

IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD “D” BENCH

**Before: Ms. Annapurna Gupta, Accountant Member
And Shri TR Senthil Kumar, Judicial Member**

ITA No. 2471 & 2853/Ahd/2017 & ITA No. 2472/Ahd/2017 Assessment Years 2012-13 & 2013-14
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Kalpataru Power Transmission Ltd. 101, Part III, GIDC Estate, Sector 28, Gandhinagar, Gujarat-382028 PAN: AAACK8387R The DCIT, Gandhinagar Circle, Gandhinagar (Appellant)	Vs Vs	The DCIT, Gandhinagar Circle, Gandhinagar Kalpataru Power Transmission Ltd. 101, Part III, GIDC Estate, Sector 28, Gandhinagar, Gujarat-382028 PAN: AAACK8387R (Respondent)
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Appellant by : Shri Milin Mehta, A.R.
Respondent by : Shri Mohd Usman, CIT/DR

Date of hearing : 11-04-2022

Date of pronouncement : 06-07-2022

आदेश/ORDER

PER : ANNAPURNA GUPTA, ACCOUNTANT MEMBER:-

The present appeals relate to the same assessee and are against separate orders passed by the Commissioner of Income Tax (Appeals)- Gandhinagar, (in short referred to as CIT(A)), u/s. 250(6) of the Income Tax Act, 1961(hereinafter referred to as the “Act”) for Assessment Year (AY)

2012-13 & 2013-14 both dated 11-09-2017. While the appeal in ITA No. 2471 & 2853/Ahd/2017 are cross appeals filed by the Assessee and the Revenue for A.Y. 2012-13 the appeal in ITA No. 2472/Ahd/2017 is the Assessee's appeal for A.Y. 2013-14 .

2. The issues arising in the assessee's appeal for the two years before us, it was stated at the outset, were common. Therefore all the appeals were taken for together for hearing and are being disposed off by this common and consolidated order. We shall be first take up the cross appeals for A.Y. 2012-13.

3. Taking up first the Assessee's appeal in ITA No. 2471/Ahd/2017 for A.Y. 2012-13.

4. Ground no. 1 and 1.1 relate to the same issue of transfer pricing adjustment made on account of short term advances made by the assessee to its associated enterprises, levying notional interest of Rs. 2,52,319/- thereon. The said grounds read as under:

1 The learned CIT(A) has erred in confirming the addition made by the learned Assessing Officer and the learned Transfer Pricing Officer to the total income of the appellant u/s 92C to the extent of Rs.2,52,319.

1.1 The learned CIT(A) has erred in confirming the order of the AO and TPO levying notional interest of Rs. 2,52,319 on short term advance made to its overseas subsidiaries being Kalpataru Power Transmission (Mauritius) Ltd and Kalpataru Power Transmission (Nigeria) Ltd. It is submitted that the learned CIT(A), AO and TPO failed to appreciate the reasons for making advance as well as the benefits received by the appellant from the same. It be so held now.

5. Taking us through the fact of the case, Id. Counsel for the assessee pointed out that in the order passed u/s. 92CA(3) of the Income Tax Act 1961, the Transfer Pricing Officer (TPO) had proposed an adjustment of Rs. 2,52,319/- on account of the international transaction of short term advances given by the assessee to two of its associated enterprises(AE) as under:

Name of associated enterprise	Amount of Rs.
(i) Kalpataru power transmission (Mauritius Ltd.)	Rs. 14,70,994/-
(ii) Kalpataru Power transmission (Nigeria Ltd.)	Rs. 37,46,789/-.

6. The TPO noted that no interest was charged on these advances given by the assessee to the AEs. Accordingly show cause notice was issued to the assessee proposing to make adjustment on account of interest on the loans using LIBOR rate of 4.16% in respect of the Mauritius loan and 4.03% in respect of the Nigeria loan. Id.Counsel pointed out that the assessee had pleaded no such adjustment to be made on the ground that they were not in reality loans but were quasi capital in nature and were given interest free out of commercial expediency since the AEs were subsidiaries of the assessee floated to explore various business opportunities for the assessee only. That notional interest could not be assessed in the context of transfer pricing. The A.O. however rejected all the contentions of the assessee relying on the decision of the ITAT Delhi Bench in the case of Perot Systems TSI vs. DCIT (ITAT Delhi) and bench marked the transmission for interest to be charged thereon @ 4.16% in respect of the Mauritius loan and 4.03% in

respect of the Nigeria loan accordingly proposing an adjustment of Rs. 2,52,390/- (Rs. 87,279 + Rs. 1,65,040) respectively for the two loans. The proposed adjustment was made by the A.O. in his order passed u/s. 143(3) of the Act.

7. The matter was carried before the Ld. CIT(A) who upheld the adjustment relying on the decision of the ITAT Ahmedabad Bench in the case of Soma Textile Industries vs. Addl.CIT in ITA No. 262/Ahd/2012 pertaining to A.Y. 2007-08 holding at Para 7.2 of his order as under:

7.2 I have considered the facts of the case, assessment order and submission made by the appellant. The facts of the case are squarely covered by the Hon'ble Ahmedabad ITAT's decision in Soma Textile Industries V/s. Addl. CIT - ITA No. 262/Ahd/2012 pertaining to A.Y. 2007-08. The relevant portion of the findings of the Hon'ble ITAT in para 11 of the order is reproduced hereunder:-

. "11. We are unable to see any merits in his line of reasoning. As the learned counsel himself accepts, on a conceptual note, several types of debts, particularly long term unsecured debts, and revenue participation investments could be termed as 'quasi capital'. So far as arm's length price of such transactions are concerned, this cannot be 'nil' because, under the comparable uncontrolled price method, such other transactions between the independent enterprises cannot be at 'nil' consideration either. Nobody would advance loan, in arm's length situation, at a nil rate of interest. The comparable uncontrolled price of quasi capital loan, unless it is only for a transitory period and the de facto reward for this value of money is the opportunity for capital investment or such other benefit, cannot be nil. As for the intent of the assessee to treat this loan as investment, nothing turns on it either. Whether assessee wanted to treat this loan as an investment or not does not matter so far as determination of arm's length price of this loan is concerned; what really matters is whether such a loan transaction would have taken place, in an arm's length situation, without any interest being charged in respect of the same. As for the contention regarding crucial role being played by, or visualized for, this AE, there is no material on record to demonstrate the same or to justify that even in an arm's length situation, a zero interest rate loan would have been justified to such an entity. A

lot of emphasis has also been placed on the fact that the loan was out of the GDR funds, and, for this reason, the interest free loan was justified. We are unable to see any logic in this explanation either. Even when the loan is given out of the GDR funds held abroad, the arm's length price of the loan is to be ascertained. The source of funds is immaterial in the present context. We have also noted that the assessee has not offered any assistance on the quantum of ALP adjustment in respect of this loan transaction, and that in the subsequent assessment years, the assessee himself has accepted ALP adjustment by adopting the LIBOR + 2% interest rate. In this view of the matter, no interference is warranted on the quantum of the ALP adjustment either. In view of these discussions, we confirm the stand of the authorities below on this issue and decline to interfere in the matter."

The facts of the appellant's case being identical, addition of Rs.2,52,391/- made on short term advance to its overseas subsidiaries is held justified and is hereby confirmed. Relevant ground of appeal is rejected.

8. Before us, the Ld. Counsel for the assessee reiterated the contentions made before the lower authorities that the impugned advances were in the nature of quasi equity capital since they were given to the subsidiaries which were floated to explore business opportunities in their respective regions; the advances had no repayment schedule and was granted without any condition for repayment and further that the loans were given for commercial purposes and was not a simplicitor loan or advance given to the wholly own subsidiary. Heavy reliance was placed on the decision of the ITAT Ahmedabad Bench in the case of Micro Inks Ltd. vs. ACIT (2013) 144 ITD 610. Our attention was drawn to the contents of the said decision which was placed before us at Paper Book page no. 400 to 436. Taking us to Para 14 & 15 of the said decision, it was pointed out that in the case of Perot System TSI (India) Ltd vs Dy. CIT (2010) 37 SOT 358 (Delhi) identical issue was discussed and it was pointed out that the argument of loan being

quasi capital in nature was rejected on facts since there was no material on record to establish so. From Para 15 of the order, it was pointed out that the Bench noted that in the facts of the case before it, (Micro Inks), it had been demonstrated that the loan was given in place of capital contribution which required the RBI permission. When the RBI permission was ultimately obtained the loan was converted into shares effective from the date when the loan was given. It was also noted by the Bench that the entity which received the interest free advance was not only wholly owned subsidiary of the assessee but also played a significant role in its sales and distribution chain. That in this backdrop the Bench noted that lending of money could not be considered in isolation with these business considerations, and the relationship between the assessee and its AE was not simply that of a lender or borrower. Going forward the Bench thereafter dealt with the applicability of the LIBOR rate for the ALP of interest to be charged on such transaction in the backdrop of these facts and held that even in terms of Rule 10(B)(i) for the computation of ALP under the CUP method, the price is to be adjusted to account for difference between the International Transaction and the CUP method and considering the differences between the circumstances in which LIBOR is applied and the nature of the transaction before the Bench, it was held that the application of LIBOR rate would not be appropriate.

9. Submissions in brief on the issue were filed before us as under:

Appellant's Proposition

- *Advance is in nature of quasi-equity capital since*

- *Appellant floated these subsidiaries to explore business opportunities in respective regions*
- *Short term interest free advance granted to easily repatriate money back to India once the entities start earning revenue*
- *Advance has no repayment schedule and granted without any condition for repayment*
- *Refer Page 204 to 205 of Paper Book & Page No 701 to 702 of Paper Book*
- *Reliance placed on decision of ITAT Ahmedabad in case of Micro Inks Ltd. v. Asstt. CIT [2013] 144 ITD 610 (Refer Page No 702 to 704 of Paper Book)*
- *Decision of Perot Systems TSI (India) Ltd vs DCIT 37 SOT 358 2010 not applicable (Refer Page No. 702 of Paper Book)*
- *Argument of quasi-equity capital rejected on the basis of facts*
- *Core legal issue i.e. whether ALP adjustments will also be warranted in case of interest free loans given as quasi capital, was left open*
- *There was no material on record to establish that the loans were in reality not loans but were quasi-capital*
- *Without prejudice to above, application of LIBOR + rate for arm's length price determination in case of short-term advance is not permitted. Reliance is placed on decision of ITAT Ahmedabad in case of Micro Inks Ltd. v. Asstt. CIT [2013] 144 ITD 61*
- *LIBOR is an inter-bank offer rate and is applicable between 2 banks*
- *Such rate charged between banks cannot be made a basis to determine ALP of short-term advance*
- *In any case, if LIBOR is to be applied, appropriate adjustments must be allowed as per Rule 10B(3)(ii)*
- *If differences mentioned in Rule 10B(2) are not removed by way of adjustments under Rule 10B(3), then such ALP determined is bad in law*

- *Reliance placed on CLSA India (P.) Ltd. vs. DCIT [2019] 101 taxmann.com 388 wherein it is held that ALP would be on adhoc basis and void if appropriate adjustments not made for removing the differences.*
- *Reliance is placed also on Gulbrandsen Chemicals (P.) Ltd. vs. DCIT [2019] 104 taxmann.com 253 (Ahmedabad)*

10. At this juncture, Ld. Counsel for the assessee was asked at bar to demonstrate with evidence as to how the loan given in the present case would qualify as quasi capital and or given for commercial expediency of the assessee as were the facts in the case of Micro Inks Ltd. (supra) referred to by the Id. Counsel for the assessee before us. Ld. Counsel was unable to convincingly demonstrate the same except for reiterating his contention before the A.O, that the advances were given to its wholly owned subsidiary newly formed for the purpose of procuring work/business of the assessee in the respective countries where they were set up i.e. Mauritius and Nigeria respectively.

11. In view of the above, the main argument of the assessee against the transfer pricing adjustment made on account of the short term advances given to its subsidiaries in Mauritius and Nigeria, fails. The assessee being unable to demonstrate that the advances were not in the nature of loan/advance but were quasi capital in nature and for commercially expedient purposes of the assessee and hence the LIBOR rate could not be applied to them for the purposes of making ALP adjustment on the interest to be charged, the decision of the Ahmedabad Bench in the case of Micro Inks Ltd. is not applicable to the assessee . The assessee being unable to

establish with evidence the parity of facts as noted by the ITAT in the said case, of the advance being in the nature of quasi capital given to safeguards the business interest of the assessee, the said decision is of no assistance to the assessee. The advances therefore we hold are in the nature of loans and since no interest has been charged by the assessee on the same, the transfer pricing adjustment made by charging interest applying LIBOR is, we hold, justified.

12. In view of the above, we see no reason to interfere in the order passed of the Ld. CIT(A) upholding the transfer pricing adjustment of Rs. 2,52,319/- on account of determination of Arms Length Price (ALP) of interest to be charged on short term advances given to the AE of the assessee.

13. Ground of appeal No. 1 & 1.1 is accordingly dismissed.

14. Ground no. 2 to 2.5, it was pointed out related to disallowance of expenses made for the purposes of earning exempt income as per the provisions of Section 14A of the Act. The grounds reads as under:

2. The learned CIT(A) has erred in partly confirming the addition made by the learned Assessing Officer to the total income of the appellant u/s 14A by invoking rule 8D in respect of investments made in Indian companies and Mutual Funds.

2.1 The learned CIT(A) has erred in confirming disallowance under Section 14A made by the learned AO. It is submitted that, in the facts and circumstances, no disallowance over and above disallowance already made by the Appellant in the return of income need be made under Section 14A.

2.2 Without prejudice to above, the learned CIT(A) has erred in holding that the learned AO was justified in invoking provisions of Section 14A in respect of

strategic investments, the proximate purpose whereof is not to earn exempt income. It be so held now.

2.3 The learned CIT(A) has erred confirming the order passed by the learned AO invoking provisions of Rule 8D without satisfying conditions of Section 14A for invocation thereof. It is submitted that it be so held now.

2.4 Without prejudice to above, the learned CIT(A) has erred in holding that the investments from which no exempt dividend income is received during the year are also includible while computing disallowance u/s. 14A on the ground that other investments have yielded exempt income. It is submitted that section 14A has to be applied separately for each investment. It be so held now.

2.5 Without prejudice to above, the learned CIT(A) has erred in not directing the learned AO in excluding all investments which generates income chargeable to tax from value of average investments, in calculating amount to be disallowed as per clause (iii) of Rule 8D(2) of the Income Tax Rules, 1962.

15. Drawing our attention to the facts of the case, it was pointed out that the assessee had earned dividend income of Rs. 8,18,54,250/- during the year, mainly from its subsidiary namely JMC Projects India Ltd., which was claimed as exempt u/s. 10 of the Act. The assessee had made suo moto disallowance of Rs. 60,000/- of administrative expenses u/s. 14A of the Act. The A.O. however noting that the assessee was holding substantial investments at the beginning and end of the year amounting to Rs. 39,558.01 lacs and Rs.40,493.58 lacs respectively applied Rule 8D of the Income Tax Rules,1962,(in short hereinafter referred to as Rules) and computed the amount disallowable at Rs.2,05,15,540/-.Reducing therefrom the suo moto disallowance of Rs. 60,000/- made by the assessee, he further disallowed an amount of Rs. 2,04,55,540/-.

16. The Ld. CIT(A) deleted the disallowance of expenses in relation to investments made by the assessee in foreign subsidiary companies, noting

that the dividend income earned therefrom were not exempt, while the rest of the disallowance was upheld. The Id. CIT(A) followed the decision of the ITAT Ahmedabad in the case of the assessee for A.Y. 2009-10 in this regard. The relevant findings of the Id.CIT(A) at Para 9.3 and 9.3.1 of his order are as under:

9.3 I have carefully considered the Assessment Order and submission filed by the Appellant. The Appellant has earned exempt income in the form of dividend of Rs.8,18,54,250/- and while fining the Return of Income it has made suo moto disallowance of Rs.60,000 in computation of total income towards administrative and other expenditure. The AO has applied Rule 8D and worked out disallowance of Rs.2,05,15,540 being 0.5% of average investments. As Appellant has made suo moto disallowance of Rs.60,000, net addition of Rs.2,04,55,540/- was made. It is observed that similar disallowance was made in A.Y. 2009-10 wherein Hon'ble Ahmedabad ITAT in ITA No. 538/Ahd/2013 (dated 18/03/2016) has confirmed such disallowance and held as under:

"39. We have noted that Section 14A(2) categorically provides that "The Assessing Officer shall determine the amount of expenditure incurred in relation to such income which does not form part of the total income under this Act in accordance with such method as may be prescribed, if the Assessing Officer, having regard to the accounts of the assessee, is not satisfied with the correctness of the claim of the assessee in respect of such expenditure in relation to income which does not form part of the total income under this Act.[Emphasis supplied by us]". Here is a case in which the Assessing Officer has taken note of the huge expenditure, a part of which is also attributable to the tax exempt income, and finds that the small disallowance of Rs 30,000 made by the assessee is not on any rational, logical or actual basis, and, it is for this reason that the Assessing Officer has invoked disallowance under rule 8D. We see no infirmity in the stand so taken by the Assessing Officer. The conditions of Section 14A (2) are clearly fulfilled. The CIT(A) has granted the impugned relief on the basis that the AO has not given any finding about incorrectness of the disallowance offered by the assessee, but this is, as we can see from the extracts from the assessment order, factually incorrect. As regards learned counsel's reliance on Priya Exhibitors Pvt Ltd vs DCIT [(2012) 54 SOT 356 (Del)], we find that the coordinate bench had specifically stated that "..... Their I.T.A. No.: 538/Ahd/2013 Assessment year: 2009-10 Lordships has held that the Assessing Officer must in

the first instance determine whether the claim of the assessee is correct and determination must be made having regard to the accounts of the assessee. The legislature directs him to follow rule 8D only where the Assessing Officer is not satisfied with the claim of assessee. In the present case, the Assessing " Officer has not fulfilled his onus of recording his findings". The facts in the present case are diametrically opposed to the said factual position. It is a case, as evident from the reproductions set out earlier in this order, in which the Assessing Officer has recorded specific dissatisfaction with the claim of the assessee. As a matter of fact, this precedent supports the case of the revenue. We may now refer to the observations of the CIT(A) to the effect and investment in new areas. No facts have been brought on record by AO which indicate that there were lot of movements in the investment activity requiring involvement of senior management personnel". We find that it is not even in dispute that a part of expenses attributable to the work in connection with the investment are to be disallowed, as the assessee has on its own offered Rs 30,000 for disallowance in this regard. The dispute is confined to the quantum of disallowance and the basis on which it is to be quantified. In the absence of any reasonable basis of disallowance offered by the assessee, and in the absence of the assessee even disclosing the basis on which disallowance is made, the Assessing Officer had invoked the rule 8D. We see no infirmity in this action. In view of these discussions, as also bearing in mind entirety of the case, we vacate the relief granted by the CIT(A) and restore the disallowance of Rs.68,45,142 made by the Assessing Officer."

9.3.1 In view of above finding of Hon'ble ITAT in Appellant's own case, it is held that AO was justified in holding that Rule 8D is applicable and disallowance made by AO is confirmed subject to following observations:

(i) During the year under consideration, Appellant has also made ad hoc disallowance of Rs.60,000 for which no basis was provided hence following the observations in appellate order supra, plea of Appellant that AO has not recorded his satisfaction regarding not accepting method of disallowance is Return of Income cannot be • accepted. Further, Hon'ble Gujarat High Court in the case of Devarsons Industries Pvt. Limited V/s ACIT 84 taxmann.com 244 has held that mere fact that AO did not arrive at satisfaction in particular manner while making disallowance would not per se destroy mandate of Section 14A.

(ii) The Appellant has also contended that investments made by it are strategic investments being investments in subsidiary, associate, joint investments hence such investments are beyond the scope of Section 14A of the Act. This contention of Appellant cannot be accepted in view of decision of Hon'ble Mumbai ITAT in

the case of DOT V/s Saraswat Co-operative Bank Limited in UA No. 8622/Mumbai/2010 dated 31st October, 2016, decision of Chennai ITAT in the case of Voltech Engineers Pvt. Limited V/s DOT (HA No. 1801/Mds/2016), dated 20th February, 2017 and decision of Hon'ble Punjab & Haryana High Court in the case of Punjab Tractors Limited V/s CIT 246 taxman 31 (17).

(iii) The appellant has also taken one more argument that investments from which exempt dividend income is not received should be excluded for the purpose of section 14A. The decisions of Hon'ble Gujarat High court and other court relied upon by appellant states that when no exempt dividend income is earned, 14A disallowance should not be made but nowhere state that 14A should be restricted only on those investments from which exempt income is earned.

(iii) The Appellant has also submitted that investments considered by AO include investment in foreign subsidiary companies from which taxable dividend income is earned hence disallowance under Section 14A should not be made on such investments. The Hon'ble Gujarat High Court in the case of CIT V/s Suzlon Energy Limited 33 taxmabn.com 151 have decided similar issue in favour of Assessee and held that while computing disallowance under Section 14A, investment in foreign subsidiary should be excluded. On this basis, AO is directed to re-compute disallowance under Section 14A by excluding investments in foreign subsidiaries. Subject to above observation, the ground of appeal is partly allowed.

17. Before us Id. Counsel for the assessee first pointed out that the nature of investments made by the assessee is as under:

Type of Investment	Value in Lakhs as on 31.03.2012	Value in Lakhs as on 31.03.2012
Foreign Subsidiaries	476.01	314.37
Special Purpose Vehicle company	3815.51	3815.51
Investment from which no dividend income earned in the year	6639.50	3855.00
Investment from which dividend income earned during the year	29562.52	31573.09
Total	40493.54	39557.97

18. He thereafter submitted that ground no. 2.1 and 2.2 were not being pressed. With respect to ground no. 2.3 raised by the assessee against the invocation of Rule 8D of the Rules by the A.O. without recording any satisfaction, Ld. Counsel for the assessee pointed out that though the issue stood decided against the assessee in its own case in A.Y. 2009-10 to A.Y. 2011-12 by the ITAT Ahmedabad however considering the decision of the Hon'ble Apex Court in the case of Godrej & Boyce Manufacturing Co. Ltd. 394 ITR 449 holding that recording of reasons by A.O. is mandatory for making disallowance u/s. 14A and since the Hon'ble Apex Court decision was pronounced after the ITAT's order in the assessee's own case for A.Y. 2009-10 it ought to be considered. At this juncture Ld. Counsel for the assessee was asked to point out from the assessment order as to how the A.O. had recorded his satisfaction rejecting the assessee's explanation of the suo moto disallowance made u/s. 14A of the Act.

19. Our attention was drawn to para 10.1 to 10.2 of the assessment order .

10, Disallowance under section 14A of the Act

10.1 During the year the assessee has earned exempt income in form of dividend of Rs. 8,1-8,54,250/- however, the assessee has not made any disallowance with regard to the expenses incurred relatable to earning of the exempt income. During the assessment proceedings details were called for with regard to the dividend income claimed as exempt by the assessee vide Notice issued under section 142(1) of the Act on 18.08.2015. As per the submission made by the assessee, it was claimed that the investments held by the company have been held for business purpose and the same have been made out of the own funds of

the company available with it in form of share capital and share premium Further, it was submitted that the assessee-company has disallowed a sum of Rs. 60,000/- in computation of total income towards administrative and other expenditure for earning of exempt income as per Statement of Total Income submitted during the course of hearing.

10.2 However, the assessee did not provide for the details of the manner in which such disallowance was computed. The assessee has merely made an adhoc disallowance under section 14A of the Act. Further, the assessee is holding investments of Rs.40,493.58 lacs as at 31.03.2012. Further, the investments as at 31.03.2011 stood at Rs. 39,558.01 lacs. This clearly implies that the assessee is maintaining huge investment portfolio resulting in significant exempt income as dividend. Moreover, there is significant activity in the investment portfolio of the assessee company.

20. On perusing the same, it was noted that the assessee had given no basis for making a suo moto disallowance of Rs. 60,000/- to the A.O. and the A.O. noting the huge investments made by the assessee on which there was significant activity in the investment portfolio of the assessee company, had recorded his dis-satisfaction with the quantum of expenses disallowed by the assessee. Ld. Counsel for the assessee was asked as to what specific explanation was filed by the assessee to the A.O. justifying the suo moto disallowance of Rs. 60,000/-.

21. The L.d Counsel for the assessee was unable to point out any such explanation but only referred to the explanation filed to the Ld. CIT(A) to the fact that the investments were strategic and no expenses were required to be incurred and therefore only a portion of the expenses of the

accountant was disallowed attributing it to the earning of exempt income which amounted to Rs. 60,000/-.

22. Considering the above, we are of the view that the Ld. CIT(A) has rightly held that the A.O. has duly recorded his reasons for not being satisfied with the explanation of the assessee for making suo moto disallowance of expenses and has therefore rightly proceeded to apply Rule 8D for working out the same. As is evident from a bare perusal of the assessment order and as pointed out to the Id. Counsel for the assessee during the course of hearing before us, the assessee was unable to give plausible explanation to the A.O. for making suo moto disallowance of Rs.60,000/-. It may be pointed out that for invoking Rule 8D for working out the disallowance, it is the A.O. who has to record his satisfaction for doing so. Therefore what is relevant is the explanation of the assessee before the A.O. for the disallowances made by it. Any explanation given to the CIT(A) is of no relevance and as noted above since the assessee had given no plausible explanation for making a suo moto disallowance of Rs. 60,000/- and considering the huge investments made by the assessee averaging Rs. 40 crores and huge dividend income earned by the assessee during the year of approximately 8 crores and also noting the substantial activity in the investments made, moving from Rs.39 crores to Rs.40 crores from the beginning to the end of the year, the A.O. had rightly recorded his non satisfaction with the reply of the assessee. Therefore even considering the decision of the Hon'ble Apex Court in the case of Godrej & Boyce Manufacturing Co.Ltd. (supra), pointed out by the Ld. Counsel for the

assessee before us, we hold that there was valid satisfaction of the A.O. for rejecting the explanation of the assessee . The argument of the Ld. Counsel for the assessee therefore that the A.O. had recorded no satisfaction before proceeding to apply Rule 8D for calculating the disallowance to be made u/s. 14A, is therefore dismissed.

23. The next contention raised by the Ld. Counsel for the assessee before us was that the investment in SPVs and those investments which did not earn any dividend income during the year should not be considered for the purpose of applying Rule 8D. Reliance was placed on the following decisions in this regard:

Ground No 2.4 & 2.5 - Disallowance as per Rule 8D should be revised

- *Investments in SPVs (Jhajjar KT Transco Pvt Ltd) should be excluded while applying Rule 8D since the investment was mandatory requirement for executing the EPC contract awarded.*
- *Hence, the investment in SPV should be excluded from the value of total investments while computing disallowance under Rule 8D*
- *Reliance is placed on decision of*
- *ACIT, Circle 13(1) vs M/s Oriental Structural Engineers (P) Limited ITA No. 4245/Del/2011*
- *CIT vs Oriental Structural Engineers (P.) Ltd 216 Taxman 92 (Delhi HC) [2013]*
- *Ram Infrastructure Limited vs JCIT ITA No. 746/PN/2013*
- *L & T Infrastructure Development Projects Ltd vs ITO [2015] 58 taxmann.com 165*
- *Only those investments on which dividend income is earned during 'he year should be considered for applying Rule 8D*

- *ACIT vs Vireet Investments (P.) Ltd [2017] 82 taxmann.com 415 (Special Bench Delhi)*
- *Adani Enterprise Ltd. Vs ACIT [2019] 111 taxmann.com 196 (ITAT Ahmedabad)*
- *Aditya Medisales Ltd vs DCIT [2019] 105 taxmann.com 209 (ITAT Ahmedabad)*

24. Ld. D.R. countered by stating that the issue of investment in SPVs already stood decided against the assessee by the Hon'ble Apex Court in the case of Maxopp Investments. Ltd. vs Commissioner of Income Tax (2018) 406 ITR 0640(SC).

25. Having considered the arguments of both the parties, we find no merit in the contention raised by the Ld.Counsel for the assessee for reducing Strategic Investments made while computing disallowance as per Rule 8D of the Rules. As rightly pointed out by the Ld.DR the Hon'ble apex court in the case of Maxopp (supra) has in very clear terms upheld the theory of apportionment of expenses between taxable and exempt income ,categorically rejecting the dominant purpose theory ,as per which the dominant purpose of the investment made would determine the applicability of section 14A of the Act . Meaning thereby that whether investments have been made for trading purpose or controlling purposes (strategic investment), it would make no difference to the applicability of section 14A as long as such investments earn exempt dividend income. The theory of apportionment would come into play in such cases and expenses incurred in relation to earning exempt income needs to be disallowed. The

relevant findings of the Hon'ble apex court in this regard at para 34-35 of the order is as under:

*"34. Having clarified the aforesaid position, the first and foremost issue that falls for consideration is as to whether the dominant purpose test, which is pressed into service by the assessee would apply while interpreting Section 14A of the Act or we have to go by the theory of apportionment. We are of the opinion that the dominant purpose for which the investment into shares is made by an assessee may not be relevant. No doubt, the assessee like Maxopp Investment Limited may have made the investment in order to gain control of the investee company. However, that does not appear to be a relevant factor in determining the issue at hand. Fact remains that such dividend income is non-taxable. In this scenario, if expenditure is incurred on earning the dividend income, that much of the expenditure which is attributable to the dividend income has to be disallowed and cannot be treated as business expenditure. Keeping this objective behind Section 14A of the Act in mind, the said provision has to be interpreted, particularly, the word 'in relation to the income' that does not form part of total income. Considered in this hue, the principle of apportionment of expenses comes into play as that is the principle which is engrained in Section 14A of the Act. This is so held in **Walfort Share and Stock Brokers P Ltd.**, relevant passage whereof is already reproduced above, for the sake of continuity of discussion, we would like to quote the following few lines therefrom.*

"The next phrase is, "in relation to income which does not form part of total income under the Act". It means that if an income does not form part of total income, then the related expenditure is outside the ambit of the applicability of section 14A..

xxx xxx xxx

The theory of apportionment of expenditure between taxable and non-taxable has, in principle, been now widened under section 14 A."

35. The Delhi High Court, therefore, correctly observed that prior to introduction of Section 14A of the Act, the law was that when an assessee had a composite and indivisible business which had elements of both taxable and non-taxable income, the entire expenditure in respect of said business was deductible and, in such a case, the principle of apportionment of the expenditure relating to the non-taxable income did not apply. The principle of apportionment was made available only where the business was divisible. It is to find a cure to the aforesaid problem that the Legislature has not only inserted Section 14A by the Finance (Amendment) Act, 2001 but also made it retrospective, i.e., 1962 when the Income Tax Act itself came into force. The aforesaid intent was expressed loudly and clearly in the Memorandum

explaining the provisions of the Finance Bill, 2001. We, thus, agree with the view taken by the Delhi High Court, and are not inclined to accept the opinion of Punjab & Haryana High Court which went by dominant purpose theory. The aforesaid reasoning would be applicable in cases where shares are held as investment in the investee company, may be for the purpose of having controlling interest therein. On that reasoning, appeals of Maxopp Investment Limited as well as similar cases where shares were purchased by the assessees to have controlling interest in the investee companies have to fail and are, therefore, dismissed."

26. In view of the same the argument of the Ld.Counsel for the assessee seeking exclusion of strategic investments while computing disallowance as per Rule 8D of the Rules is dismissed.

27. Ground of appeal No. 2- 2.5 is dismissed.

28. In effect appeal of the assessee is dismissed.

29. We shall now take up the Revenue's appeal in ITA No.2853/Ahd/2017 for A.Y. 2012-13.

30. Ground no. 1 reads as under:

1. Whether on the facts & circumstances of the case, the Ld CIT(A) was justified in deleting the upward adjustment made u/s 92CA of Rs.1,07,38,080/-

31. The issue relates to the deletion of Arm's Length Price adjustment made to the Success fees paid by the assessee to its subsidiary Kalpataru Power Transmission, USA, for its services in identifying projects in the US market.

32. The assessee had reported international transaction of Liaison Service Fee of Rs. 2,57,27,549/- paid to its associate enterprise Kalapatru Power Transmission USA Inc. and had bench marked it using CUP method in its report filed in Form No.3CEB. The TPO in his order passed u/s.92CA(3) rejected the bench marking adopted by the assessee and adopted the bench marking of Liaison support Service Fee @ 2% in the case of Cadila Health care Ltd. approved by the ITAT Ahmedabad Bench. Accordingly the difference amounting to Rs. 1,04,85,761/- was proposed to be adjusted by way of reduction in the liaison fees so paid by the assessee. The same was accordingly adjusted by the A.O. in his order passed u/s. 143(3).

33. Ld. CIT(A) however, it was pointed out, deleted the same noting that the liaison fees paid to Pharmaceutical Company i.e. Cadila could not be said to be comparable for the assessee which was engaged in the business of designing High end transmission lines towers and providing turnkey solutions. The relevant findings of the CIT(A) at para 6.2 of his order is as under:

6.2 I have considered the facts of the case, assessment order and submission filed by the appellant. The Appellant Company has set up an AE in USA for identifying projects in. America, to collect project data and technical specifications and transmitting the same to India for further, analysis. In respect of these services the AE charges a monthly sum of USD 15000 plus 3% success fee on the net invoice. During the year under consideration the AE was successful in generating business for the Appellant and a success fee of 3% was paid for securing the order from Isoluv Ingenieria, SA. The Appellant has benchmarked the above transaction applying comparable uncontrolled price method. In all the submissions before the TPO the appellant has submitted that 3% success fee is

nothing but the commission paid to its foreign AE, This transaction is being benchmarked using the US Census Bureau published annual data relating to sales .made by agents on behalf of and commission earned by such agents as part of annual economic census. As per the said data agents derived 4.1% commission on sales generated by them. Against this 4.1% the AE has charged a success fee of 3% which is approximately 30% lower. However, the TPO has summarily rejected the above benchmarking process and held that the aforesaid data encompasses commission of electronics market broker which may not involve same or similar products. Accordingly he rejected CUP as the most appropriate method. The TPO thereafter proceeded to apply the ratio laid down by the Hon'ble Ahmedabad ITAT in the case of Cadila Healthcare Ltd. Wherein a 2% liaison fee was found acceptable ALP by Hon'ble UAT. I have also perused the decision of Cadila Healthcare extensively relied/upon by the TPO. In the case of Cadila Healthcare it had set up an AE in foreign jurisdiction so as to register product with Competent Authorities in difference jurisdictions. For providing these services, the AE charged a cost plus mark-up of 6 to 10% over the actual expenses. The said contract does not have any element of success fee involved therein. In the facts of the case, although the appellant has grouped the expenses under liaison support services, after having gone through the' relevant facts, I am of the opinion that as the expenses paid to AE is a success fee it has to be benchmarked with "the commission paid to third parties and the appellant has rightly used the US Census Bureau data published to benchmark the success fee. TPO on one hand has stated that the figures of the US Census Bureau is not applicable since the nature of service/product dealt by the appellant is totally different. Thereafter, he goes on to compare the appellant with a pharmaceutical company and benchmark the entire transactions at 2%. The data compiled by the US Census Bureau in respect of electronics market, commission agents etc. has also been compiled vide Annexure-G of the Paper-book. The data collection methodology has been elaborately described and it is seen that it is not merely an estimate but it is actual collection of data from various organizations in different fields of activities. At this juncture, it is relevant to refer to Rule 10D(3) which gives a statutory support to use a Government publication in/the benchmarking process. Clause (a) of Rule 10D(3) categorically specifies that the assessee can use official publications, reports, studies, database from the Government of the country of residence of the AE. The TPO has simply rejected the CUP method and has compared the Appellant Company engaged in the business of designing high-end transmission lines, towers and providing turnkey solutions with a pharmaceutical company which does not seem to be appropriate

at all. Accordingly, the addition made by the TPO simply relying on the decision: of Cadila Healthcare is held not justified and is hereby directed to be deleted. .Relevant grounds of appeal are therefore, allowed.

34. Ld. D.R. relied on the order of the A.O. while the Ld. Counsel for the CIT(A).

35. We have gone through the order of the Ld. CIT(A). We find that the Ld.CIT(A) considered all the facts before him relating to the issue and thereafter gave a well reasoned and detailed finding that the comparable selected by the assessee for determining the ALP of the transaction was correct while that by the Revenue was not appropriate. The Ld.CIT(A) noted the nature of activities conducted by the AE for the assessee as being identifying projects ,collecting project data and technical specification and transmitting the same to India for analysis. He noted that a success fee of 3% was agreed to be paid to the AE for securing orders and during the impugned year had paid the fee for securing order from Isoluv Ingenieria, SA. He noted that the assessee had benchmarked the transaction using US Census Bureau published annual data relating to sales made by agents on behalf of others and commission earned by such agents as part of annual economic census. He noted that as per the data such agents derived 4.1 % commission while the AE had charged only 3%. He found the benchmarking done by the assessee to be correct noting that the Census report relied upon by the assessee was relating to electronics market commission agents and contained actual data and not estimates. He further noted that the comparable selected by the TPO was functionally different from the

assessee, being a pharmaceutical company while the assessee was in the business of establishing transmission network. That the CUP method did not approve such functionally distinct comparable to be used for bench marking. Accordingly the Ld. CIT(A) has rejected the bench marking of the A.O. and held that of the assessee to be justified.

36. Ld.DR was unable to point out any infirmity in the findings of the Ld.CIT(A) nor do we find any.

37. We therefore uphold the order of the Ld. CIT(A) deleting the adjustment made to the liaison fee on account of Arm's Length Price adjustment made u/s. 92CA(3) of the Act.

38. Ground of appeal no. 1 is therefore dismissed.

39. Ground no. 2 reads as under:

2. Whether on the facts & circumstances of the case, the Ld CIT(A) was justified in deleting the addition made on profit on sale of carbon credit of Rs.5,25,41,076/

40. The issue relates to taxability of Carbon Credit i.e. CER certificate (Carbon Credits) issued to the assessee for saving emission of carbon. The assessee had two biomass based power generation plant using agricultural waste as fuel at Padampur and Tonk in Rajasthan State. The assessee had earned the following income/incurred expenditure in relation to the CER Certificates earned in the impugned year.

Particulars	Padampur	Tonk	Total
.CERs	94,64,058	4,15,34,675	5,09,98,733
Exchange Gain on CERs	. 20,63,672	57,07,462	77,71,134
Expenditure	-18,59,929	-43,68,862	-62,28.791.
Net Income	96,67,801	4,28,73,275	5,25,41,076
Actual receipt on sale of CERs approved by UNFCC	Nil	Nil	Nil

41. While filing the return of income the assessee had excluded the income pertaining to CER and added back the expenditure incurred for earning such income in its total income on the ground that CER is a Capital receipt. The A.O. held that CER was akin to import entitlement and was a taxable business receipt and referring to section 2(13) of the Act concluded that profit arising from sale of Carbon Credits was business profit u/s. 28 of the Act. Accordingly the income earned from the sale of the Carbon Credits amounting to Rs. 5,25,41,076/- was added to the business income of the assessee being taxable business receipt.

42. The Ld. CIT(A) deleted the addition agreeing with the assessee's contention that it was a capital receipt ,noting his own order in the case of the assessee for A.Y. 2010-11 & 2011-12 in first appeal and further following the decision of the ITAT Ahmedabad Bench in the case of Alembic Ltd. In ITA NO. 1912/Ahd/2012. The order of the Ld. CIT(A) in this regard at para 8.3.4 to 8.3.6 is as under:

8.3.4 On careful consideration of entire facts, it is observed that similar issue was .decided by CIT (Appeals)- III in case of Appellant in its favour for A.Y. 2009-

10 vide order dated 10th December, 2012 and even same order is followed by CIT (Appeals) - 12 in case of Appellant for A.Y. 201-011 and 2011-12 vide order dated 21st February, 2016. The said order has been submitted by Appellant during the course of Appellate proceedings and on careful consideration of such order it is observed that CERs received by Appellant including sale proceeds are capital receipt. The jurisdictional Hon'ble AHMEDABAD ITAT in the case of ALEMBIC LIMITED in TTA No. 1912/Ahd/2012, relied by Appellant, dealt with the issue in the factual matrix of the case where the appellant itself had treated the income from sale of CERs as the revenue income in profit & loss account but the judicial authorities held it to be in the nature of the capital income. The relevant extracts of the judgment are as follows:

"19, Adverting to the additional ground No.1 in respect of income from realization-of carbon credits, which is taxed as Revenue receipt. The Id. Counsel for the appellant, at the outset, contends that the Hon'ble Karnataka High Court in the case of CIT vs. SubhashKabini Power Corporation Ltd, [2016] 69 taxmann.com 394 (Karnataka).dealt with the issue at length and relied on various judicial pronouncements, holding income received from realization of carbon credits as capital in nature. The Hon'ble Karnataka High Court in paragraph 6 of its order (supra) has dealt with the issue at length and square held that the carbon credits are generated out of environmental concerns which does not have any character of trading activity; therefore, any receipt from an activity which is not a trading activity is capital in nature by following observation:-

19.1 The Hon'ble High Court further relied on the judgment of Hon'ble Andhra Pradesh High Court in the case of CIT vs. My Home Power Ltd [2014] 46 taxmann.com 314/365 ITR 82 and the judgment of Hon'ble Karnataka High Court in the case of CIT vs. D.G. Gopala Gowda, [2013] 354 ITR 501, which have taken the same view on realization of carbon credits as capital receipt. There is no contrary judgment and the two Hon'ble High Courts, i.e. Andhra Pradesh High Court and Karnataka High Court, having taken a concurrent view on this matter, are to be followed in judicial discipline

19.2 The Id. Departmental Representative, on the other hand, contends that the realization from carbon credits has been treated by the appellant itself as revenue income and offered to tax and in fact in actualities they are revenue receipt. However, no adverse judgment on this has been cited.

20. We have heard the rival contentions, perused the material available on record and gone through the orders of the authorities below. The additional ground stands already admitted. The duty of the ITAT is to ensure that fair, just

and proper assessment is made. Merely because the appellant was of the opinion' that the- receipt was Revenue in nature cannot act as an estoppels against it when the law as interpreted by Hon'ble High Courts takes a view at variance with the Appellant. The law is settled that the Revenue cannot stand benefited from a tax-which is not leviable in right earnest. We find merit in the contentions of the Id. Counsel for the appellant that the Hon'ble Karnataka High Court in the case of SubhashKabini Power Corporation Ltd (supra) and the Hon'ble Andhra Pradesh High Court in the case of My Home Power Ltd (supra), have taken a view that the carbon credit realization is capital in nature. No contrary judgment is cited. Therefore, respectfully following these judgments, this additional ground of the appellant in respect of realization of carbon credit as capital receipt is allowed. Thus, this additional ground is accordingly allowed."

It is further observed from the above finding given, by the Hon'ble Tribunal later on was confirmed by the Hon'ble Gujarat High Court in Tax Appeal No. 553 of 2017 dated 28/08/2017 wherein it was held as under:

"6. The last surviving question pertains to the treatment that the appellant's income from trading of carbon credits should be given. The Tribunal held that receipts should be in the nature of capital receipts and therefore, would not invite tax. This issue has been examined by two High Courts. The Karnataka High Court in case of CIT v. SubhashKabini Power Corporation Ltd. reported in (2016) 385 ITR 592 (Karn) and Andhra Pradesh High Court in case of Commissioner of Income tax v. My Home Power Limited reported in (2014) 365 ITR 82 (AP) have held that receipts of carbon credit are in 'nature of revenue receipts. Following the decision of said two High Courts, this question is also not considered."

It is observed that entire legal issue involved.in present case has been decided in favour of Assessee by Hon'ble Ahmedabad ITAT and Gujarat High Court.

'8.3.5 It is further observed that while passing Assessment Order for A.Y. 2009-10 in case of Appellant, AO has taxed CERs on accrual basis even though there was no sale of such CERs. The said addition was deleted by CIT (Appeals) and Hon'ble Ahmedabad ITAT confirmed the order of CIT(A) deleting the addition, however, on a different ground that no income on account of CERs accrued during the relevant year. As regards characterization of CERs as capital or revenue receipts, the Hon'ble ITAT made certain observations. However, upon appeal filed by the Appellant, Hon'ble Gujarat High Court (TAXAP/73/2017) has

quashed the observations made by TTAT in respect of taxability" of the CERs and observed as under:

[5.0] Having heard learned Counsel appearing on behalf of the respective parties and considering the impugned judgment and order passed by the learned Tribunal, we are of the opinion that as such the learned Tribunal has materially erred in proceeding further to examine the taxability of the income from sale of CERs in future year. It is not in dispute that so far.as the year under consideration for which the appeal was before the learned Tribunal, the-learned Tribunal has confirmed, the order passed by the learned CIT(A) deleting the addition of Rs.5,78,28,058.by observing that no such income has been received by the assessee in the year under consideration as there was neither any sale nor transfer of the carbon receipts in favour of any foreign companies during the year under consideration. Therefore, as such the issue before the learned Tribunal was as such academic. Therefore, keeping the said question open to be considered in accordance with law in the year in which the income is derived from sale of CERs, the learned Tribunal ought to have disposed of the appeal. At this stage it is required to be noted that even the learned Tribunal has in the impugned order has specifically observed that the learned tribunal is making observations on the aforesaid issue to show their understanding on the issue and that they have briefly touched the issue. In any case the learned Tribunal ought not to have decided the issue which as such was academic before it. Therefore, while quashing and setting aside the observations made by the learned Tribunal with respect to the income derived from carbon receipts and/or on sale of CERs, we hold the question in favour of the assessee and against the Revenue by keeping the said question open to be considered in accordance with law in the year in which the income from safe of CERs is received, tinder the circumstances, we hereby set aside the observations made by the learned Tribunal with respect to the income from sale of CERs, made in the Impugned judgment and order, however keeping the said question open to be considered in accordance with law and in the year in which the income from sale of CERs is accrued / received.

Thus, Hon'ble Gujarat High Court has held that the taxability of CERs is a question open to be considered in accordance with the law in the year in which the income from sale of CERs is received. It is observed that Hon'ble Ahmedabad TTAT in the case of Alembic Limited referred supra, has on identical facts has held that income from sale of CERs is capital receipt and said decision is upheld by Hon'ble Gujarat High Court referred supra, which has settled entire controversy as discussed herein above.

8.3.6 During the course of Appellate proceedings Appellant has also relied upon following decisions which are also in favour of Assessee:

(i) Decision of Hon'ble Andhra Pradesh High court in the case of CIT v. My Home Power Ltd 1720141 365 ITR 82]:

Section 28(1) of the Income-tax Act, 1961 - Business income -Chargeable as (Carbon credits) - Assessment year 2007-08 - Appellant-company was 'engaged in business of power generation through biomass power generation unit - It received carbon credits, namely, carbon Emission Reduction Certificates for its project activity of switching off fossil fuel from naphtha and diesel to biomass - It transferred said carbon credits and offered receipt from said transfer : as capital receipt - However/ Assessing Officer treated said receipt as business income and brought same to tax - Tribunal held that carbon credit not being .an offshoot: of business but an offshoot of environmental concern, amount received on their transfer had no element of profit or gain - Whether since carbon .credit was not even linked with power generation, Tribunal was justified in its decision-Held, yes [Para 2] [In favour of appellant]

(ii) Decision of Hon'ble ITAT Chennai in case of Sri Velayudhaswamv Spinning Mills (P.) Ltd. Vs. DCIT T20131 [40 taxmann.com 141]:

Section 4 of the Income-tax Act, 1961 - Income - Chargeable, as [Carbon credits] Assessment year 2009-10 - Appellant was engaged in business of manufacturing of yarn and electricity generation through windmills - Appellan.t treated clean development mechanism (COM) receipts, on account of sale of carbon credits as capital receipts, whereas Assessing Officer held same to be revenue receipts - Whether following decision in Ambika Cotton Mills Ltd. v. ,Dy. CIT [2013] 27 ITR (Trib.) 44 (Chennai), sale of carbon credits was to be considered as capital receipt-Held, yes [Para 7] [In favour of appellant]

(iii) Decision of Hon'ble ITAT Hyderabad DCIT Vs. Sree Rayataseema Green Energy Ltd. [2015] [58 taxmann.com 62]:

Section 28(1) of the Income-tax Act, 1961 - Business income -Chargeable as (Carbon credits) - Assessment year 2010-11 - Appellant, engaged in business of generation of power and sale of transformers, credited income from sale of carbon credits-to its sister concern instead of crediting amount in profit and loss account - It claimed said amount as deduction under section 80-IA from generation of power -Assessing Officer brought income from sale of carbon credits to tax as business income but excluded it from profits considered for deduction under section 80-IA - Whether income received on sale of carbon credits was a capital receipt and not a business receipts - Held, yes [Para 11],[In favour of appellant].

(iv) Decision of Hon'ble Karnataka High court in the case of CIT vs SubhashKabini Power Corporation Ltd [69 taxmann. com 394]:

Section 28(1), read with section 263, of the Income-tax Act^ 1961 – Business income - Chargeable as (Carbon credit) - Assessment year 2009-10-Whether since carbon credit was generated out of environmental concerns and it was not having character of trading activity, receipt from sale of carbon credit was capital receipt and not business income - Held, yes [Para 12] [In favour of appellant].

Considering the facts discussed Herein above it is held that income from sale of CERs is capital receipt and AO is not justified in treating such income as revenue receipt. It is also held that AO is not justified in reducing deduction under Section 80-IA claimed by Appellant by reducing expenditure incurred for sale of CERs from profit derived from industrial undertaking. Thus, both the grounds of appeal are allowed.

43. We have gone through the order of the Id. CIT(A) and we have noted that the Ld. CIT(A) relied on a plethora of decisions both of the ITAT and the Hon'ble High Courts of Karnataka and Andhra Pradesh holding CER receipts as capital in nature and income earned there from also being capital receipt. The Ld. D.R. unable to distinguish the case laws.

44. In view of the above, we see no reason to interfere in the order passed by the L.d CIT(A) deleting the addition made on profit of sale of Carbon Credits of Rs. 5,25,41,076/-.

45. Ground of appeal no. 2 is dismissed.

46. Ground no. 3 reads as under:

3. Whether on the facts & circumstances of the case, the Ld CIT(A) was justified in allowing the Additional depreciation of Rs.26,41,911/-.

47. The issue relates to claim of additional depreciation @50% of the rate applicable which was allowed in the preceding year on account of the fact that the asset so qualifying was purchased and put to use for less than 180 days and the balance was accordingly claimed by the assessee in the impugned year, which was disallowed by the A.O. but allowed by the Id. CIT(A). The assessee had claimed additional depreciation of Rs. 26,41,911/- u/s. 32(1)(iia) of the Income Tax Act during the impugned year i.e. A.Y. 2012-13, on the assets which were put to use in A.Y.2011-12 for a period less than 182 days and therefore additional depreciation was calculated at 50% of the applicable rate during A.Y. 2011-12. The balance additional depreciation was claimed during the impugned year. The A.O. disallowed the same following his order in A.Y.2010-11 & 2011-12 in the assessee's own case. Before us, the Id. Counsel for the assessee pointed out that the order of the Id. CIT(A) in A.Y. 2010-11 & 2011-12 had been upheld by the ITAT in its order in ITA No. 1422 & 1463/Ahd/2016 dated 10.05.2019. Our attention was drawn to para 8 of the order **is as under:**

8. *Ground No.3 of Revenue's appeal concerns eligibility of additional depreciation amounting to Rs.7,91,852/-. The CIT(A) has dealt with the issue as under:*

"7. Next set of grounds of appeal is regarding rejection of claim of additional depreciation of Rs. 7,91,852/- u/s 32(I)(iia). The Appellant had acquired and installed new plant & machinery in FY 2009-10. Since the plant & machinery were used for less than 182 days, the claim of additional depreciation during AY 2010-11 was restricted to 50%. During the assessment proceedings for the current assessment year, the Appellant during the course of assessment made an additional claim before the AO for allowing the balance additional depreciation u/s. 32(I)(iia) vide letter No. 933 dated 17-3-2014. Detailed submissions were made before the AO during the course of assessment, however,

the AO was not convinced with the submissions made by the Appellant and therefore did not entertain the claim of balance additional depreciation. The AO was of the view that additional depreciation can be allowed only in the year in which the assets are acquired and installed and not in the subsequent year. The AO has stated that the law does not contain any provision enabling the tax payer to claim the balance half entitlement in the subsequent years as there is no explicit provision entitling the assessee to claim the balance of the additional depreciation in subsequent year. The proviso to Section 32(1)(ii) has to be construed in a restrictive way and liberal interpretation of the same cannot be made.

7.2 Before me, the Appellant submitted that since no additional depreciation was claimed in the return of income, the AO could not have added the sum to the total income while passing the assessment order. In view of the same the very action of the AO in firstly making the addition without there being any claim in the return of income, and secondly, not allowing the legally valid claim made by way of a communication dated 17/3/2014 is erroneous. The appellant has made written submissions and challenged the addition/disallowance made on account of depreciation claimed by the Appellant during the assessment proceeding towards additional depreciation u/s 32(I)(iia) on the assets installed during the preceding assessment year used for a period less of than 182 days during the preceding assessment year. The Appellant has claimed the additional depreciation of Rs.7,91,852/- u/s 32(I)(iia) of the Income Tax Act, 1961 during the assessment proceeding of Asst. Tear 2011-12, on the assets which were put to use during the assessment year 2010-11 for a period less than 182 days and therefore additional depreciation was calculated at 50% of the applicable rate during the assessment year 2010-11. The balance amount of additional depreciation was not claimed by the Appellant at the time of filing the return of income and therefore such additional depreciation was claimed by submitting the letter No 933 dated 17.03.2014 clarifying the reason thereof. However, the Assessing officer not only rejects the claim but addition of the same amount of Rs. 7,91,852/- was made while calculating the total income without considering the facts that the said amount of Rs. 7,91,852/- on account of additional depreciation was not claimed at the time of filing the return of income. Accordingly, the AO has erred in computation of total income by not allowing the deduction of additional depreciation but also erred while calculating the assessed taxable income u/s 143(3) of the Act by way of addition

on account of additional depreciation which was not at all claimed originally at the time of calculation of taxable income at the time of filing return of income.

7.3 The Appellant further submitted that with regard to additional depreciation u/s 32(I)(iia), 50% of which has not been claimed in preceding assessment year 2010-11 (due to restriction of claiming only 50% depreciation on account of use of the same for less than 182 days), is clearly allowable during the current assessment year 2011-12. The Assessing Officer has erred in rejecting the legally valid claim of the Appellant made during the course of assessment proceedings. The Appellant relied on the following Authorities wherein half unclaimed portion of the additional depreciation has been held allowable in succeeding assessment year:

- Apollo Tyres Ltd. v. Asstt CIT 45 taxmann.com 337*

10. We have also carefully gone through the Second Proviso to section 32(I)(ii) of the Act, which reads as follows:

"Provided further that where an asset referred to clause (i) or clause (ii) or clause (iia), as the case may be, is acquired by the assessee during the previous year and is put to use for the purpose of business or ; profession for a period of less than one hundred and eighty days in that previous year, the deduction under this sub-section in respect of such asset shall be restricted to fifty per cent of the amount calculated at the percentage prescribed for an asset under clause (i) or clause (iii) or clause (iia) as the case may be."

11. A bare reading of this section 32(I)(iia) clearly says that in case a new machinery or plant was acquired and installed after 31-03-2005 by an assessee, who is engaged in the business of manufacture or produce of article or thing, the, a sum equal to 20% of the actual cost of the machinery and plant shall be allowed as a deduction. It is not in dispute that the assessee has acquired and installed the machinery after 31-03-2005. IT is also not in dispute that the assessee is engaged in the manufacture of article or thing. Therefore the assessee is eligible for additional depreciation which is equivalent to 20% of the actual cost of such machinery. The dispute is the year in which the depreciation has to be allowed. The assessee Has already claimed 10% of the depreciation in the earlier assessment year since the machinery was used for less than 180 days and

claiming the balance 10% in the year under consideration. Section 32(l)(iia) does not say that the year in which the additional depreciation has to be allowed. It simply says that the assessee is eligible for additional depreciation equal to 20% of the cost of the machinery provided the machinery or plant is acquired by the machinery or plant is acquired and installed after 31-03-2005. Proviso to section 32(l)(iia) says that if the machinery was acquired by the assessee during the previous year and has put to use for the purpose of business less than 180 days, the deduction shall be restricted to 50% of the amount calculated at the prescribed rate.

Therefore, if the machinery is put to use in any particular year, the assessee is entitled for 50% of the prescribed rate of additional depreciation. The Income-tax Act is silent about the allowance of the balance 10% additional depreciation in the subsequent year. Taking advantage of this position, the assessee now claims that the year in which the machinery was put to use the assessee is entitled for 50% additional depreciation since the machinery was put to use for less than 180 days and the balance 50% shall be allowed in the next year since the eligibility of the assessee for claiming 20% of the additional depreciation cannot be denied by invoking Second Proviso to section 32(l)(ii) of the Act.

- *DCIT v. Cosmo Films Ltd. 139 ITD 628 [2012 “....*

o Thus, the intention was not to deny the benefit to the assessee who have acquired or installed new machinery or plant. The second proviso to section 32(l)(iia) restricts the allowances only to 50% where the assets have been acquired and put to use for a period less than 180 days in the year of acquisition. This restriction is only on the basis of period of use. There is no restriction that balance of one time incentive in the form of additional sum of depreciation shall not be available in the subsequent year. Section 32(2) provide for a carry forward set up of unabsorbed depreciation. This additional benefit in the form of additional allowance u/s. 32(l)(iia) is onetime benefit to encourage the industrialization and in view of the decision of Hon'ble Supreme Court in the case of Bajaj Temp Ltd. (supra), the provisions related to it have to be construed reasonably liberally and purposive to make the provision meaningful while granting the additional allowance. This additional benefit is to give impetus to industrialization and the basic intention and purpose of these provisions can be reasonably and liberally held that the assessee deserves to get the benefit in full when there is no restriction in the statute to deny the benefit of balance of 50%

when the new machinery and plant were acquired and used for less than 180 days. Onetime benefit extended to assessee has been earned in the year of acquisition of new machinery and plant. It has been calculated @ 15% but restricted to 50% only on account of usage of these plant and machinery in the year of acquisition. In section 32(1)(iia), the expression used is "shall be allowed". Thus, the assessee had earned the benefit as soon as he had purchased the new machinery and plant in full but it is restricted to 50% in that particular year on account of period usages. Such restrictions cannot divest the statutory right. Law does not prohibit that balance 50% will not be allowed in succeeding year. The extra depreciation allowable u/s. 32(1)(iia) is an extra incentive which has been earned and calculated in the year of acquisition but restricted for that year to 50% on account of usage. The so earned incentive must be made available in the subsequent year. The overall deduction of depreciation u/s 32 shall definitely not exceed the total cost of machinery and plant. In view of this matter, we set aside the orders of the authorities below and direct to extend the benefit. We allow ground no.2 of the assessee's appeal. Since we have decided ground no.2 in favour of assessee, there is no need to decide the alternative claim raised in ground no.3. The same is dismissed."

- *Asstt. CIT v. SIL Investment Ltd. 26 taxmann.com 78 (Delhi)*

o 40. There is nothing on record to show that the directions given by Id. CIT(A) are not proper. The eligibility for deduction of additional depreciation stands admitted, since 50% thereof had already been allowed by the AO in the assessment year 2005-06, i.e., the immediately preceding assessment year. Therefore, obviously, the balance 50% of the deduction is to be allowed in the current year, i.e. assessment year 2006-07. The Id CIT(A) has merely directed the verification of the contentions of the assessee and to allow the balance additional depreciation after such factual verification. Accordingly, finding no merit therein, ground No. 3 raised by the Department is rejected.

- *Birla Corporation Ltd. v. DCIT 55 taxmann.com 33*

15. We have heard rival submissions and gone through facts and circumstances of the case. The facts are admitted and there is no dispute on the facts. Only issue for adjudication is whether the assessee is entitled for the balance 50% additional depreciation in view of sec. 32(1)(iia) of the Act in the next assessment year for remaining unutilized additional depreciation. We have gone through the relevant provisions of second proviso to section 32(1)(ii) and 32(1)(iia)

of the Act. In the present case before us, the assessee has purchased and installed new plant and machinery for its manufacturing unit and put to use for a period of less than i.e. 180 days, during the FY 2005-06 relevant to AY 2006-07 and claimed 50% additional depreciation u/s. 32(I)(iia) of the Act in view of the second proviso to section 32(I)(ii) of the Act. Further, the balance 50% of additional depreciation on such plant and machinery has been claimed by the assessee company during the year under consideration i.e. the FY 2006-07 relevant to this assessment year 2007-08. A bare reading of clause (iia) of section 32(1) of the Act w.e.f. the AY 2006-07, provides for allowance of additional depreciation equal to 20% of actual cost of new plant and machinery acquired and installed after March, 31st 2005 by an assessee engaged in the business of manufacture or production of any article or thing. Such additional depreciation is to be allowed as deduction u/s. 32(I)(iia) of the Act but second proviso to section 32(I)(ii) restricts the allowance of depreciation at 50%, if the plant and machinery is acquired during the previous year is put to use for a period of less than 180 days in that previous year. The second proviso specifically makes a reference to an asset referred to in clause (iia) of the said section 32(1) of the Act. And it is because of the second proviso assessee claimed only 50%; additional depreciation for AY 2006-07 and accordingly, claimed the balance amount of additional depreciation in the immediately subsequent year i.e. the year under consideration AY 2007-08. We are in full agreement with the argument of Shri J. P. Khaitan, Senior Advocate that a bare reading of section 32(I)(ha) clearly shows that the assessee is eligible for additional depreciation in case the new machinery and plant was acquired and installed after 31-03-2005. There is no restrictive condition in the clause for the eligibility of the assessee to claim additional depreciation. When the assessee is eligible for depreciation @ 20%, in the absence of any specific provision, the AO cannot cut down the scope of deduction by referring to second proviso to section 32(I)(ii) of the Act. He also pointed out that even if there is any contradiction between sections 32(I)(iia) and second proviso to section 32(I)(ii), it has to be reconciled so as to give harmonious effect to the legislative intent. The benefits conferred on the assessee by way of incentive provision cannot be taken away by adopting an implied meaning to second I proviso to section 32(I)(ii) of the Act. Since the second proviso to section 32(I)(ii) does not expressly prohibit, the allowance of the balance 50% depreciation in the subsequent year, second proviso to section 32(I)(ii) shall not be interpreted to mean that it impliedly restrict the additional depreciation to be allowed in the subsequent assessment year. We are of the view that the assessee now is entitled for 50b/o additional depreciation,

because in the year in which the machinery was first put to use the assessee claimed only 50% of additional depreciation for the reason that the same was put to use for less than 180 days, in this assessment year for the balance of depreciation.

7.4 I have considered the facts and circumstances of the case. I find that the controversy is indeed squarely covered by various decisions of the Tribunal and High Courts in favour of the Appellant. The Appellant has referred to various decisions in its written submissions. Further, the Jurisdictional ITAT, Ahmedabad deciding the similar issue in case of Income Tax Officer, Ward 2(2), Surat v. M/s. Aswani Industries, Surat in ITA No. 140/Ahd/2013 for AY 2008-09, has held in favour of the assessee as under:

"4. The Second issue relates to additional depreciation of Rs. 4,98,859/-. Assessing officer has disallowed the balance additional depreciation claimed by assessee on the machinery installed in the second half of the previous year relevant to the A.Y. 2007-08. The assessee's contention was that he was eligible for additional depreciation @ 20 % on the plant and machinery purchased in the second half of the financial year 2006-07 but being used less than 180 days, only 10 % depreciation was allowed by A.O. The balance 10 % additional depreciation was carried forward in the year under appeal and claimed in the computation of income which was disallowed by A.O. on the ground that carried forward of such additional depreciation is inadmissible as per provisions of section 32(I)(iia). The Ld. CIT(A) has given relief to the assessee by following the decision of ITAT, Delhi in the case of DCIT vs. Cosmo Films Ltd (124 Taxman.com 189) wherein it has been held that the additional depreciation cannot be restricted to 50 % and it has to be allowed in succeeding years if it is not allowed full in the relevant year. For the sake of convenience the relevant portion of the order is as under:

"17. We have heard both the sides on this issue. Section 32(1)(iia) inserted by Finance (No. 2) with effect from 1.4.2003. In speech of Finance Minister this clause was inserted to provide incentive for fresh investment in industrial sector. This clause was intended to give impetus to new investment in setting up a new industrial unit or for expanding the installed capacity of existing units by at least 25 % thereafter these provisions were amended by the Finance (No.2) Act of 2004 w.e.f. 1.4.2005 and provided that in the case of any machinery or plant which has been acquired after the 31st day of march, 2005 by an assessee engaged in the business of manufacture of production of any article or thing a

further sum equal 15 % of actual cost of such machinery or plant shall be allowed as deduction under clause (ii) of section 32(1). This additional allowance u/s 32(1)(iia) is made available as certain percentage of actual cost of new machinery and plant acquired and installed. This provision has been directed to the setting up new industrial undertaking making or for expansion of the industrial undertaking by way of making more investment in capital goods. Thus, these are incentives aimed to boost new investments in setting up and expanding the units. The proviso to section 32(1)(iia) restricts the benefits in respect of following- 'Provided that no deduction shall be allowed in respect of_ (A) Any machinery or plant which, before its installation by the assessee was used either within or outside India by any other person; or (B) Any machinery or plant installed in any office premises or any residential accommodation, including accommodation in the nature of a guest-house or (C) Any office appliances or road transport vehicle, or (D) Any machinery or plant, the whole of the actual cost of which is allowed as a deduction (whether by way of depreciation or otherwise) in computing the income chargeable under the head "profit and gains of business or profession of any previous year."

Thus, this incentive in the form of additional sum of depreciation is not available to any plant or machinery which been used either within India or outside India by any other person or such machinery and plant are installed in any office premises or any residential accommodation, including accommodation in the nature of a guest house or any office appliances or road transport vehicles, or any machinery or plant the whole of actual cost of which is allowable as deduction (where by way of depreciation or otherwise) in computing the total income under the head "Profit and gains of business or profession" of any one previous year. Thus, the intension was not to deny the benefit to the assets who have acquired or instated new machinery or plant. The second proviso to section 32(1)(ii) restricts the allowances only to 50% where the assets have been acquired and part to use for a period less than 160 days in the year of acquisition.

This restriction is only on the basis of period of use. There is no restriction, that balance of one time incentive in the form of additional sum of depreciation shall not be available in the subsequent year. Section 32(2) provides for a carry forward set up of unabsorbed depreciation. This additional benefit in the form of additional allowance u/s 32(1)(iia) is one time benefit to encourage the industrialization and in view of the decision of Hon'ble Supreme Court in the case of Bajaj Tempo vs. CIT,; cited supra, the provisions related to it have to be

constructed reasonably, liberally and purposive to make the provision meaningful while granting the additional allowance. This additional benefit is to give impetus to industrialization and the basic intention and purpose of these provisions can be reasonably and liberally held that the assessee deserves to get the benefit in full when there is no restriction in the statute to deny the benefit of balance of 50% when the new plant and machinery were acquired and use for less than 180 days. One time benefit extended to assessee has been earned in the year of acquisition of new plant and machinery. It has been calculated @ 15% but restricted to 50% only on account of usage of these plant & machinery in the year of acquisition. In section 32(1)(iia) the expression used is "shall be allowed". Thus the assessee had earned the benefit as soon as he had purchased the new plant and machinery in full but it is restricted to 50% in that particular year on account of period of usages. Such restrictions cannot divest the statutory right. Law does not prohibit that balance 50% will not be allowed in succeeding year. The extra depreciation allowable u/s 32(1)(iia) is an extra incentive which has been earned and calculated in the year of acquisition but restricted for that year to 50% on account of usage. The so earned incentive must be made available in the subsequent year. The overall deduction of depreciation u/s 32 shall definitely not exceed the total cost of plant machinery. In view of this matter, we set aside the orders of the authorities below and direct to extend the benefit."

In view of the above, we feel no need to interfere with the order passed by Ld. CIT(A) in respect of deletion of disallowance on account of additional depreciation of Rs. 4,98,859/- also and the order passed by Ld. CIT(A) is hereby upheld."

6.5 Considering the series of Authorities relied upon by the appellant and as extracted above, it is imperative to hold that the provisions of Section 32(1)(iia) of the Act beneficial to assessee and therefore have to be interpreted liberally so as to benefit the Assessee. It is also found that the intention of the legislation is to allow additional benefit. The Karnataka High Court opined that the proviso would not restrain the assessee from claiming¹ the balance of the benefit of additional depreciation in the subsequent assessment year. Similar view is held by the ITAT, Ahmedabad in the case of M/s. Aswani Industries (supra). In view of the above, the claim made by the Appellant of Rs. 7,91,852 being balance additional depreciation for new assets acquired and installed in AY 2010-11 is allowed in the current assessment year. It is also noted that as per Explanation 5 to section 32(1) it is compulsory for the AO to allow depreciation whether claimed or not in

the computation of total income. In view of the statutory provisions the AO was not correct in not allowing the additional depreciation claim made during the course of assessment. I therefore delete the addition made, and additionally, allow the claim of additional depreciation of Rs. 7,91,852/-. This ground of appeal is thus allowed."

8.1. We find that the CIT(A) has appreciated the facts and law in perspective and has rightfully come to a conclusion that assessee was entitled to remaining part of 50% of the claim of the additional depreciation eligible under s.32(1)(iia) of the Act in the subsequent assessment year adopting purposive approach to the issue. We thus find no infirmity in the view taken by the CIT(A) and therefore decline to interfere. Ground No.3 of Revenue's appeal is accordingly dismissed.

48. In view of the above, since identical issue stands adjudicated in favour of the assessee by the ITAT in preceding years, We see no reason to interfere in the order passed by the Ld. CIT(A) deleting the disallowance of additional depreciation of Rs. 26,41,911/-.

49. Ground no. 3 is dismissed.

50. Ground no. 4 reads as under:

4. Whether on the facts & circumstances of the case, the Ld CIT(A) was justified in deleting the disallowance made u/s 14A rws Rule 8D of Rs.2,05,15,540/-

51. The issue relates to disallowance of expenses pertaining to exempt income earned as per the provisions of Section 14 A of the Act and the revenue is aggrieved by the order of the Ld. CIT(A) deleting the disallowance of expenses pertaining to foreign investment made by the assessee . The Id. CIT(A) had directed exclusion of foreign investment made

for the purpose of computation of disallowance u/s. 14A as per Rule 8D of the Income Tax Rules 1962 holding that the dividend earned from the said foreign investment was not exempt from tax.

52. The Id. D.R. was unable to controvert the above findings of the Id. CIT(A).

53. In view of the above, we see no reason to interfere in the order passed by the Id. CIT(A) deleting the disallowance made u/s. 14A read with Rule 8D of the Rules with respect to foreign investment made by the assessee.

53.1. Ground no. 4 is dismissed.

54. In effect, appeal of the Revenue is dismissed.

55. We shall now take up the Assessee's appeal in ITA No.2472/Ahd/2017 for A.Y. 2013-14

56. The solitary issue raised in the present appeal it was pointed out related to disallowance of expenses made for the purpose of earning exempt income as per Section 14A read with Rule 8D of the Income Tax Rules 1962. The grounds read as under:

1 The learned CIT(A) has erred in partly confirming the addition made by the learned Assessing Officer to the total income of the appellant u/s 14A by invoking rule 8D in respect of investments made in Indian companies and Mutual Funds.

2 *The learned CIT(A) has erred in confirming disallowance under Section 14A made by the learned AO. It is submitted that, in the facts and circumstances, no disallowance over and above disallowance already made by the Appellant in the return of income need be made under Section 14 A.*

3 *Without prejudice to above, the learned CIT(A) has erred in holding that the learned AO was justified in invoking provisions of Section 14A in respect of strategic investments, the proximate purpose whereof is not to earn exempt income. It be so held now.*

4 *The learned CIT(A) has erred confirming the order passed by the learned AO invoking provisions of Rule 8D without satisfying conditions of Section 14A for invocation thereof. It is submitted that it be so held now.*

5 *Without prejudice to above, the learned CIT(A) has erred in holding that the investments from which no exempt dividend income is received during the year are also includible while computing disallowance u/s. 14A on the ground that other investments have yielded exempt income. It is submitted that section 14A has to be applied separately for each investment. It be so held now.*
Without prejudice to above, the learned CIT(A) has erred in not directing the learned AO in excluding all investments which generates income chargeable to tax from value of average investments, in calculating amount to be disallowed as per clause (iii) of Rule 8D(2) of the Income Tax Rules, 1962.

57. **Ld. Counsel for the assessee contended that the issue was identical to that raised in ground no. 2 in its appeal for A.Y. 2012-13 dealt with by us above. It was common ground that the facts of the case were identical to that in A.Y. 2012-13. Our decision rendered therein at Para 20-25. of our order above will therefore squarely apply to the above grounds raised by the assessee following which we dismiss the ground raised by the assessee.**

58. Appeal of the assessee is dismissed.

59. In effect all the appeals of the assessee and Revenue are dismissed.

Order pronounced in the open court on 06 -07-2022

Sd/-
(TR SENTHIL KUMAR)
JUDICIAL MEMBER *True Copy*
Ahmedabad : Dated 06/07/2022

Sd/-
(ANNAPURNA GUPTA)
ACCOUNTANT MEMBER

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
अहमदाबाद