IN THE INCOME TAX APPELLATE TRIBUNAL,
KOLKATA BENCH "B", KOLKATA

BEFORE SHRI SANJAY GARG, JUDICIAL MEMBER
AND SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER

ITA No.1741/Kol/2018
Assessment Year: 2014-15

Deputy Commissioner of Income-tax, Circle-10(1) Kolkata	Vs.	**Berger Paints India Ltd. 129, Park Street Kolkata-17 (PAN: AABCB0976E)**
(Appellant)		(Respondent)

&

ITA No.2299/Kol/2019
Assessment Year: 2014-15

Berger Paints India Ltd. 129, Park Street Kolkata-17	Vs.	**Deputy Commissioner of Income-tax, Circle-10(1) Kolkata**
(Appellant)		(Respondent)

Present for:
Assessee : Shri J. P. Khaitan, Sr. Advocate and
Shri Pratyush Jhunjhunwala, Advocate
Revenue : Shri Amol Kamat, CIT, DR

Date of Hearing : 19.07.2022
Date of Pronouncement : 29.07.2022

O R D E R

PER GIRISH AGRAWAL, ACCOUNTANT MEMBER:

Both these cross appeals by the revenue and assessee are arising out of order of ld. CIT(A)-22, Kolkata vide Appeal No. 14/CIT(A)-22/14-15/16-17/Kol dated 31.02.2018 against the order of DCIT, Circle-10(1), Kolkata passed u/s 143(3) of the Income-tax Act,1961 (hereinafter referred to as the Act), dated 31.12.2016 for AY 2014-15.

2. Before us, Shri J. P. Khaitan, Sr. Advocate and Shri Pratyush Jhunjhunwala, Advocate appeared for the assessee and Shri Amol Kamat, CIT, DR represented the revenue. Ld. Counsel for the

assessee has placed on record, a brief note on the submissions made along with paper books and chart substantiate the claims made by the assessee in the assessment year under appeal.

3. In respect of appeal of assessee in ITA Nos. 2299/Kol/2019, Ld. Counsel submitted that there is a delay in filing the appeal by 431 days for which a petition for condonation of delay along with affidavit is placed on record. He further submitted that the solitary issue involved in the appeal of the assessee is against the action of Ld. CIT(A) in upholding the action of the Ld. AO on account of deduction of education cess. Ld. Counsel for the assessee did not press this ground of appeal against which ld. CIT, DR did not raise any objection. After hearing both the sides, we condone the delay for adjudication and dismiss this appeal of assessee as not pressed.

4. Accordingly, the appeal of the assessee is dismissed.

5. Now, we take up the appeal by the Revenue in ITA No.1741/Kol/2018.

6. Revenue has challenged the merits of the addition which have been deleted by the Ld. CIT(A). Grounds taken by the revenue are extracted below:

> *"1. The Ld. CIT(A) has erred in allowing the deductions claimed by the assessee u/s. 8OIB for an aggregate amount of Rs.18,15,18,800/-. Whether the Ld. CIT(A) was correct in rejecting the methodology of deduction u/s.80-IB computed by the A.O particularly when the actual expenses are determinable on actual accounts maintained in previous year in question was not the methodology to attribute expenses on the basis of inflation incorrect?*

2. The Ld. CIT(A) has erred in allowing the deductions of Rs.1,09,68,000/- claimed by the assessee u/s. 80IB on sale of scrap without appreciation the fact that other income in the form of sale of scrap credited by the assessee in the P&L account cannot be treated as having been derived from industrial undertaking on similar analogy and has also failed to appreciate the principle laid down by the Hon'ble supreme Court in the case of Liberty India Vs. CIT 317 ITR 218?

3. Ld. CIT(A) has erred in deleting addition made u/s. 14A read with Rule 8D for Rs.3,05,68,576/-."

7. Brief facts of the case as culled out from the records are that the assessee is engaged in the business of manufacture and sale of paints having its works located at various places. Assessee filed its return of income on 29.11.2014 which was subsequently revised on 17.11.2015 and 31.03.2016 reporting total income of Rs. 219,44,13,020/- computed under the normal provisions of the Act. During the year, assessee claimed deduction u/s 80IB of the Act of Rs.54,00,24,357/- with respect to profits derived from its industrial undertakings located at Jammu, which is tabulated as under:

S. No.	Industrial Undertaking	Amount of deduction claimed (Rs.)
1	Jammu (Solvent based)	7,87,75,108
2	Jammu (Water based)	35,20,82,882
3	Jammu (Rajdoot)	9,67,39,265
4	Jammu (Powder Coating)	1,24,27,102
	Total	54,00,24,357

7.1 During the assessment proceedings, ld. AO called for details and explanation in respect of deduction claimed by the assessee u/s 80IB of the Act, all of which were complied by furnishing all the necessary details and relevant documents as noted in the order itself. It was submitted that assessee maintains separate books of account for the units eligible for deduction under section 80IB of the Act. The profits derived from such units are computed

on the basis of such books of account, maintained separately. Business of the assessee being unified, viz., manufacture and sale of paints, there are certain common head office and selling expenses which are incurred by the assessee on account of both the eligible and non-eligible units and are therefore required to be apportioned between such units.

7.2 On this issue, ld. AO noted that *"Assessee has already prepared a separate profit & loss account for each fiscal unit and claimed the profits from these fiscal units as eligible for deduction under chapter VI-A. Now it remains to be seen whether the profits and gains have been correctly computed as if these units are the only source of income. These are submitted in Form 10CCB. To determine the profit & gains from these units assessee has considered both direct cost and indirect cost (selling and head office expenses). Now it remains to be seen whether the quantum of indirect cost attributed to these fiscal units are as if these units are the only source of income."* Ld. AO worked out the apportionment of indirect expenses by resorting to 'turnover criteria' according to which sales from units claiming deduction under chapter VI-A is 20.79% of the total sales of the assessee as a whole. He, therefore, proposed to apportion 20.79% of the total indirect expenses which was quantified at Rs.18,15,18,000/- after considering the amount of Rs.22,58,75,000/- already apportioned by the assessee which will result in withdrawal of deduction u/s 80IB to that extent.

7.3 Assessee submitted its reply according to which indirect cost consisted of head office expenses and selling expenses. The basis of allocation of these expenses was explained, which is summarized below, as contained in para 3.3 of the assessment order:

Head office expense:

(a) It identifies the year in which the units claiming deduction under chapter-VIA started operation.

(b) It then consider the total head office expense in the year previous to year in which units claiming deduction under chapter-VIA started operating (let us say this figure is 100).

(c) Then it adjusts the value in (b) by inflation index of the country and calculate the inflation adjusted expense of head office. For this it uses the Inflation index of the year previous to year in which the units claiming deduction under chapter-IVA started operating and Inflation index of AY 2013-14. Say the figure calculated is 120.

(d) It then applies a logic saying that this inflated adjusted expense of head office would have taken place even if the units claiming deduction under chapter-VIA have not started operation. Then it takes the total head office expense for year in consideration (in this case AY 2014-15) (say 150). It then states that out of this 150 the figure of 120 (which was 100 adjusted by inflation) will be expense of head office in AY 2014-15 even if the units claiming deduction under chapter-VIA have not started operation. It thus consider the difference of 150 less 120, which is 30 as expense for units claiming deduction under chapter-VIA. This figure of 30 is then apportioned amongst units claiming deduction under chapter-VIA on basis of turnover."

Selling Expense:

The above principle is applied to selling depot expenses also.

7.4 Assessee also submitted before the ld. AO the above basis of apportionment of common head office expense and selling expenses which has been held to be scientific and reasonable by the Co-ordinate bench of ITAT Kolkata in the assessee's own case for –

(a) AY 2000-01 and 2001-02 in ITA Nos. 1889(K)/04, 268(K)/05, CO Nos. 107 & 65(Kol)2005, vide order dated 17.10.2006

(b) AY 2002-03 in ITA Nos. 290 & 1166/Kol/2006 vide order dated 13.08.2007

7.5 However, ld. AO proceeded to hold that apportionment of indirect expenses should be made on the basis of turnover and thus made an addition of Rs.18,15,18,000/- as proposed by disallowing the deduction u/s 80IB to that extent.

7.6 Aggrieved, assessee went in appeal before the ld. CIT(A) who by placing reliance on the decisions of the Co-ordinate bench of ITAT Kolkata in assessee's own case for earlier years held that ld. AO was not justified in his action and granted the relief to the assessee. Aggrieved, Revenue is appeal before this Tribunal.

8. Ground no. 1 (*supra*) is with regard to apportionment of common head office and selling expenses for the purpose of computation of profit of units eligible for deduction u/s. 80IB of the Act.

9. Before us, at the outset, Ld. Counsel for the assessee submitted that methodology followed by the assessee as stated above, was considered by this Hon'ble Tribunal in the assessee's case for preceding years holding it to be reasonable and scientific, orders of which are placed on record in the paper books. Details of the preceding years and their respective appeal nos. are listed below for ease of reference –

(a) AY 2000-01 and 2001-02

[Order in ITA Nos. 1889(K)/04 & 268(K)/05 and CO Nos. 107 & 65/Kol/2005 dated 17.10.2006, page 88 at pages 94-95 of the Part - A - Corporate Tax Paper Book]. It was held that the basis adopted by the assessee for allocation of the said common

expenses was reasonable and scientific and did not call for any modification. Revenue's appeal against the said order dated 17.10.2006, being ITA No. 117 of 2009, was dismissed by the Hon'ble Calcutta High Court on 20.11.2009 on the ground of unexplained and inordinate delay [Pages 170-171 of Part A - Corporate Tax Paper Book].

(b) AY 2002-03

Order in ITA Nos. 290/Kol/2006 & 1166/Kol/2006 dated 13.08.2007 [Page 98 at pages 109-112 of the Part A - Corporate Tax Paper Book]. Against the said order, revenue preferred an appeal before the Hon'ble Calcutta High Court, being ITA No. 230 of 2009, which was dismissed by the Hon'ble High Court on 02.09.2019 [Page 1 of the Corporate Tax Compendium of Case Laws].

(c) AY 2005-06

The Hon'ble Calcutta High Court by a judgment dated May 20, 2011 in WP No. 858 of 2008 [Page 127 at 141-142 of the Part A - Corporate Tax Paper Book]. Ld. CIT sought to direct special audit under section 142(2A) of the Act, inter alia, with regard to allocation of the common head office and selling expenses. The assessee instituted writ proceeding against such direction for special audit. The Hon'ble Calcutta High Court held that this Hon'ble Tribunal having found the allocation of the said expenses as based upon scientific and reasonable basis, which was followed for several years, the Commissioner should not have disregarded such view of this Tribunal and directed special audit.

(d) AY 2006-07

ITA No. 2112/Kol/2013 [Page 172 at pages 179- 180 of the Part A - Corporate Tax Paper Book]. Revenue's appeal, being ITAT/223/2017 against the said order was dismissed by the Hon'ble Calcutta High Court by an order dated 02.02.2022 [Page 6 of the Corporate Tax Compendium of Case Laws] and the question of law answered against the revenue.

(e) AY 2008-09

ITA Nos. 1105 and 1403/Kol/2013 dated 14.12.2016 [Page 181 at pages 186- 187 of the Corporate Tax Paper Book]. Revenue's appeal being ITAT 256 of 2017, was dismissed by the Hon'ble Calcutta High Court by an order dated 14.12.2021 [Page 2 of the Corporate Tax Compendium of Case Laws] and the question of law was answered against the revenue.

(f) AY 2011-12

[Order dated December 31, 2018 in ITA No. 1257/Kol/2017 - Page 193 at page 203 of the Part A - Corporate Tax Paper Book]

(g) AY 2012-13

[Order dated November 14, 2018 in ITA No. 2161/Kol/2017 - Page 217 at page 225 of the Part A - Corporate Tax Paper Book]

9.1 Ld. Counsel thus emphasized that the reasons given by the ld. AO for not accepting the assessee's basis of allocation in the impugned AY 2014-15 are the same as those in the earlier and subsequent years and that this Hon’ble Tribunal has accepted the assessee's basis as reasonable and scientific and this view has received the approval of the Hon'ble jurisdictional High Court of

Calcutta as well. Hence, he urged before the bench to allow the claim of the assessee.

10. Per contra, the CIT, DR placed reliance on the order of the ld. AO. Through the written submission placed on record, he stated that the approach adopted by the assessee is not correct and it is stated that all common expenses ought to be allocated to the eligible unit based on its share of turnover with total turnover. He also referred to certain judicial precedents as stated in the said written submission.

11. We have heard both the sides, gone through the facts and circumstances of the case and perused the material placed on record. We note that the issue before us vide Ground no. 1 in the present appeal pertains only to adoption of rational basis for apportionment of indirect expenses which include common head office expenses and selling expenses and their quantification for the purpose of claiming deduction u/s 80IB of the Act by the eligible units of the assessee. We also note that there is no change in the fact pattern and applicable law in respect of the claim of deduction made by the assessee u/s 80IB in the year under consideration before us vis-à-vis the years for which appellate orders of Co-ordinate of ITAT Kolkata or that of Hon'ble jurisdictional High Court of Calcutta in assessee's own case have been referred and relied upon. The methodology adopted by the assessee for apportionment of common head office expenses and selling expenses has consistently been followed year-on-year basis which has been held to be reasonable and scientific. It is thus noted that the issue in hand before us is no longer *res integra* considering the decisions in assessee's own case. Relevant extracts from one of the several decisions referred above in

assessee's own case are reproduced hereunder for ease of reference from *AY 2008-09 in ITA Nos. 1105 & 1403/Kol/2013, dated 14.12.2016 by ITAT Kolkata*:

> *"10. Heard rival submissions and perused the material available on record. We find that the assessee submitted before the CIT-A that the Tribunal has accepted the method of allocating the Head office and common selling expenses. Considering the above, the CIT-A in the present case allowed the deduction claimed u/s. 80IB of the Act in respect of 'common expenses'. Therefore, it is also pertinent to reproduce the relevant finding of the ITAT, C Bench, Kolkata in assessee's own case in ITA Nos. 1889/Kol/04 & 268/Kol/05 for the AYs 2000-01 and 2001-02 the order dated 17/20-10- 2006 is reproduced herein below:*
>
> > *"5.5 We have given a careful consideration to the facts of the case and the position in law. We have also considered the method/basis of estimation of common HO & selling expenses. We noted that the assessee has filed an audited certificate with the return to substantiate its claim u/s. 80IB. The profit & loss account of Pondicherry unit has been certified by the auditors' to be true & fair subject to the aforesaid note. From the audit report it is clear that the auditors' arrived at the profit of the Pondicherry unit after considering & apportioning all expenses related to the unit except for common HO & selling expenses. Therefore the auditors' clearly stated that the profit & loss account of the Pondicherry unit gives a true & fair view as regard income & expenditures derived by the unit except for common HO & selling expenses . It was only relating to the common HO & selling expenses the Auditors' gave the said note, The company as a whole has an audited account & from this audited accounts common HO & selling expenses attributable to the Pondicherry unit has not been considered by the auditors. We agree with the A/R that this allocation is an estimation from audited figures based on some scientific/reasonable method and not audit (as the company has an audited account). the same has been covered by way of note. The assessee itself has adopted a basis for allocation of common HO and selling expenses which may be attributed to the operations at the Pondicherry unit as stated in the foregoing paragraphs. The assessee has taken all relevant common HO & selling expenses attributable to Pondicherry "Unit, applied inflation rate @ 5% from F.Y. 1996-97 (i.e. AY.l997-98) & after arriving at the total common HO & Selling expenses for the relevant assessment year applied the turnover ratio (turnover of Pondicherry/ turnover*

of the company). From the detailed calculations of allocations of common head office expenses placed at pages 67-68 of the Paper Book, we note that all the common expenses (viz. MCRE, rent - office & residence, Office & flat un keep, law charges. tea room, medical, electricity, rates and taxes, TTP, BP & BE, printing & stationery, boo & perm lea. traveling, LTA, bank charges, in-house computer expenses, cash commission, repacking expenses, HRA, incentive salesman, other expenses, canteen, staff welfare, donation & subscription, directors fees, gratuity, machine accounting. sec. off expenses, insurance, training & developments, professional fees.. brokerage & commission, in-house Xerox, ESI, shifting expenses, ARB, internal audit expenses' etc.) including expenses on salaries, advertisement and sales promotion etc. have been duly considered by the assessee for allocation to the unit eligible for deduction u/s. 80ID and thus there cannot be any question of inflated profits as raised by the Department in Ground No. (iv). On going through the basis of allocation of the said common head office and se1Jing expenses adopted by the assessee consistently from the AY 98-99, we are of the considered view that the said basis adopted by the assessee for allocation of common expenses is a reasonable and scientific basis and does not call for any modification. The basis accepted by the AO is arbitrary as he has not stated the reason for rejection of the assessee's method, he has not stated how he arrived at 20% for allocating common HO exp. Which shows he has taken an adhoc figure & we accept that profit ratio cannot be applied consistently in all years. Moreover, in addition to the audited accounts of the company, the assessee maintains separate accounts for the Pondicherry unit to ascertain its profit & which again is certified by the auditors. The same should be accepted. We are in agreement with the contention of the Ld. A/R which is supported by the decision of the Hon'ble Supreme Court as stated above that once the Department has accepted a decision on a particular issued by not challenging the same before any higher forum it is not open for it to contend in the contrary on the sme issue in a later year. We would reiterate that in the present case the Department has accepted the basis of allocation of common head office and selling expenses in the AY 98-99 and there is no dispute as to the fact that the same basis has been adopted by the assessee in AY 2000-01 which are before us. Following the ratio laid down in the decisions rendered by the Hon'ble Supreme Court, we uphold the decision of the CIT(A) on this issue and thus dismiss Ground Nos. (iii) & (iv) raised by the Department."

11. On perusal of the orders for AY 2000-01 and 2001-02 in ITA No's. 1889/Kol/2004, 268 /Kol/2005 and CO No's. 107 & 65 /Kol)/2005 in assessee's own case placed at page no-86 of paper book shows the basis of apportionment of head office and common selling expenses is being followed by the Assessee consistently. We find the Tribunal found the basis of apportionment of common head office and common selling expenses adopted consistently by the company is scientific and reasonable and accepted and allowed deduction under Section 80IB of the Act. Respectfully following the above, we uphold the impugned order of the CIT-A and we have no hesitation to allow the deduction as claimed u/s.80IB of the Act and therefore, ground raised in this regard fails and it is dismissed."

11.1 Judgment by the Hon'ble jurisdictional High Court of Calcutta in ITAT 256 of 2017 dated 14.12.2021 on the appeal by the revenue against the above referred decision in assessee's own case affirmed the findings given by the ITAT Kolkata. The said judgment is reproduced hereunder for ease of reference which covers ground nos. 1, 2 and 3 of revenue's appeal in favor of the assessee:

"The Court: This appeal by the revenue filed under Section 260A of the Income tax Act (the "Act" in brevity) is directed against the order dated 14th December, 2016 passed by the Income Tax Appellate Tribunal, A-Bench, Kolkata (the 'Tribunal') in ITA Nos. 1105/Kol/2013 for the Assessment Year 2008-09.

The revenue has raised the following substantial questions of law for consideration:

i) Whether on the facts and in the circumstances of the case the Learned Tribunal has erred in law in upholding the order of CIT(Appeal) in allowing deduction under Section 80IB of Income Tax Act, 1961 in respect of "common expenses" of Rs. 10,21,06,200/- in respect of its Units at Pandicharry, Goa and Jammu by disregarding that it was not correctly apportioned ?

ii) Whether on the facts and in the circumstances of the case the Learned Tribunal has erred in law in upholding the order of CIT (Appeal) in allowing deduction under Section 80IB of Income Tax Act, 1961 in respect of "interest income" of Rs. 57,93,000/- on sale of scrap by treating it as income derived from profits and gains of industrial undertaking?

iii) Whether on the facts and in the circumstances of the case the Learned Tribunal has erred in law in deleting the addition of Rs.38,07,778/- made by the Assessing Officer under Section 14A of the Income Tax Act, 1961 read with Rule 8D of the Income Tax Rules, 1962 by disregarding that there were borrowed capitals of Rs.78.05 crores and investments out of such borrowed funds were also made in making investments that yielded exempt income?

We have heard Mr. P. K. Bhowmik, learned standing Counsel assisted by Mr. Madhu Jana, learned junior standing counsel appearing for the appellant/revenue and Mr. J.P. Khaitan, learned Senior Counsel assisted by Mrs. Nilanjana Banerjee Pal, learned junior standing Counsel appearing for the respondent/assessee.

So far as the first substantial question of law is concerned, the Tribunal followed the assessee's own case for the assessment years, namely, 2000-01 and 2001-02 and allowed the deduction as claimed under Section 80IB of the Act. As against the said order of the Tribunal, the revenue preferred appeal before this Court and the appeal preferred by the revenue in ITA No. 117 of 2009 was dismissed by a judgement dated 20th November, 2009 on the ground of unexplained and inordinate delay.

With regard to the assessment year 2002-03, the Tribunal granted relief to the assessee and the revenue carried the matter on appeal to this Court in ITA No.230 of 2009 which was dismissed by judgment dated 2nd September, 2019 on the ground that no questions of law arises for consideration. Thus, the decision rendered by the Tribunal does not call for any interference.

The second substantial question of law concerns claim for deduction under Section 80IB on the sale of scrap. This issue is no longer res integra and there are several decisions which are in favour of the assessee and the Tribunal had followed the decision of this Court in the case of Reckitt Benckiser (India) Ltd. -vs- Additional Commissioner of Income Tax, Range -12, Kolkata, reported in [2015] 56 taxmann.com 415 (Calcutta) and granted relief to the assessee. We find that the revenue has not made out

any ground to interfere with the said finding rendered by the Tribunal which is taken note of the correct legal position.

With regard to the third substantial question of law, the Tribunal granted relief taking note of the decision in favour of the assesses by placing reliance in the case of Commissioner of Income Tax, Central-I, Calcutta —vs- Ashish Jhunjhunwala, reported in 2015(12) TMI 905. The said decision lays down the correct legal principle. Therefore, there is no error in the order passed by the Tribunal.

In the result, the appeal fails and the same stands dismissed. The substantial questions of law are answered against the revenue."
[emphasis supplied by us by underline]

11.2 Admittedly, it is a fact that this is a recurring issue from preceding assessment years. By adopting judicial consistency in the given facts and circumstances, we affirm the order of ld. CIT(A) and direct to delete the addition made by the ld. AO of Rs. 18,15,18,000/-. Thus, ground no. 1 is dismissed.

12. Third ground of revenue's appeal is with regard to deletion of disallowance of Rs.3,05,68,576/- made u/s 14A read with rule 8D of the Income Tax rules, 1962 (hereinafter referred to as the "Rules").

12.1 Briefly stated, facts for this issue are that during the year assessee earned nil income which is exempt from tax against which assessee *suo motto* made a disallowance u/s 14A of the Act of Rs.1,63,498/- representing expenditure allocated for earning exempt income in accordance with the provisions of section 14A of the Act. Ld. AO invoked and applied rule 8D of the Rules by observing that assessee the business accounts and investment accounts are the part of single books of accounts and the investments were made from time to time out of the common fund (interest bearing loan fund and own capital) gathered by the

assessee for the business which is indivisible. Thus, being not satisfied with the correctness of the claim of the assessee, computed the disallowance of interest of Rs. 2,37,85,324/- under rule 8D(2)(ii) and of Rs. 69,46,750/- under rule 8D(2)(iii) of the Rules. Thus total disallowance of Rs. 3,05,69,576/- was made after considering the amount of *suo motto* disallowance made by the assessee of Rs.1,63,498/-. Aggrieved, assessee went in appeal before the ld. CIT(A).

12.2 Before the ld. CIT(A), assessee submitted that assessee had common pool of funds. It submitted that as on 01.04.2013 i.e. on the opening date of the year under consideration, share capital and reserves and surplus was of Rs.984.43 crores and Rs.1131.89 crores as on 31.03.2014. Against this, total investments as on 31.03.2013 were Rs.90.58 crores and Rs.187.29 crores as on 31.03.2014. The entire investments were out of assessee's own funds. Assessee submitted the details of investments made during the year, all of which, according to it will yield taxable income. Further, assessee took loans wholly and exclusively for the purpose of business and not for investment purposes. Assessee contended before the ld. CIT(A) that since money is fungible, in a running concern it is not possible to draw adverse conclusion as done by the ld. AO. Ld. CIT(A) following the decision of Co-ordinate bench of *ITAT Kolkata in the case of Integrated Coal Mining Ltd v. DCIT in ITA No. 1146/Kol/2012 dated 30.11.2015* and the decision in *assessee's own case for AY 2008-09 in ITA No. 1105/Kol/2013 dated 14.12.2016* deleted the disallowance made by the ld. AO by holding that ld. AO has failed to prove any nexus of interest with the investment from which exempt income of dividend has been earned. Ld. CIT(A) also deleted the *suo motto* disallowance of

Rs.1,63,498/- made by the assessee in its return. Aggrieved, Revenue is in appeal before this Tribunal for the deletion of disallowance of Rs.3,05,68,576/-.

13. At the outset, ld. Counsel for the assessee submitted that the issue is squarely covered by the decision of Co-ordinate bench of ITAT Kolkata in the assessee's own case for AY 2008-09 (*supra*) wherein it was held that assessee had made the investments out of its own funds and that the ld. AO was not justified in invoking and applying rule 8D without specifying any cogent reason. He further submitted that against the said order, revenue had preferred an appeal before the Hon'ble Calcutta High Court vide appeal no. ITAT 256 of 2017, which was rejected by the Hon'ble High Court by an order dated 14.12.2021 by answering the question of law against the revenue (*judgment reproduced above*). Relevant extract from the said order of ITAT Kolkata in assessee's own case for AY 2008-09 (*supra*) is reproduced for ease of reference:

> *"19. During the assessment proceedings the AO found that the assessee has earned dividend income o f Rs.20,53,923/- and offered Rs.21,921/- as expenditure incurred towards earning such exempt income. According to AO , the assessee invested Rs.29.52 crores against total loan fund of Rs.78.05 crores and observed that investment is made only 37.82%. The AO not satisfied with the correctness of claim of assessee in respect of determined expenditure as incurred in relation to exempt income and applying Rule 8D disallowed Rs.38,07,778/- for the purpose of computation o f expenditure u/s. 14A o f the Act.*
> *20. Before the CIT-A the assessee contended that all the details relating to said expenditure were filed before the AO and without satisfying the precondition as required to be followed before application o f Rule 8D, disallowed the impugned addition arbitrarily. The CIT-A observed that the AO rightly applied the Rule 8D as he was not satisfied with the expenditure as offered by the Assessee on its own and confirmed the impugned addition made by the AO.*
> *21. Before us the ld.AR submits that the assessee on its own disallowed to an extent of Rs.21,921/- which involves electricity, corporation tax and telephone charges. The AO did not examine the workings of assessee as offered by the assessee before him in the assessment proceedings. He did not make any reference to such workings in his order and without*

proving the nexus between the borrowed funds and investments made applied Rule 8D. The Ld.AR referred to page no- 192 of the paper book to show the details of expenditure as made by the assessee. The Ld.AR also referred to page no-8 of the paper book to show that the assessee has reserve of Rs.200 crores of common fund and referred to page no-9 of the paper book to substantiate its claim. The ld.AR of the assessee also drew our attention to page no-10 of the paper book to show the profit on sale of investments and dividend income earned from investments and further referred to page no-12 to show interest expenditure. In support of assessee's contention the AR relied on the order of the Hon'ble Calcutta High Court in the case o f CIT Vs. Ashish Jhunjhunwala in GA 2190/2013 in ITAT 157/2013.

22. On the contrary, the ld. DR relied on the orders of the authorities below.

23. Heard rival submissions and perused the material evidence available in the paper book as filed by the assessee before us. It was submitted that reserve and surplus funds as available in common pool was more than the investments. It is seen from the page no-8 at para-8 it was stated that as on 11-04-07 the opening surplus was 212 crores and as on the same the share capital was at 63.77 crores. Therefore it amply proves that the Assessee has made investments from its own funds and as rightly pointed by the Ld.AR that the AO did not examine the nexus between the investments if any made from borrowed funds, without the same application o f Rule 8D to compute the expenditure for the purpose of disallowance u/section 14A of the Act is bad. We find that the issue in hand is covered by the decision of the Hon'ble Calcutta High Court in the case of supra which held that while rejecting the claim of the Assessee with regard to expenditure or no expenditure, as the case may be , in relation to exempted income , the AO has to indicate cogent reasons. We find the AO without assigning any reasons to the claim o f the Assessee applied Rule 8D, therefore , the disallowance as made to an extent of 38,07,778/- is not maintainable. Respectfully following the decision supra, we have no hesitation to delete the impugned addition as made by the AO and confirmed by the CIT-A and sole ground o f as raised in this appeal is allowed."

13.1 Ld. CIT, DR opposed the contentions of the Ld. Counsel and relied on the order of ld. AO.

13.2 Per contra, Ld. Counsel for the assessee submitted that there is no doubt that the assessee's own funds far exceeded its investments in each of the two years, fact of which already placed on record, forming part of the order of ld. CIT(A). It was further submitted that ld. AO did not specify any reason whatsoever as to why the assessee's claim of proportionate expenditure was not

satisfactory and mechanically invoked and applied rule 8D of the Rules. Ld. Counsel also pointed that Revenue is not in appeal on the deletion of Rs.1,63,498/- which pertains to *suo motto* disallowance made u/s. 14A of the Act by the assessee in its return. He stated that ld. CIT(A) deleted the said disallowance by holding that since there is no exempt income earned during the year, no disallowance is warranted u/s. 14A of the Act.

14. We have heard the rival submissions, gone through the facts and circumstances of the case. After perusing the order of Co-ordinate bench of ITAT Kolkata in assessee's own case for AY 2008-09 (*supra*) and also the decision of Hon'ble jurisdictional High Court of Calcutta affirming the same (*supra*), we find that facts and circumstances are similar in the present case before us as discussed above and thus respectfully following the said decisions, we delete the disallowance of Rs.3,05,68,576/- made by the ld. AO and upheld the findings given by the ld. CIT(A) in this respect. While holding so on the given set of facts, we also find force from the decision of Hon'ble Supreme Court in the case of *South Indian Bank Ltd v. CIT [2021] 130 taxmann.com 178 (SC) dated 09.09.2021* wherein it was held that *where interest free own funds available with assessee-banks exceeded their investments in tax-free securities; investments would be presumed to be made out of assessee's own funds and proportionate disallowance was not warranted under section 14A on ground that separate accounts were not maintained by assessee for investments and other expenditure incurred for earning tax-free income.*

14.1 Further, on the submissions made by the ld. Counsel in respect of deletion of disallowance of Rs.1,63,498/- by the ld. CIT(A), we note from the details of disallowance furnished by the

assessee placed at page 245 of the paper book that this includes expenses towards electricity, lease rent, corporate tax, printing and stationery, upkeep/administration, telephone, books & periodicals, in-house computer, depreciation and salary. These were considered by the assessee on the basis of facility/time utilized by the persons managing the investments. Thus, admittedly, it's a fact on record that assessee has incurred expenses which pertain to managing the investments yielding exempt income and the same have been *suo motto* disallowed by the assessee in its computation of total income reported in the return for the year. On a specific query by the bench on this factual position, ld. Counsel candidly admitted for its correctness of the *suo motto* treatment given by the assessee in the return. We thus, direct the ld. AO to restore and restrict the disallowance u/s 14A of Rs.1,63,498/- which has been *suo motto* disallowed by the assessee in its return of income. Accordingly, ground no. 3 is partly allowed.

15. Second ground of revenue's appeal is as to whether income from sale of scrap generated in the manufacturing process employed in the eligible unit can be taken into consideration for deduction under section 80IB of the Act. Ld. AO held the sale of scrap of Rs.1,09,68,000/- as other income not eligible for deduction u/s 80IB of the Act since it is not profits derived from eligible business of industrial undertakings. Ld. CIT(A) deleted the addition by respectfully following the decision of the Co-ordinate bench of ITAT Kolkata in assessee's own case for AY 2008-09 (supra) on similar fact pattern.

15.1 At the outset, ld. Counsel for the assessee also pointed out that the said question on the eligibility of deduction u/s 80IB in

respect of receipt from sale of scrap arising out manufacturing process was decided by this Tribunal in the assessee's favour in its own case for AY 2008-09 (*supra*). He further stated that against the said order, revenue preferred an appeal before the Hon'ble Calcutta High Court, vide appeal no. ITAT 256 of 2017, which was dismissed by the Hon'ble Calcutta High Court by order dated 14.12.2021 by answering the question against the revenue (*judgment reproduced above*). It was thus submitted by the Ld. Counsel of the assessee that the said ground is squarely covered against the revenue and in favour of the assessee.

15.2 Ld. CIT, DR placed reliance on the order of ld. AO.

16. We have heard the rival submissions and gone through the facts and circumstances of the case. We note that there is no change in the factual matrix and applicable law on the issue before us when compared with the preceding years. We have perused the order of Co-ordinate bench of ITAT Kolkata in assessee's own case for AY 2008-09 (*supra*), relevant extracts of which are reproduced as under:

> *"12. Ground no.2 is relating to disallowance of deduction u/s. 80IB of the Act in respect of income of Rs.57,93,000/- on account of sale of scrap.*
>
> *13. During the assessment proceedings the AO found that the assessee credited an amount of Rs.57,93,000 to its P & L account and claimed the same as deduction u/s. 80IB of the Act on account of sale of scrap. According to AO, it cannot be treated as derived from profit and gains of industrial undertaking being eligible for business.*
>
> *14. In first appeal, the CIT-A allowed the ground of appeal as raised by the assessee before him by relying on the order of the Tribunal in assessee's own case supra by finding as under:-*
>
> > *"5. Appeal on grounds no. 2(a), (b) and (c) are against the addition of Rs.57,93,000/- disallowing deduction u/s. 80IB of the I.T Act, 1961. The AO in his assessment order has mentioned that 'the other income of Rs.11586000/- is from sale of scrap. It is clear that deduction u/s. 80IB/80IC is not allowable on interest income and sale of scrap because this receipts cannot be treated as profit and gains derived from business referred to in sub-sec. 1 of Sec. 80IB/80IC."The A.R in his written*

submission filed during the appellate proceeding has brought on record that this issue was covered in order passed u/s. 263 of the I.T Act, 1961 by the Ld. CIT-IV, Kolkata in the case of assessment year 2000-01. But the order passed u/s. 263 was quashed by the Hon'ble ITAT vide its order in ITA No.922(Kol)/2005 for A.Y 2000-01. I have considered the finding of the A.O and the written submission filed by the A.R. I find that this issue was there in the order passed u/s. 263 by the Ld. CIT-IV, Kolkata for A.Y 2000-01 but his order was later on quashed by the Hon'ble ITAT, Kolkata. Accordingly, assessee's appeal on ground 2(a), (b) and (c) are allowed."

15. Before us the ld.DR relied on the order of the AO. On the contrary, the ld.AR submits the issue in hand is covered by the orders of various Hon'ble High Courts and referred to page no's.175 and 176 of the paper book.

16. Heard rival submissions and perused the material available on record. We find that the issue in hand is covered by various Hon'ble High Courts in the cases of DClT vs Harjivandas Juthabhai Zaveri reported in 2581TR 785 (GUj), ClT vs Sundaram Clayton Ltd reported in 1331TR 34 (Mad), CIT vs Wheels India Ltd reported in 141 ITR 745 (Med) and Arati Industries Ltd Vs DCIT reported in 95 TTJ 14 (Ahm) as rightly pointed out by the ld.AR of the assessee before us. We find that the AO following the same allowed the deduction and relevant finding of which is reproduced herein below:

"With respect to the second issue the assessee submitted that ".....other income' of Rs.15,86,OOO/- as appearing in the Profit & Loss A/c of the Unit at Pondicherry comprises of income arising on account of sale of scrap generated in the manufacturing process employed at said Unit. The said fact would be apparent from the complete set of invoices reused by the unit In this regard. Since such general of scrap is directly connected with the production process employed by the company at its Unit at Pondicherry the profit derived from which is eligible for deduction under sect/on 80-IB of the Act. The generation of scrap has therefore a direct nexus with the goods produced by the company at the said eligible Unit and the profit derived therefrom is incidental to the activity of the industrial undertaking. The provision of section 80-IB under which the impugned deduction has been allowed by the Assessing Officer is in pari material to section 80-I and 80IA. It is submitted that in the under noted decisions which have been rendered in the context of section 80-I of the Act by various High Courts, it has been inter alia held that scrap generated in the manufacturing activity carried on by the assessee is eligible for deduction under the provisions of the said section- DClT vs Harjivandas Juthabhai Zaveri [2581TR 785 (Guj) CIT vs Sundaram Ciayton Ltd [1331TR 34 (Mad)] CIT vs Wheels India Ltd [141 ITR 745 (Med)] Arati Industries Ltd Vs DCIT [95 TTJ 14 Ahm)

"The submissions of the assessee have been examined and the copies of the invoices submitted have been carefully checked. It is seen that the invoices have been raised by the Pondicherry unit (which qualifies for deduction u/s 80IB) and that these relate to sale of scrap. Since the issue of Inclusion of income from sale of scrap for calculating the allowable deduction u/s 801B has already been decided by various Courts, no addition in this matter is called for."

17. We find that the various Hon'ble High Courts held that scrap generated in the manufacturing activity is eligible for deduction and respectfully following the same, we hold that the Assessee is entitled to claim deduction under the provisions of the section 80IB of the Act and the impugned order of the CIT-A on this issue is

justified and delete the addition of Rs.57,93,000/- as made by the AO, accordingly, ground no-2 of revenue's appeal is dismissed."

16.1 Considering the factual matrix and respectfully following the judicial precedents in the assessee's own case for AY 2008-09 (*supra*), we direct to delete the addition of Rs.1,09,68,000/- made by the ld. AO which is eligible for claiming deduction u/s 80IB of the Act. Accordingly, this ground of appeal is dismissed.

17. In the result, the appeal of the revenue is partly allowed. Appeal of the assessee is dismissed.

Order is pronounced in the open court on 29th July, 2022

Sd/- Sd/-

(SANJAY GARG) **(GIRISH AGRAWAL)**
JUDICIAL MEMBER **ACCOUNTANT MEMBER**

Kolkata, Dated: 29.07.2022.
JD, Sr. P.S.
Copy to:

1. The Appellant:
2. The Respondent:
3. The DCIT, Circle-10(1), Kolkata
4. The CIT (A) – 22 , Kolkata
5. CIT, Kolkata
6. The DR, ITAT, Kolkata.

//True Copy//

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata