.1,56,80,632/- levied u/s.271(1)(c) of the I.T. Act by the Assessing Officer is cancelled. The appellant's grounds of appeal are allowed.

37. Nothing has been brought on record by the Revenue to rebut the findings of the Ld.CIT(A). On a careful perusal of the order of the Ld.CIT(A) and the reasons given therein, we do not find any infirmity in the findings of the Ld.CIT(A). Accordingly, ground raised by the revenue is dismissed.

38. In the result, appeal filed by the Revenue is dismissed.

Order pronounced in the open court on 03rd June, 2022.

Sd/-	Sd/-
(VIKAS AWASTHY)	**(S. RIFAUR RAHMAN)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai / Dated 03.06.2022
Giridhar, Sr.PS

Copy of the Order forwarded to:

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

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum